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DRAWING LINES IN THE DISAPPEARING SAND: A  
RE-EVALUATION OF SHORELINE RIGHTS AND  
REGIMES A QUARTER CENTURY AFTER  
*BELL V. TOWN OF WELLS*

*Michael P. Dixon\**

*“The ‘control of nature’ is a phrase conceived in arrogance,  
born of the Neanderthal age of . . . philosophy, when it was  
supposed that nature exists for the convenience of man.”*

-Rachel Carson, *Silent Spring*

INTRODUCTION

Humankind has long tried in vain to exert its will over natural phenomena that remain beyond its control. There are countless forces of nature that persistently and consistently foil these attempts, but few are as bedeviling as those of the sea. While it is now virtually undisputed that the collective conduct of humankind in recent decades has had a significant impact on the oceans, only a fool would be so bold as to claim any sort of dominion over them.

And yet, at the seashore, society’s affinity for drawing lines, building fences, conveying titles, and generally imposing legal regimes continues to run up against the prevailing powers of the sea. As a result, countless legal riddles arise at the water’s edge, where over 50 percent of the American population now lives,<sup>1</sup> where many make their living and derive their sustenance, and where still more flock for days of frolic. The attempted solutions to these riddles are as various and numerous as the issues and, more often than not, courts, legislatures, agencies, and municipalities at multiple levels throw a combination of doctrines,

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1. *Over Half of the American Population Lives Within 50 Miles of the Coast*, NAT’L OCEAN SERVICE, <http://oceanservice.noaa.gov/facts/population.html> (last updated Apr. 19, 2011) [hereinafter *NOAA FACTS*].

statutes, regulations, and ordinances at any given dispute.<sup>2</sup> But the seas, storms, and sands have yet to yield to even these weighty efforts to impose order.<sup>3</sup>

Over twenty years ago, the Maine Supreme Judicial Court (locally known as the Law Court) disregarded the realities recognized in the overwhelming majority of states and reasserted one of the more antiquated legal rationales on the books to circumscribe a starkly limited public trust in the foreshore. In so holding, the Law Court also struck down the state legislature's declaration of a more expansive public trust and granted preeminence to the claims of private beachfront landowners.<sup>4</sup> In the years following what are now commonly known as the *Moody Beach Cases*,<sup>5</sup> commentators upset by both the outcome and the reasoning, which was largely grounded in a colonial ordinance over 300

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2. In addition to the many rules of common law, legislative bodies at both the federal and state levels have enacted countless statutes and created innumerable administrative bodies to address issues at or near the shoreline. *See, e.g.*, Coastal Zone Management Act, 16 U.S.C. §§ 1451-1464 (2006); the Public Trust in Intertidal Land Act, ME. REV. STAT. ANN. tit. 12, §§ 571-573 (2011). Examples of parallel administrative bodies include the NOAA Office of Coastal Resource Management and the Maine Coastal Program. And more than one state has included coastal provisions in its Constitution. *See, e.g.*, FLA. CONST. art. X, § 11; HAW. CONST. art. XI, § 1. Many of these authorities and agencies have overlapping and often contradictory scope and enforcement powers, and so must be reconciled with one another, not to mention with the ancient common law doctrines. For example, at the state level alone in Maine, there are at least nine state statutes that impact the shoreline zone. MARINE LAW INST., MAINE STATE PLANNING OFFICE & MAINE GEOLOGICAL SURVEY, ANTICIPATORY PLANNING FOR SEA LEVEL RISE ALONG THE COAST OF MAINE A-1 (1994), *available at* [http://epa.gov/climatechange/effects/downloads/maine\\_a.pdf](http://epa.gov/climatechange/effects/downloads/maine_a.pdf) [hereinafter MAINE ANTICIPATORY PLANNING] (identifying the state's Natural Resource Protection Act and Sand Dunes Regulations; the Coastal Management Policies Act; the Growth Management Act; the Shoreland Zoning Act; the Site Location of Development Act; the Subdivision Law; the State Floodplain Management Program; the Submerged Lands Act; and the Coastal Barrier Resources System).

3. "To know the beaches is to know the beaches are moving." WALLACE KAUFMAN & ORRIN H. PILKEY, JR., *THE BEACHES ARE MOVING: THE DROWNING OF AMERICA'S SHORELINE* 13 (1983). "We ignore this when we build motels, pavilions, boardwalks, and even whole towns on the edge of the ocean. In our business hats we do not recognize any real estate as movable. Corners are staked, lines drawn, and neat rectangular lots are recorded in courthouses as if they would be true forever." *Id.* "Beaches are not stable, but they are in dynamic equilibrium." *Id.* at 15 (emphasis omitted)

4. *Bell v. Town of Wells (Bell II)*, 557 A.2d 168, 178-179 (Me. 1989).

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

years old, have flooded the pages of this journal and others with critique. Just over ten years ago, in *Eaton v. Town of Wells*,<sup>6</sup> a case that bore both geographical and legal resemblance to the questions presented in the *Moody Beach Cases*, Justice Saufley, now the Chief Justice of the Law Court, called for their overturn.<sup>7</sup> Thus far, however, none of these arguments has crested the judicial seawall, and the legislature has not returned directly to such turbulent waters since.

Meanwhile, those two decades have also brought substantial changes in both the seascape and the legal landscape that call for yet another reassessment of how best to confront those issues that arise along with tides, wind, waves, and storm surge. Part I of this Comment will explore the history and development of both civil and common law frameworks of rights and privileges at the coastline. In Part II, this Comment will outline the situation that gave rise to the controversial decision of the Law Court, the arguments of the majority of the court, the ensuing dissent and critique, and an independent analysis. With this foundation laid, the third and fourth parts of this Comment will examine recent trends and developments that call for a more effective approach to the shoreline realities unacknowledged by the majority of the Law Court in 1989. In Part III, this Comment will explore four recent case studies in which these legal frameworks were applied very differently in other American jurisdictions than in Maine. Part IV will document the increasing challenges of climate change and the futility of coastal engineering. Finally, this Comment will synthesize the implications of these factors and propose that these previously unknown or overlooked scientific, theoretical, and legal grounds call more loudly than ever for a more sustainable legal approach at the sea's dynamic edge.

## I. DOCTRINES AND LEGAL FRAMEWORKS

### *A. Overview*

For better or worse, with some apparent success and some obvious failure, humankind has long tried to exert control over the environment. More often than not, at least in the Western canon, man is pitted against the forces of nature, and nature against man. Having largely secured basic shelter and a steady supply of food, Western society has moved on to devote tremendous manpower and financial resources to tame the

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6. 760 A.2d 232 (Me. 2000).

7. *Id.* at 248 (Saufley, J., concurring).

courses of rivers,<sup>8</sup> seed the clouds for rain, drill into the ocean floor,<sup>9</sup> and corral mudslides, rockslides, and lava flows—to cite just a few examples.<sup>10</sup> But society may spend at least as much time engineering legal constructs as it does rigs, dams, and arroyos.

Whether in court, on the floor of the legislature, or in our everyday speech, our language and our legal fictions frequently reflect this perception of rights to possession and control in the face of natural phenomena. Instead of describing our responsibilities in relationship with, or stewardship of, nature, we talk about our rights as owners of land, of water, of the air, of an unimpeded view of the sun.<sup>11</sup> Delineating these property “rights,” even in the most tangible of these, land, has proven no easy task. We have had to create doctrines of title and real property interests. We name and define fees as simple and absolute when they are more truly neither. We separate property interests into strands, or sticks, in a bundle—access, use, usufruct, exclusion—each a cognizable piece of property, theoretically capable of being allocated by gift or sale, or of being taken by the government. In so doing, we create legal fictions of permanency in a world that reminds us every day of how impermanent our existence is.

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8. On April 29, 2011, a federal judge approved the U.S. Army Corp of Engineers’ plan to blast a two-mile wide hole into its own levee on the Mississippi River. Gerry Smith, *In Illinois, Flooding Leads to Border Tension*, L.A. TIMES, Apr. 30, 2011, <http://www.latimes.com/news/nationworld/nation/la-na-illinois-flooding-20110430,0,1959238.story>. Three days later, the Birds Point levee was blown open, inundating 130,000 acres of Missouri farmland and 90 homes in hopes of preventing flooding in Cairo, Illinois. A.G. Sulzberger, *River Level Drops After Blast at Levee*, N.Y. TIMES, May 3, 2011, [http://www.nytimes.com/2011/05/04/us/04levee.html?pagewanted=1&\\_r=1&sq=River Level Drops after blast&st=cse&scp=1](http://www.nytimes.com/2011/05/04/us/04levee.html?pagewanted=1&_r=1&sq=River Level Drops after blast&st=cse&scp=1).

9. On April 20, 2011, when the risks of drilling deep into the sea floor from a floating offshore rig were underestimated, an explosion destroyed the platform, killed eleven people, and released over four million barrels of oil into the Gulf of Mexico. BOB GRAHAM & WILLIAM REILLY, NAT’L COMM’N ON THE BP DEEPWATER HORIZON OIL SPILL AND OFFSHORE DRILLING, *DEEP WATER: THE GULF OIL DISASTER AND THE FUTURE OF OFFSHORE DRILLING* vi (2011).

10. See, e.g., JOHN MCPHEE, *THE CONTROL OF NATURE* 190 (1989). One of the more extreme examples of this urge can be found in recently proposed responses to global warming, including a geoengineering technique known as ocean iron fertilization, which seeks to promote algae growth in the ocean in order to increase global carbon absorption. See, e.g., Ken Buesseler et al., *Ocean Iron Fertilization—Moving Forward in a Sea of Uncertainty*, 319 SCI. 161 (2008).

11. Cf. JOSEPH K. ANGELL, *A TREATISE ON THE RIGHT TO PROPERTY* 16 (1826) (translating THE INSTITUTES OF JUSTINIAN 2.1.1.).

Nowhere, perhaps, are these conflicts more apparent than at the ocean's edge, where several common law doctrines, the most prominent of which are surveyed here, have attempted to describe rights in the midst of ever-shifting topographies.

*B. Selected "Traditional" Doctrines*

1. Shoreline Variations: Avulsion, Accretion, Erosion, and Reliction

The urge to impose rules even upon the shifting sands is an ancient and universal one. As the Michigan Supreme Court has observed, "All maritime nations, recognizing the vagaries of the sea . . . have evolved systems of law, founded upon . . . conceptions of common justice, to adjust and compensate its effects."<sup>12</sup>

As may already be apparent, the description of shoreline movements has required the creation of a specialized and specified vocabulary. For example, "erosion" is the gradual and imperceptible<sup>13</sup> wearing away of land from the shore or bank. "Accretion" means the gradual and imperceptible accumulation of land along the shore or bank of a body of water.<sup>14</sup> "Reliction" is an increase of the land by a gradual and imperceptible withdrawal of any body of water.<sup>15</sup> "Avulsion" on the other hand, is the sudden or perceptible loss of or addition to land by the action of the water or a sudden change in the bed of a lake or the course of a stream.<sup>16</sup>

According to one general, longstanding, and widely accepted rule, where a large body of water works gradually or imperceptibly to change the shoreline by deposits or erosion, the title of the riparian owner follows the shoreline "under what has been graphically called 'a movable

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12. *Hilt v. Weber*, 233 N.W. 159, 165 (Mich. 1930).

13. "Gradual and imperceptible" means that, although witnesses may periodically perceive changes in the waterfront, they could not observe them occurring. *See* BLACK'S LAW DICTIONARY 582 (8th ed. 2004); 65 C.J.S. *Navigable Waters* § 101 (2000); *see generally* FRANK E. MALONEY ET AL., WATER LAW AND ADMINISTRATION: THE FLORIDA EXPERIENCE 385-92 (1968).

14. *See* BLACK'S LAW DICTIONARY, *supra* note 13, at 22; C.J.S., *supra* note 13, § 94; *see generally* MALONEY ET AL., *supra* note 13, at 685-92.

15. *See* BLACK'S LAW DICTIONARY, *supra* note 13, at 1317; C.J.S., *supra* note 13, § 94; *see generally* MALONEY ET AL., *supra* note 13, at 685-92.

16. *See* BLACK'S LAW DICTIONARY, *supra* note 13, at 147; C.J.S., *supra* note 13, § 94; *see generally* MALONEY ET AL., *supra* note 13, at 685-92. "Alluvion" describes the actual deposit of land that is added to the shore or bank. 78 AM. JUR. 2d *Waters* § 315 (2002).

freehold.”<sup>17</sup> On the other hand, the equally widespread law is that the rapid addition or loss of land due to avulsion (that is, by a sudden natural phenomenon) does not affect the seaward boundary of the upland owner.<sup>18</sup> Thus, under the common law of most states, “the legal effect of changes to the shoreline on the boundary between public lands and uplands varies depending upon whether the shoreline changes gradually and imperceptibly or whether it changes suddenly and perceptibly.”<sup>19</sup>

In the end, then, “the principal significance of the distinction between erosion[, reliction], and accretion on the one hand, and avulsion on the other,” according to Blackstone’s age-old summary,

is that the owner of the [upland] loses title to land that is lost by erosion and ordinarily becomes the owner of land that is added to his land by accretion [or reliction], whereas if an avulsion has occurred, the boundary line remains the same regardless of the change in the . . . shoreline.<sup>20</sup>

There are four commonly cited rationales underlying these doctrines that attempt to balance the interests of the parties affected by inevitable changes in the shoreline:

(1) [*D*]e minimis non curat lex; (2) he who sustains the burden of losses and of repairs imposed by the contiguity of waters ought to receive whatever benefits they may bring by accretion; (3) it is in the interest of the community that all land have an owner and, for convenience, the riparian is the chosen one; (4) the necessity for preserving the riparian right of access to the water.<sup>21</sup>

Despite all these doctrinal distinctions and variations, the boundary in the vast majority of states between public lands and private uplands remains the mean high water line (MHWL), which represents an average

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17. *Id.* at 165-166 (quoting Hallsbury, 28 Laws of England 361); see also COASTAL STATES ORG., INC., PUTTING THE PUBLIC TRUST DOCTRINE TO WORK 108 (David C. Slade, R. Kerry Kehoe, Jane K. Stahl eds., 2d ed. 1997) [hereinafter COASTAL STATES ORG.].

18. *Id.*

19. Walton Cnty. v. Stop the Beach Renourishment, Inc. (*STBR I*), 998 So. 2d 1102, 1113 (Fla. 2008).

20. *STBR I*, 998 So. 2d. at 1114 (citing 73 AM. JUR. PROOF OF FACTS 3d 167, 182); see also 1 WATERS AND WATER RIGHTS § 6.03(b)(2) (2007); 78 AM. JUR. 2d *Waters* § 315 (2002).

21. Bd. of Trs. of the Internal Improvement Trust Fund v. Medeira Beach Nominee, Inc., 272 So. 2d 209, 212-13 (Fla. App. Ct. 1973); see also MALONEY ET AL., *supra* note 13, at 685-92.

over a nineteen-year period.<sup>22</sup> Thus, in cases of erosion, reliction, and accretion, the boundary between public and private land is a flexible MHWL, “altered to reflect gradual and imperceptible losses or additions to the shoreline.”<sup>23</sup> Under the doctrine of avulsion, however, the MHWL does not move, and “the boundary between public and private land remains the MHWL as it existed before the avulsive event led to sudden and perceptible losses or additions to the shoreline.”<sup>24</sup>

## 2. The Common Enemy Doctrine

Even with all these doctrines in place, the determination of what is a natural or artificial change in the shoreline due to accretion can be perplexing. This is particularly true because “[n]early every area of public trust shoreline in the country has been modified to some degree, by groins, jetties, dams, seawalls, wharfs, piers, docks, hydraulic mining, beach nourishment, dredging and other actions.”<sup>25</sup> Responding to this prevalence of engineered shoreline structures, courts of the past have also devised a “common enemy doctrine,” so called because it recognizes a an upland owner’s right to defend and armor his property against the erosive forces of the sea—the *common enemy* in question—even to the detriment of his neighbor’s property.<sup>26</sup>

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22. See, e.g., George M. Cole, *Tidal Water Boundaries*, 20 STETSON L. REV. 165, 166-67 (1990). This figure is rounded off from the 18.6 years it takes for the variations which occur in major tide producing forces to go through one complete cycle. Frank E. Maloney & Richard C. Ausness, *The Use and Legal Significance of the Mean High Water Line in Coastal Boundary Mapping*, 53 N.C. L. REV. 185, 196 (1974). In some states, this nineteen-year period for determining the MHWL is codified. See, e.g., FLA. STAT. § 177.27 (14-15) (2007). As to the boundary line, only Maine and four other states, all founding colonies (Massachusetts, Delaware, Pennsylvania, and Virginia), recognize private ownership rights all the way down to the low-water line, while Texas and Hawai’i recognize public rights all the way up to the natural vegetation line. See Robin Kundis Craig, *A Comparative Guide to the Eastern Public Trust Doctrines: Classifications of States, Property Rights, and State Summaries* (2007), available at [http://works.bepress.com/robin\\_craig/1](http://works.bepress.com/robin_craig/1); see also *infra* note 51. Under Roman civil law, the upper boundary of the public’s seashore went “as far as the greatest wave extended itself in the winter.” ANGELL, *supra* note 11, at 65. Though no state’s public trust reaches this far today, the closest are in Texas and Hawai’i, where public easements are recognized up to the natural vegetation line. See *infra* notes 183 (applicable Hawai’ian case law), 202 (applicable Texas statute).

23. *STBR I*, 998 So. 2d. at 1114.

24. *Id.*; see also, e.g., *Bryant v. Peppe*, 238 So. 2d 836, 838-39 (Fla. 1970).

25. COASTAL STATES ORG., *supra* note 17, at 110.

26. Under the common enemy doctrine:

[a] man may raise an embankment on his own property to prevent the encroachments of the sea, although the fact of his doing so may be to cause the



### 3. The Equal-Footing Doctrine

Of great, if well camouflaged, significance in the coastal issues that arise, the equal-footing doctrine “creates a strong presumption,” based on agreements made to entice states and territories to join the union, “that newly admitted states acquire [without encumbrance of any kind] title to lands under navigable waters upon their admission to statehood.”<sup>27</sup> The equal-footing doctrine has also played an important role in the revitalization of the public trust doctrine.

### 4. The Public Trust Doctrine

#### a. Ancient Roots

The public trust doctrine, which holds that some things, by their nature, are common to all, is rooted in an ancient Roman precept of natural law. This precept is most famously captured by the Institutes of Justinian:

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.<sup>28</sup>

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water to beat with violence against the adjoining lands, thereby rendering it necessary for the adjoining landowner to enlarge or strengthen his defenses. U.S. v. Milner, 583 F.3d 1174, 1189 (9th Cir. 2009) (quoting Revell v. People, 52 N.E. 1052, 1059 (Ill. 1898)). This same adversarial approach to natural phenomena is manifest in both everyday parlance and in judicial contexts, where reference is made to windborne and waveborne natural *disasters* that *wreak havoc* and *devastation* and cause *losses* of land and *damages to the landscape* that we need to *repair*. See, e.g., DAVID M. BUSH, ORRIN H. PILKEY JR. & WILLIAM J. NEAL, LIVING BY THE RULES OF THE SEA 1 (1996) [hereinafter RULES OF THE SEA] (reporting that Hurricane Hazel (1954) “raked the coast of the Carolinas” and “left a path of over \$280 million in destruction”; Hurricane Betsy (1965) became the first hurricane to exceed \$1 billion in damages; Hurricane Camille (1969) killed 256 along the Gulf coast and caused \$1.4 billion in property loss; Hurricane Frederic (1979) “ran up a \$2.3 billion bill in losses”; and Hurricane Hugo (1989) “left a wake of widespread destruction” along the coast).

27. *Milner*, 583 F.3d at 1183.

28. *Bell v. Town of Wells (Bell II)*, 557 A.2d 168, 181 n.2 (Me. 1989) (Wathen, J., dissenting) (quoting JUSTINIAN INST. 2.1.1) (emphasis added). Expressed with a slight variation, under Roman civil law, which was codified under Justinian between 529 and 534 A.D., waters and shores were considered *res nullius*, incapable of being owned. See COASTAL STATES ORG., *supra* note 17, at 4; ANGELL, *supra* note 11, at 17. The original

The sixth century Institutes of Justinian were in turn based on the earlier second century Institutes and Journal of Gaius, another eminent Roman jurist, who had codified the even older natural law of Greek philosophers.<sup>29</sup> Still another earlier classical jurist, Julian, found further justification for the public trust in the longstanding use of custom.<sup>30</sup> To the extent, therefore, that they were not only “ancient in their own right,” but also rooted in even more ancient soil and time-tested by centuries of custom, “the Institutes of Justinian remain the touchstone of today’s Public Trust Doctrine.”<sup>31</sup>

After ignoring these principles during the Middle Ages, English common law grew to recognize similar public, or sovereign, rights in all “those things which from their nature cannot be *exclusively* occupied and enjoyed,” including tidewaters and the lands beneath.<sup>32</sup> Lord Chief Justice Hale, a noted jurist of the seventeenth century, observed that, though some private interest in the tidelands was possible, title to the intertidal zone remained presumptively with the sovereign.<sup>33</sup> Indeed, in adopting the doctrine, English common law also strengthened it, imposing on the government “an affirmative duty to administer, protect, manage and conserve fish and wildlife.”<sup>34</sup>

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code acknowledged that the seashore was “subject to the same law as the sea itself, and the sand or ground beneath it,” and could not be considered private property. Thomas Hodgins, *Ancient Law of Nations Respecting the Sea and Sea-shore*, 13 CANADIAN L. TIMES 16 (1893) (quoting JUSTINIAN INST. 2.1.5).

29. COASTAL STATES ORG., *supra* note 17, at 4.

30. “Immemorial custom is properly preserved as law and this is the law that is said to have been enacted by usage. For since statutes bind us for no other reason than that they have been received by the opinion of the people, properly also those things which the people have approved without any writing at all will bind all; for what does it matter whether the people declares its will by vote or by circumstances and conduct? Wherefore even this principle is most rightly received that statutes are abrogated not only by vote of the legislator but also by the tacit consent of all through desuetude.” JOHN P. DAWSON, *THE ORACLES OF THE LAW* 128 (1968) (quoting Dig. 1.3.32 (Julianus, Dig. 94)); *see also* Robert George, Comment, *The “Public Access Doctrine:” Our Constitutional Right to Sun, Surf, and Sand*, 11 *Ocean & Coastal L. J.* 73, 73 (2006).

31. COASTAL STATES ORG., *supra* note 17, at 4.

32. ANGELL, *supra* note 11, at 17.

33. *Bell II*, 557 A.2d at 181 (quoting HALE, *DE JURE MARIS* (ch. 4) (“The shore is that ground that is between the ordinary high-water mark and low-water mark. This doth *prima facie* and of common right belong to the king . . . . [S]uch shore may and commonly is parcel of the manor adjacent, and so may be belonging to a subject . . . yet *prima facie* it is the king’s”), *reprinted in* A COLLECTION OF TRACTS RELATIVE TO THE LAW OF ENGLAND FROM MANUSCRIPTS 12-13 (F. Hargrave 1st ed. 1787).

34. George, *supra* note 30, at 76.

English common law, of course, went on to become the law of the thirteen colonies, and then of the states.<sup>35</sup> Accordingly, each of these held, and continues to hold, a public trust interest in its tidelands up to the ordinary high water mark.<sup>36</sup> That said, “[e]ach also had, and continues to have, the authority to define the boundaries of the lands held in public trust as well as the authority to recognize private rights in its trust lands, and thus diminish the public’s rights therein as they see fit.”<sup>37</sup>

#### b. Defining the American Public Trust Lands

In 1892, the U.S. Supreme Court reaffirmed that each state had a duty to protect lands in the public trust, and that this obligation to preserve access under the public trust doctrine is inalienable.<sup>38</sup> Among the common attributes of most public trust lands is the fact that “they are generally unsuitable for commercial agriculture or permanent structures.”<sup>39</sup> And, “[b]ecause of the ‘public’ nature of trust lands, the title to them is not a singular title in the manner of most other real estate titles.”<sup>40</sup> Instead, public trust land is viewed as being “vested with two titles: the *jus publicum*, the public’s right to use and enjoy trust lands and waters for commerce, navigation, fishing, bathing and other related public purposes, and the *jus privatum*, or the private proprietary rights in the use and possession of trust lands.”<sup>41</sup> In other words, while in many ways the *jus publicum* title may be considered something less than fee simple ownership, it also cannot be sold.<sup>42</sup>

At the same time, in another 1892 case, the Supreme Court signaled that it would not impose a single nationwide public trust doctrine, leaving each state to apply the public trust doctrine to lands and waters “within its borders according to its own views of justice and policy.”<sup>43</sup> As a result, “there are over fifty different applications of the [public

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35. COASTAL STATES ORG., *supra* note 17, at 13.

36. *Id.*

37. *Id.*; see also *Shively v. Bowlby*, 152 U.S. 1, 26 (1894).

38. *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387, 460 (1892).

39. COASTAL STATES, *supra* note 17, at 1.

40. *Id.*

41. *Id.*

42. The sovereign may dispose of its proprietary rights in trust lands, the *jus privatum*, but its obligation to manage trust lands in the public interest, the *jus publicum*, is inalienable. A private lessee or owner may have possession and the benefits of certain rights, but his interest is subject at all times to superior public interests.

RICHARD HILDRETH & RALPH W. JOHNSON, OCEAN AND COASTAL LAW 80 (1983).

43. *Shively v. Bowlby*, 152 U.S. 1, 26 (1894).

trust] doctrine, one for each State, Territory, or Commonwealth, as well as the federal government.”<sup>44</sup>

In his landmark article at the vanguard of the twentieth-century renewal of the public trust doctrine, Professor Joseph Sax observed that courts would “look with considerable skepticism” upon any government action that restricted public rights to use and access any resource held by the state.<sup>45</sup> Before long, “nearly every State ha[d] modified the English common law, either by Constitution or legislatively,” to curtail riparian rights for private owners and expand them for public access and use.<sup>46</sup> California and New Jersey described a broad, flexible doctrine of public trust, which adapts with changing times, and most other states followed suit.<sup>47</sup> Even the D.C. Circuit Court of Appeals took approving note:

More recently, courts and commentators have found in the doctrine a dynamic common-law principle flexible enough to meet diverse modern needs. The doctrine has been expanded to protect additional water-related uses such as swimming and similar recreation, aesthetic enjoyment of rivers and lakes, and preservation of flora and fauna indigenous to public trust lands. It has evolved from a primarily negative restraint on states’ ability to alienate trust lands into a source of positive state duties.<sup>48</sup>

In 1988, the Supreme Court again stepped into the process of defining the public trust by declaring that each state, “upon entry into the Union, received ownership of all lands under waters subject to the ebb and flow of the tide.”<sup>49</sup> According to the Court, “the States have interests in lands beneath tidal waters which have nothing to do with navigation,”

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44. COASTAL STATES ORG., *supra* note 17, at 3.

45. Joseph L. Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 490 (1970).

46. COASTAL STATES ORG., *supra* note 17, at 292.

47. George, *supra* note 30, at 78-79; *Matthews v. Bay Head Improvement Ass’n*, 471 A.2d 355, 358 (N.J. 1984) (“The public’s right to use the tidal lands and water encompasses navigation, fishing, and recreational uses, including bathing, swimming, and other shore activities.”); *Borough of Neptune City v. Borough of Avon-by-the-Sea*, 294 A.2d 47, 54 (N.J. 1972) (“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.”); *State ex rel. Thornton v. Hay*, 462 P.2d 671, 673 (Or. 1969) (public has access and enjoyment rights to all lands seaward of the vegetation line).

48. *D.C. v. Air Fla., Inc.*, 750 F.2d 1077, 1083 (D.C. Cir. 1984) (footnotes omitted).

49. *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 476 (1988).

such as “bathing, swimming, recreation, fishing, and mineral development.”<sup>50</sup>

Maine, however, would prove resistant to this nearly universal recognition of extensive public trust rights in the tidelands.<sup>51</sup>

## II. THE MOODY BEACH CASES

### A. *Factual Background*

Beginning in 1984 with a quiet title action that was anything but quiet, Moody Beach, a mile-long strand situated at the southern edge of the Town of Wells, Maine, became the focus of a heated and complicated legal debate that would last for years.<sup>52</sup> At issue were the conflicting private and public claims to ownership and use rights in the wide wet-sand, intertidal portion of Moody Beach.<sup>53</sup>

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50. *Id.* at 476, 482.

51. All but five states would go on to recognize extensive public rights in the foreshore; only Maine and four other states, all of them among the thirteen original colonies and all of them endowed with statehood by 1790, insisted on adhering to pre-statehood, colonial policies by limiting public access and use in the tidelands. *See* Craig, *supra* note 22.

52. MARINE LAW INST., CITIZENS’ GUIDES TO OCEAN AND COASTAL LAW: PUBLIC SHORELINE ACCESS AND THE MOODY BEACH CASE 1 (1990) [hereinafter MLI GUIDE 1990].

Moody Beach is a sandy beach located within the Town of Wells. It is about a mile long and lies between Moody Point on the north, the Ogunquit town line on the south, the Atlantic Ocean on the east, and a seawall on the west. Moody Beach has a wide intertidal zone with a strip of dry sand above the mean high water mark. More than one hundred privately owned lots front on the ocean at Moody Beach. In addition, the Town of Wells in the past has acquired by eminent domain three lots which it uses for public access to the ocean . . . Each lot is about 50 feet wide and is bordered on the west by Ocean Avenue . . . A public beach, now known as Ogunquit Beach, lies immediately to the south of Moody Beach; the Village of Ogunquit acquired that beach by eminent domain in 1925.

*Bell v. Town of Wells (Bell II)*, 557 A.2d 168, 170 (Me. 1989).

53. Intertidal land means “all land . . . affected by the tides between the mean high watermark and either 100 rods seaward from the high watermark or the mean low watermark, whichever is closer to the mean high watermark.” ME. REV. STAT. ANN. tit. 12, § 572 (2011). That definition derives directly from the Colonial Ordinance of 1641-47. *See Bell v. Town of Wells (Bell I)*, 510 A.2d 509, 512 (Me. 1986). “At times the alternative terms ‘flats,’ ‘foreshore,’ and ‘beachfront’ are used.” *Bell II*, 557 A.2d at 169 n.3. The lots in question, plus another two miles of beachfront property, were reportedly purchased from the state in 1888 by a Portsmouth lawyer, who then resold them separately to private owners in the ensuing years, notwithstanding a mile-long stretch that he sold to the Town of Ogunquit. *Beach Ownership Splits Maine Town*, N.Y. TIMES, July

In 1984, 28 of the over 100 homeowners whose homes abutted the beach, including the named plaintiff Edward Bell, sought a judicial declaration and injunction limiting the public's use of the beach.<sup>54</sup> Expressing concerns over a perceived increase in public use of the beach and reluctance on the part of town officials to enforce against "trespassers," the homeowners sought a court order "to prevent the public from walking, swimming, sunbathing, or using the beach in front of their homes for general recreational purposes."<sup>55</sup>

According to Mr. Bell, who owned one of the houses on the beach for forty years, the town had put up signs directing the public to the beach and provided a public lifeguard on it.<sup>56</sup> "People would come down through our property and sit on our steps and tie their dogs to our railing [or] start a baseball game, and these weren't necessarily nice people."<sup>57</sup> But one local resident, who had been celebrating the Fourth of July with her family on that beach for twenty-five years, summed up the feelings of many others: "It's a crime that a handful of people can close public access to the ocean [on] the nicest stretch of sandy beach in Maine."<sup>58</sup> The Wells town manager at the time countered, "people here have always used that beach," and explained that part of the problem lies in the fact that, when the contiguous public beach in Ogunquit becomes crowded, people simply wander quite naturally over to Moody Beach, which, though technically a different beach in a different town, is visually inseparable.<sup>59</sup> When initially presented with the question, the superior court validated the state's claims of sovereign immunity and dismissed the case.<sup>60</sup>

### *B. The Decisions*

On appeal, however, the Law Court held that no sovereign immunity applied and vacated the judgment, sending the case back to the superior court with an explicitly indicated presumption for private ownership of

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11, 1989, <http://www.nytimes.com/1989/07/11/us/beach-ownership-splits-maine-town.html?pagewanted=1>.

54. *Bell II*, 557 A.2d at 169.

55. MLI GUIDE 1990, *supra* note 52, at 1.

56. *Beach Ownership Splits Maine Town*, *supra* note 53.

57. *Id.* The author knows of no assertion, and makes none here, of any public right to make use of the lot owners' steps or railings.

58. *Id.*

59. *Id.*

60. *Bell v. Town of Wells (Bell I)*, 510 A.2d 509, 510 (Me. 1986).

the tidelands.<sup>61</sup> The court grounded its reasoning in a document predating Maine statehood by nearly two centuries, the Colonial Ordinance of 1641-1647, which provided for a public easement in the tidelands for fishing, fowling, and navigation.<sup>62</sup> This decision came down May 23, 1986.<sup>63</sup> In the interim, though, the state legislature had enacted the Public Trust in Intertidal Lands Act (PTILA), which was to take effect July 16, 1986.<sup>64</sup> Nevertheless, after a four-week bench trial, the superior court entered judgments in the fall of 1987 in favor of the private landowners, declaring the PTILA unconstitutional and finding no public rights in Moody Beach beyond those afforded in the Colonial Ordinance of 1641-1647.<sup>65</sup>

Upon subsequent review, the Law Court held that “the plaintiff oceanfront owners at Moody Beach hold title in fee to the intertidal land subject to an easement, to be broadly construed, permitting public use only for fishing, fowling, and navigation . . . and any other uses reasonably incidental or related thereto.”<sup>66</sup> Acknowledging expanding public recreation needs,<sup>67</sup> the court nonetheless further concluded that, because it “declare[d] an unlimited right in the public to use the intertidal land for ‘recreation,’” PTILA was unconstitutional.<sup>68</sup> “The courts and the legislature cannot simply alter . . . long-established property rights to accommodate new recreational needs; constitutional prohibitions on the taking of private property without compensation must be considered.”<sup>69</sup>

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61. *Id.*

62. *Id.* at 512-13.

63. *Id.* at 509.

64. Public Trust in Intertidal Lands Act, ME. REV. STAT. ANN. tit. 12 §§ 571-573 (2011); *see also Bell II*, 557 A.2d at 169 n.4; 1985 Me. Laws 782.

65. *Bell I*, 510 A.2d at 510.

66. *Id.* at 169.

67. Curiously, the Law Court took the time to note the superior court’s findings that strolling up and down the beach had indeed been established as an open and continuous public use and that the plaintiffs were “perfectly willing to permit this.” *Bell II*, 557 A.2d at 170; *but see id.* at 192 (Wathen, J., dissenting) (“Twice in its opinion this Court mentions the finding of the Superior Court concerning the public’s habit of ‘strolling’ up and down the length of Moody Beach and the acquiescence of the private owners. Despite the shoreowners’ testimony that they would continue to permit this activity in the future, they are not bound to do so, and the Superior Court order, affirmed by this Court, does not acknowledge any right on the part of the public to stroll on the beach. This Court’s opinion does nothing to dispel the obvious conclusion that from this moment on, at Moody Beach and every other private shore in Maine, the public’s right even to stroll upon the intertidal lands hangs by the slender thread of the shoreowners’ consent.”).

68. *Id.*

69. *Id.*; *but see Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1034-1035 (1992) (Kennedy, J., concurring) (noting that states “should not be prevented from

Those “long-established property rights,” in the view of a 4-3 majority of the Law Court, flowed from the Colonial Ordinance and subsequent local usage and practice that were made law in the new state of Maine “by force of article X, section 3 of the Maine Constitution.”<sup>70</sup> According to the Law Court, the PTILA imposed upon all intertidal land (defined by the Act in accordance with the Colonial Ordinance) an easement for “recreation” that was “unqualified,” “undefined,” and “unlimited.”<sup>71</sup> Reasoning that this sort of recreation “*without limitation*” amounted to “much greater rights” for the public in the intertidal zone, the court concluded that, because it did not provide for compensation, the Act thus amounted to an unconstitutional taking of private property.<sup>72</sup>

The interference with private property here, the Law Court concluded, amounted to a “wholesale denial” of an owner’s right to exclude the public.<sup>73</sup> “If a possessory interest in real property has any meaning at all,” the court reasoned, “it must include the general right to exclude others.”<sup>74</sup> Finally, the court analogized its holding to a contemporary decision of the U.S. Supreme Court, which found an unconstitutional taking, however slight the adverse economic impact on the owners, when California had conditioned a seaside building permit upon the private owners’ “mak[ing] an easement across their beachfront available to the public on a permanent basis.”<sup>75</sup>

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enacting new regulatory initiatives in response to changing conditions [because the Takings Clause does not require a static body of state property law.”).

70. *Bell II*, 557 A.2d at 171; ME. CONST. art. X, § 3 (“All 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.”).

71. *Bell II*, 557 A.2d at 177. Compare *id.* at 176-177 with ME. REV. STAT. ANN. tit. 12 §§ 571-573 (2011). The majority refers to the “sole exceptions” laid out by the statute, when there are in fact four. Limitations include non-interference with existing structures, no use of motorized vehicles or watercraft without explicit authorization, and a provision that the municipality may exercise its authority to further limit permitted uses. See *id.* § 573(2)(B), (D), and (3).

72. The Law Court follows this conclusion with the requisite “parade of horrors” of all the objectionable activities the statute would permit, including baseball games and extended camping, none of which would actually be possible for more than a couple hours in the intertidal zone, which is, by definition, covered by water much of the day. *Bell II*, 557 A.2d at 177.

73. *Id.* at 178 (quoting Opinion of the Justices, 313 N.E.2d 561, 568 (Mass. 1974)).

74. *Id.* at 177 (quoting Opinion of the Justices, 313 N.E.2d 561 (1974)).

75. *Id.* at 178; see also *Nollan v. California Coastal Comm’n*, 483 U.S. 825, 832 (1987) (“We think a ‘permanent physical occupation’ has occurred, for purposes of that rule, where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises.”).



### C. Dissent

The dissent protested that the public rights had existed at common law and predated the Ordinance and the custom of private ownership.<sup>76</sup> It noted that the “grant of land” to the lower water mark by the Ordinance had been designed only for the times to promote commerce by encouraging the construction of wharves at private expense.<sup>77</sup> “The common law,” it exhorted, “would ill deserve its familiar panegyric as the ‘perfection of human reason’ if it did not expand with the progress of society and develop with new ideas of right and justice.”<sup>78</sup> It also pointed out the court’s error in not affording the legislative enactment of the PTILA a presumption of constitutionality.<sup>79</sup> Finally, the dissent highlighted the paradoxical scenarios under the majority’s interpretation that would allow, for example, a picnic in a rowboat on the foreshore but prohibit a picnic on a blanket, or that would allow a man to stand knee-deep in the water so long as he was looking for a lobster or crab, but not if he was “bathing.”<sup>80</sup> Each of these arguments pierced a hole in the bulwark of the majority opinion, exposing a number of weaknesses that have been further probed in critiques and concurrences in the ensuing years.

### D. A Closer Look

Taking its initial cue from the dissenting opinion, this Section will attempt to elaborate on some of the flaws in the underpinnings of the majority opinion—an unfortunate choice of law, an unsound theory, a mistaken statutory interpretation, an abrupt takings analysis, and compromising facts—that call its continuing legitimacy into question on legal and logical grounds alone.

#### 1. Choices of Law

First, the court’s reliance on the Colonial Ordinance of 1641-1647, to which it attributed its narrow construction of the public trust doctrine, was misplaced on multiple counts. At the outset, the court chose to adhere to a literal reading of the ordinance and a selected reading of only

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76. *Bell II*, 557 A.2d at 183-184 (Wathen, J., dissenting).

77. *Id.* at 185.

78. *Id.* at 189 (quoting *In re Robinson*, 33 A. 652, 654 (1895)).

79. *Id.* at 192.

80. *Id.* at 189 (citing Jeffrey D. Curtis, *Coastal Recreation: Legal Methods for Securing Public Rights in the Seashore*, 33 ME. L. REV. 69, 83 (1981)).

those Massachusetts cases that did the same to conclude that the drafters of the ordinance retained a public easement to the intertidal zone solely for the purposes of “fishing, fowling and navigation.”<sup>81</sup>

Despite its claim to the contrary, the *Bell II* court could have taken a more flexible and equitable approach to interpreting the statute and the case law—one essential, as the dissent points out, to the very character of the evolving common law. Such an approach was sanctioned by the U.S. Supreme Court in *Shively v. Bowlby*<sup>82</sup> and applied in the vast majority of states. Claiming a lack of precedent on point, the court referred only to two Massachusetts cases, when, in fact, it could have easily and properly taken into consideration a whole host of public trust doctrine cases from coast to coast, as well as the U.S. Supreme Court. The Massachusetts cases, moreover, were not nearly as unanimous as the *Bell II* majority portrayed them. The Massachusetts Supreme Judicial Court had previously declared in 1863 that “It would scarcely be necessary to mention bathing, or the use of the water for washing, or watering cattle, preparation of flax, or other agricultural uses, to all which uses a large body of water, devoted to public enjoyment, would usually be applied.”<sup>83</sup> And that court had also held that “it would be too strict a doctrine” to limit the public trust in the tidelands to navigation alone, reasoning that the public trust “is wider in its scope, and it includes all necessary and proper uses, in the interest of the public.”<sup>84</sup>

What’s more, though, the *Bell II* majority apparently also failed to consider the rationale underlying the colonial ordinance of 1641-1647. As even the Massachusetts Supreme Judicial Court has recognized, the notion of “extending private titles to encompass land as far as mean low water line” was “an *extraordinary* step” taken by “colonial authorities” in order to promote the building of more wharves in a region of wide, gradually sloped beaches and flats.<sup>85</sup> There simply is no longer any need to encourage the building of wharves, nor has there been one for at least decades. Indeed, today the state is more likely to deny a permit for the

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81. *Bell v. Town of Wells (Bell I)*, 510 A.2d 509, 514-15 (Me. 1986); *Bell II*, 457 A.2d at 169.

82. *Shively v. Bowlby*, 152 U.S. 1 (1894). The U.S. Supreme Court has also recognized that it is within a state’s discretion to grant riparian rights to persons “whether owners of the adjoining upland or not, as it [is] considered for the best interests of the public.” *Id.* at 26.

83. *Inhabitants of W. Roxbury v. Stoddard*, 89 Mass. 158, 167 (1863).

84. *Home for Aged Women v. Commonwealth*, 89 N.E. 124, 129 (Mass. 1909).

85. *Op. of the Justices to the House of Representatives*, 313 N.E.2d 561, 565 (Mass. 1974) (citing *Storer v. Freeman*, 6 Mass. 435 (1810)) (emphasis added); see also George, *supra* note 30, at 79-80.

building of any wharf at Moody Beach.<sup>86</sup> Without this underlying rationale, the provisions of the colonial ordinance lose their purpose and meaning. There is, therefore, a galling quality to the court's assertion that public and private rights in the foreshore today must conform to the decisions taken under exceptional circumstances by ancestors 350 years ago who undoubtedly had different conceptions of usual and unusual<sup>87</sup> and who were seeking to promote the building of structures society now restricts. As property theorist Laura Underkuffler has observed, "All individual and public claims [to property] are subject to dispute, discard, evolution, and change, as societally constructed understandings."<sup>88</sup>

## 2. Inapplicable Theories

General theories of private property rights are similarly unavailing when it comes to the tidelands. As with ordinances that lose their validity when their underlying economic development motives vanish, so, too, "private property is a form of state-sanctioned power [and] it is legitimate and worthy of respect only when it is adequately justified."<sup>89</sup> And at least one commentator has shown in the pages of this journal that a policy of private ownership, even of the dry sand area of the shoreline, (much less the wet sand area) fails on theoretical grounds.<sup>90</sup>

For example, John Locke's labor theory of property, which was widely known in colonial America, asserted that "the right to own land . . . derives from working or 'improving' the land."<sup>91</sup> "As *much Land* as a Man Tills, Plants, Improves, Cultivates, and can use the Product of, so much is his *Property*. He by his Labour does, as it were, inclose from the Common."<sup>92</sup> But this theory simply cannot apply to a foreshore that

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86. See, e.g., *Uliano v. Bd. of Env'tl. Prot.*, 977 A.2d 400, 403, 408 (Me. 2009) (upholding the denial of a dock permit under a statute barring structure that would "unreasonably interfere with existing scenic, aesthetic, recreational, or navigational uses" (quoting 38 M.R.S. § 480-D(1) (2008))).

87. Notably, in 1641, Massachusetts also became the first colony to statutorily recognize slavery. See THE MASSACHUSETTS BODY OF LIBERTIES, § 91 (1641), available at <http://history.hanover.edu/texts/masslib.html>.

88. LAURA S. UNDERKUFFLER, *THE IDEA OF PROPERTY: ITS MEANING AND POWER* 93 (2003).

89. *Id.* at 49 (quoting ERIC T. FREYFOGLE, *THE LAND WE SHARE: PRIVATE PROPERTY AND THE COMMON GOOD* 107 (2003)).

90. See generally Robert Thompson, *Property Theory and Owning the Sandy Shore: No Firm Ground to Stand On*, 11 OCEAN & COASTAL L. J. 47 (2005-2006).

91. *Id.* at 54.

92. *Id.* (quoting JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* (1689) reprinted in *PROPERTY: MAINSTREAM AND CRITICAL POSITIONS* 17 (C.B. Macpherson ed., 1978)).

can be neither worked nor improved, land that cannot be tilled, planted, improved, or cultivated.

Alternatively, the aggregate social utility theory, arguably the dominant moral justification for private property ownership in the United States, proposes a somewhat different rationale: “Private property exists and is legitimate because of the overall utility it generates for society as a whole. With reasonably secure rights, a person can plant in the spring confident that she can harvest in the fall.”<sup>93</sup> Again, though, of what use is it to either the individual or the public to guarantee the fall harvest of a seed planted in spring where no seeds can be planted? Of what use is the guarantee of investment backed expectations where none can logically or legally be held?

Thus, neither Locke’s labor theory nor the aggregate social utility theory, articulates any benefit that might lie in the private ownership of property of such a unique and inherently impermanent nature as tidelands. As Thompson and others conclude, we have seen that the very nature of almost all public trust lands, is that they are unsuitable for possession and commercial or agricultural development; this is unquestionably true of beaches, and particularly of wet sand beaches.<sup>94</sup>

Regardless of whether there can be legitimate private ownership rights in the tidelands, though, the *Bell II* court goes on to ground its decision in a fundamental right to exclude others, which seems to be based at least in part on concepts of privacy and nuisance theory. The circumstances of Moody Beach,<sup>95</sup> however, do not lend themselves to easy application of either theory. For one, neighboring home lots may have fences between the houses, but there is no physical boundary between lots on the beach.<sup>96</sup> Hypothetically, what if the owners of the neighboring lot are mean and boisterous and like to play frisbee and baseball on their foreshore right next door? There are also several public rights-of-way on the beach that extend “perpendicular access” from Ocean Avenue between house lots down to the water’s edge. Even just a quick look at satellite photos of the beach belies any notion of privacy or

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93. Thompson, *supra* note 90, at 66 (quoting FREYFOGLE, *supra* note 89, at 118).

94. *See id.* at 60-61; *see also* City of Daytona Beach v. Tona-Rama, Inc., 294 So. 2d 73, 77 (Fla. 1974) (“The sandy portion of the beaches are of no use for farming, grazing, timber production, or residency—the traditional uses of land—but has served as a thoroughfare and haven for fishermen and bathers, as well as a place of recreation for the public. The interest and rights of the public to the full use of the beaches should be protected.”).

95. Author site visit, March 10, 2010, 2:00p.m. – 3:00p.m. [hereinafter Author Site Visit].

96. *Id.*

exclusion in this topographical context.<sup>97</sup> To focus in on the beachfront houses themselves is to realize, too, that, however subjective aesthetic judgments may be, an annual Fourth-of-July, low-tide barbecue can certainly be no more a pig in this parlor<sup>98</sup> than many of the structures and pastimes on these heavily-built Ocean Avenue lots. As a result, it is hard to imagine how the “exclusion” principle of private property could ever be meaningfully enforced when so many neighbors and so many members of the public are using the beach in such close proximity—all fully within their rights even as constrained by the *Bell* decisions. In short, does the owner of a heavily-glazed house on a fifty-foot lot right on a beach that is contiguous to 125 other similar house lots and two public beaches really have a rightful expectation of privacy, or to exclude anyone from his fifty-foot strip of sand?

### 3. Abrupt Takings Analysis

And yet, it is precisely upon this exclusionary right that the *Bell II* court focuses its somewhat abrupt takings analysis.<sup>99</sup> Having established for its own purposes a presumptive right of private ownership in the tideland, the courts likens the infringement of the PTILA to a total deprivation of the right to exclude, a “permanent invasion” like the one described in *Nollan* that, without compensation, made the statute unconstitutional.<sup>100</sup> But, with one eye on the takings clause,<sup>101</sup> a closer examination of the property in question, the extent to which this property

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97. See Map of Moody Beach, GOOGLE MAPS, <http://maps.google.com/> (search “Moody, ME”) [hereinafter GOOGLE MAP]; see also STEPHEN M. DICKSON, BEACH AND DUNE GEOLOGY, MOODY BEACH, WELLS, MAINE, available at [www.maine.gov/doc/nrimc/mgs/pubs/online/dunes/01-439.pdf](http://www.maine.gov/doc/nrimc/mgs/pubs/online/dunes/01-439.pdf) [hereinafter Dickson I]; STEPHEN M. DICKSON, BEACH AND DUNE GEOLOGY, MOODY BEACH, WELLS, MAINE, available at [www.maine.gov/doc/nrimc/mgs/pubs/online/dunes/01-440.pdf](http://www.maine.gov/doc/nrimc/mgs/pubs/online/dunes/01-440.pdf) [hereinafter Dickson II] (overlying geological and geographical identifiers onto 1986 aerial photos of the southern and northern halves of Moody Beach).

98. See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926) (“A nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard.”). One structure, in particular, a pink, four-story, pseudo-Mediterranean villa, stands out in both memory and satellite imagery.

99. For extensive discussion of the *Bell II* court’s takings analysis, see Alison Rieser, *Public Trust, Public Use, and Just Compensation*, 42 ME. L. REV. 5, 12-27 (1990).

100. See *supra* note 79, identifying *Nollan* as the “contemporaneous decision of the U.S. Supreme Court” invoked by the *Bell II* majority.

101. “[N]or shall private property be taken for public use, without just compensation.” U.S. CONST. amend. V.

was taken, and the actual compensation due, yields a different conclusion.

a. False Analogy

First, other than the fact that they both involve beaches, *Bell II* and *Nollan* are not really analogous at all. In *Nollan*, the U.S. Supreme Court held that the bargained-for right of way for public passage constituted a taking in the *Loretto* branch of permanent invasions.<sup>102</sup> “Traditionally,” it explained, “the right to exclude others has been deemed a fundamental stick in the bundle of property rights.”<sup>103</sup> That makes for nice dicta for the *Bell II* majority to quote, but that is where its legitimate use in informing this case should end. For one, *Nollan*, a case involving an exaction rather than a legislative taking, was emphatically not a public trust case. It also involved the dry sand area, open to passage 24 hours a day, of a beach where the public had no prior right of passage whatsoever, as opposed to the wet sand area already subject to a public easement in question here.<sup>104</sup>

b. Property

Disregarding the misplaced analogy to *Nollan*, the court still failed to define with any precision what constitutionally cognizable property was at issue here. The U.S. Supreme Court has established both temporal and geographical criteria that need to be evaluated in determining such property.<sup>105</sup> Given the court’s reverent mention of *Nollan*, a permanent

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102. *Nollan v. California Coastal Comm’n*, 483 U.S. 825, 825 (1987).

103. *COASTAL STATES ORG.*, *supra* note 17, at 367; *see also* *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434-35 (1982) (“In short, when the ‘character of the governmental action’ is a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner.”) (citation omitted).

104. *See Nollan* 483 U.S. at 865 (Blackmun, J., dissenting) (“I do not understand the Court’s opinion in this case to implicate in any way the public-trust doctrine.”).

105. *See* *First English Evangelical Lutheran Church of Glendale v. Cnty. of Los Angeles, California*, 482 U.S. 304 (1987) (establishing that temporary taking may still require compensation); *Tahoe-Sierra Preservation Council v. Tahoe Reg’l Planning Agency*, 535 U.S. 302 (2002) (establishing that 32-month moratorium on development may not necessarily constitute a taking); *Loretto*, 458 U.S. 419 (establishing per se takings rule where permanent physical occupation); *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470 (1987) (establishing that there may not be a taking where only partial diminution in value of property).

physical invasion, and one of the fundamental sticks in the bundle of property rights, it seems reasonable to infer that it had some portion of the beach, or some portion of the right to exclude, or some combination of the two, in mind.

But which portion of the beach? The dry sand area was not in question in this case. Meanwhile, Mr. Bell's portion of the beach only extended fifty feet in width. So, it seems likely that the portion in question would be the wet sand area within the fifty feet of Mr. Bell's frontage. Notably, at low tide, this area is certainly larger than any dry sand area on the beach. That said, there are also temporal bounds on the area, since, on average, it is only exposed by the tides for approximately half of each day. As a practical matter, most of the houses on Moody Beach are seasonal, and most of the visitors to the beach are seasonal, too, which in Maine, means that the area in question becomes a controversial one for half a year at most.

And which portion of the right to exclude? The verb is transitive, so there logically needs to be some object or person that is excluded from the area in question. Here, too, however, there are more limitations, because, in all his years of living on the beach, Mr. Bell never had any unlimited right to exclude. For one, even after the court's holding, any member of the public, whether nice or not, retained her rights, "broadly construed," to access any tideland lot on the beach for purposes of "fishing, fowling, or navigation," or "related activities." As many have pointed out, this would mean, in practice, that, so long as she had a fishing pole or a boat, she could stroll all over the beach, or picnic for hours. Moreover, as the plaintiffs apparently pledged and both courts noted in a *sotto voce* aside, members of the public would still be permitted to stroll the beach.<sup>106</sup>

What cognizable property right is left to be taken, then? It would appear that the only thing left is the right of the owner, if he is present, to exclude certain people who are not fishing, fowling, navigating, or engaging in related activities, during half of every day, half of the year in a fifty-foot-wide lot that is bordered on both sides by more fifty-foot lots? Taking these limitations together, how could any "invasion" be

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106. "[A] citizen of the state may walk along a beach carrying a fishing rod or a gun, but may not walk along that same beach empty-handed or carrying a surfboard." *Eaton v. Town of Wells*, 760 A.2d 232, 248-49 (Me. 2000) (Saufley, J., concurring). "As the dissent [in *Bell II*] so eloquently summed up, 'the public's right even to stroll upon the intertidal lands hangs by the slender thread of the shoreowners' consent.'" *Id.* at 249 (quoting *Bell II* at 192 (Wathen, J., dissenting)).

deemed permanent? And even if so, was this much narrower property interest actually taken by the PTILA?

c. Taken, or A Mistaken Statutory Interpretation

The *Bell II* majority made three critical missteps in its interpretation of the PTILA. First, as the dissent noted, it failed in its facial review of a new statute to accord the legislation its due presumption of constitutionality. Second, the court seemed to take offense at the “unlimited” nature of the public recreation described in the statute, when there are, in fact, four exceptions specified not to constitute permissible public recreation.<sup>107</sup> Those limitations, appearing primarily under the unambiguous heading “Limitations,” include prohibitions against interference with existing structures, and on the use of motorized vehicles or watercraft without explicit authorization.<sup>108</sup>

The court also failed to take adequate notice of the fact that the statute also provides for the municipality to further limit permitted uses, potentially even to an extent the court might have found acceptable.<sup>109</sup> Instead, glossing over these considerations, the court next set forth the requisite “parade of horrors” of all the unconscionable activities the statute would assertedly permit. These included baseball games and extended camping, neither of which would actually be possible for more than a couple hours in the intertidal zone, and both of which the neighbors on either side of any 50-foot lot could still do.<sup>110</sup> With so many limitations already in place, and the distinct possibility that municipalities might have, pursuant to the statute, implemented even more limitations to adequately protect the private interest at stake, it seems fully possible that the PTILA, if given a chance to go into full effect, could do so without exercising a taking.

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107. Compare *Bell v. Town of Wells (Bell II)*, 557 A.2d 168, 176-177 (1989) with ME. REV. STAT. ANN. tit. 12, § 73(2) (2011).

108. ME. REV. STAT. ANN. tit. 12, § 573(2).

109. *Id.* § 573(3).

110. *Bell II*, 557 A.2d at 177. Because there were, in fact, a number of limitations described in the statute, one is left to speculate about the unstated rationale of the decision. As the dissent notes, the enactment of the statute during the pendency of the *Bell II* hearings was probably meant to influence the outcome. Did the justices take umbrage at this as some sort of interference? Would the *Bell II* result have been different if the statute had been enacted just a couple years earlier? If the statute had included just a couple more specific parameters describing allowed uses within the public trust?



#### d. Just Compensation

Finally, even assuming there is a constitutionally cognizable property interest in such a limited right to exclude a few others, and even if it was taken by the PTILA even before the statute could be implemented, what compensation is due? Of what monetary worth is that property interest? Can it really be the \$50,000 per lot, as appraised by the town,<sup>111</sup> or is this more akin to a *Loretto* situation, where the per se private property right has been upheld, but a token amount of one dollar would suffice in compensation for the loss of a partial right to exclude some of the public, from a narrow strip of land, for a fraction of each day during part of each year?<sup>112</sup>

#### 4. Summary

In sum, a closer look at the reasoning of the *Bell II* decision in light of the actual topography of Moody Beach, reveals that the judicial cabining of “private” zones of this tideland is a theoretical exercise that has no meaningful basis in reality. Furthermore, it might be worth considering that Edward Bell had been a homeowner on Moody Beach for thirty-five years before ever bringing any complaint. Reportedly, he and his co-plaintiffs only did so because the Town of Wells had begun to direct people to the beach in the summer and to station a lifeguard there, which in turn attracted bigger crowds, some of whom apparently played baseball and were not so nice. It might also be worth noting that, other than putting a stop to the lifeguard stands and busloads of tourists, the Law Court decision may not have had an immediate impact on Moody Beach itself that would seem to merit all those years and all those legal fees. After all, the public still accesses the water and walks the beach and probably still today engages in more than just fishing, fowling, and navigation in those tidelands. Insofar as a decision of the Law Court prevails as the law of the state, however, what may matter little for this one beach may have unforeseen consequences for other beaches

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111. In 1989, Wells had ten of the 126 lots appraised to see about purchasing tidelands. The result was a figure of about \$516,000. If a representative figure, then all tidelands on Moody Beach would cost about \$6.5 million. A subsequent revocable license negotiated by the town and owners was later rejected by voters at a town meeting in 1990. MARINE LAW INST., CITIZENS’ GUIDES TO OCEAN AND COASTAL LAW: PUBLIC SHORELINE ACCESS IN MAINE 9 n.7 (2004) [hereinafter MLI GUIDE 2004].

112. ROBERT ELLICKSON & VICKI BEEN, LAND USE CONTROLS 168 (2005) (noting that the final result in *Loretto*, was that the cable and the regulation remained in place for the token price of \$1 in compensation).

throughout the state. The specter of this wrongly decided case needs to be exorcised once and for all so that Maine can join the vast majority of its fellow states in building a more sustainable relationship between its citizens and the sea.

### III. RECENT LEGAL DEVELOPMENTS AT THE SHORELINE

As anomalous as a doctrine of private rights in the tidelands may have been two decades ago, the *Bell II* ruling by the Law Court in Maine has grown only more distant from legal regimes in other coastal states, where legislatures and courts have increasingly articulated diminished private rights, expanded public rights, and a growing deference towards natural forces at the seashore.

#### *A. Case Study 1: Florida, Beach Renourishment, and Access vs. Contact*

##### 1. Factual Background

Starting in 1995 with Hurricane Opal, followed in 1998 by Hurricane Georges, and then twice more in 2002 and 2004 with Hurricanes Isidore and Ivan, the beaches in Walton County, Florida were subjected to storm after large storm.<sup>113</sup> One of these beaches, to a large extent wiped out, would go on to occupy county and state officials, public and private parties asserting conflicting rights, and court after court for years to come.

Pursuant to state statute, the Florida Department of Environmental Protection identified the “problem” of these “damaged” beaches and placed them on its list of “critically-eroded beaches,” prompting both the city and county to initiate the process of beach “renourishment.”<sup>114</sup> In response, six private upland owners formed a not-for profit association called Stop the Beach Renourishment (STBR) to challenge the three-year permitting and renourishment process in administrative and judicial forums.<sup>115</sup>

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113. STBR I, 998 So. 2d 1102, 1106 (Fla. 2008).

114. *Id.* “In 2005, the U.S. Army Corps of Engineers pumped \$156 million [worth] of sand onto Florida beaches to replace what was washed away by rising sea levels and more intense storms.” Forrest J. Bass, *Calming the Storm: Public Access to Florida’s Beaches in the Wake of Hurricane-Related Sand Loss*, 38 STETSON L. REV. 541, 570 (2009) (quoting Surfrider Foundation, *State of the Beach Report: The Bad and The Rad*, BEACHAPEDIA.ORG, [http://www.beachapedia.org/State\\_of\\_the\\_Beach/Bad\\_and\\_Rad](http://www.beachapedia.org/State_of_the_Beach/Bad_and_Rad) (last visited Mar. 7, 2011).

115. *See STBR I*, 998 So. 2d at 1106.

The Florida Supreme Court, in a strictly limited holding, upheld the policy of public restoration of even previously private, critically eroded beaches and the constitutionality of the state's Beach and Shore Preservation Act.<sup>116</sup> But this supposedly narrow holding, involving a small group of homeowners protesting a beach already rebuilt, was nonetheless controversial enough to gain the attention of the U.S. Supreme Court.<sup>117</sup>

## 2. The Beach and Shore Preservation Act

In 1961, the Florida legislature declared "beach erosion [to be] a serious menace to the economy and general welfare of the people of [Florida]."<sup>118</sup> The legislature further declared it "a necessary governmental responsibility to properly manage and protect Florida beaches . . . from erosion," and to fund beach nourishment projects.<sup>119</sup>

Based on these determinations, the legislature enacted the Beach and Shore Preservation Act (BSPA) and delegated to the state's Department of Environmental Protection (DEP) the authority to identify "those beaches which are critically eroded and in need of restoration and nourishment" and to "authorize appropriations to pay up to 75 percent of the actual costs for restoring and renourishing a critically eroded beach."<sup>120</sup> The restoration process in this case, a typical one, involved extensive surveying to fix both a mean high water line (MHWL) and erosion control line (ECL) (here, the same line) and to plan the dredging that would "renourish" the beaches.<sup>121</sup>

But STBR, consisting of six owners of beachfront property in the area of the proposed project, had other ideas, and brought a constitutional challenge to this application of the BSPA.<sup>122</sup> Specifically, STBR claimed

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116. *Id.* at 1105.

117. STBR I, 998 So. 2d 1102, *cert. granted*, 129 S. Ct. 2792, (U.S. June 15, 2009) (No. 08-1151).

118. STBR I, 998 So. 2d at 1107 (quoting FLA. STAT. § 161.088 (LexisNexis 2010)).

119. *Id.*

120. STBR I, 998 So. 2d at 1107-08 (quoting FLA. STAT. § 161.101(1) (LexisNexis 2010)).

121. STBR I, 998 So. 2d at 1107-08. The dredging plan included two options, one of which was to use a large vacuum and pipeline to pump sand from a submerged shoal to the area to be renourished. *Id.* at 1106.

122. *Id.* at 1106 n.5. The DEP, following administrative hearings, had issued a final order approving the beach renourishment permit. *Id.* at 1106-07. The "Joint Coastal Permit and Authorization to Use Sovereign Submerged Lands" refers to the state's status, under both common law and statute as sovereign titleholder of the submerged bottoms. *Id.* at 1106, 1108 n.8; *see also* FLA. STAT. § 161.181 (LexisNexis 2010). It was this order

that the section of the BSPA that “fixes the shoreline boundary after the ECL is recorded, unconstitutionally divests upland owners of all common law littoral rights [including rights to accretion and reliction] by severing these rights from the uplands.”<sup>123</sup>

### 3. To the State Supreme Court

Finding the constitutional issue raised to be “of great public importance,” the intermediate court of appeals thus certified the question of whether the statute here acted in such a way as to deprive the private landowners of their “riparian” rights without just compensation.<sup>124</sup> To the consternation of the dissent, *see infra*, the first step of the majority of the Florida Supreme Court was to rephrase the certified question to read as a facial challenge: “On its face, does the Beach and Shore Preservation Act unconstitutionally deprive upland owners of littoral<sup>125</sup> rights without just compensation?”<sup>126</sup> In choosing to review the statute’s constitutionality on its face rather than in this application, the court granted itself the power of *de novo* review, accorded the statute a presumption of constitutionality, and raised the burden of the challenge to one requiring a showing that “no set of circumstances exists under which the statute would be valid.”<sup>127</sup>

### 4. Applying the Doctrines

With the bar thus set, the court delved into Florida’s public trust doctrine. “Under both the Florida Constitution and the common law,” the court declared, “the State holds the lands seaward of the MHWL, including the beaches between the mean high and low water lines, in trust for the public for the purposes of bathing, fishing, and

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that STBR challenged in the Florida’s First District Court of Appeals. *STBR I*, 998 So. 2d at 1107.

123. *Id.*

124. *Id.* at 1105.

125. Though occasionally used more broadly, or even interchangeably in cases and statutes, “[t]he term ‘riparian owner’ applies to waterfront owners along a river or stream, and the term ‘littoral owner’ applies to waterfront owners abutting an ocean, sea, or lake.” Bd. of Trs. of the Internal Improvement Trust Fund v. Sand Key Assocs., Ltd., 512 So. 2d 934, 936 (Fla. 1987); *see also* JOHN M. GOULD, A TREATISE ON THE LAW OF WATERS § 148 at 297 n.1 (3d ed. 1900) (“Littoral is derived from Latin *litus*, the sea-shore.”).

126. *STBR I*, 998 So. 2d at 1105. The dissent refers to this step as “a manipulation.” *See id.* at 1121 (Lewis, J., dissenting).

127. *Id.* at 1105, 1116 n.12.

navigation.”<sup>128</sup> “Concisely put,” the court summarized, “the State has a constitutional duty to protect Florida’s beaches, part of which it holds ‘in trust for all the people.’”<sup>129</sup> On the other hand, the court went on to acknowledge that private upland owners have their own array of rights that figure into the question *sub judice*.<sup>130</sup>

In Florida, private upland owners hold the same (no more, no less) bathing, fishing, and navigation rights as the public.<sup>131</sup> That said, “upland owners [also] hold several special or exclusive common law littoral rights: (1) the right to have access to the water; (2) the right to reasonably use the water; (3) the right to accretion and reliction; and (4) the right to the unobstructed view of the water.”<sup>132</sup> These littoral rights, the court recognized, are not subordinate to any public rights and may not be taken by act or regulation of the state without just compensation; nor do any of these rights require a separate act of creation, as they are incidental to littoral ownership.<sup>133</sup> The rights to access, use, and uninterrupted view are considered easements under the law and give no title to land under navigable waters.<sup>134</sup>

But the court drew a distinction between these rights and the rights to accretion and reliction:

The rights to access, use, and view are rights relating to the present use of the foreshore and water. The same is not true of the right to accretion and reliction. The right to accretion and reliction is a contingent, future interest that only becomes a possessory interest if and when land is added to the upland by accretion or reliction.<sup>135</sup>

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128. *Id.* at 1109 (citing FLA. CONST. art. X, § 11).

129. *Id.* at 1110-1111 (citing FLA. CONST. art. X, § 11).

130. *Id.* at 1111. It noted, too, that these common law rights vary state by state. *Id.* at 1111-12 n.9 (pointing out, as an example, differences between littoral rights in Mississippi and North Carolina).

131. *Id.* at 1111.

132. *Id.*

133. *Id.* at 1111-12 n. 10 (citing Jon W. Bruce, THE LAW OF EASEMENTS AND LICENSES IN LAND § 1.02 (1995)).

134. *Id.* at 1112.

135. *Id.* at 1112 (citing *Brickell v. Trammell*, 82 So. 221, 227 (Fla. 1919) (“[Littoral] rights . . . give no title to the land under navigable waters except such as may be lawfully acquired by accretion, reliction, and other similar rights.”); *cf.* Restatement of Property § 153 (1936)).

Inevitably, though, any discussion of these littoral rights requires some examination of the “dynamic boundary” on the shoreline between public lands and private lands, and this was the court’s next task.<sup>136</sup>

##### 5. Balancing Public and Private Interests

Noting that “Florida’s common law ha[d] never fully addressed how public-sponsored beach restoration affects the interests of the public and the interests of the upland owners,” the court turned to an analysis of the statute’s balancing of public and private interests.<sup>137</sup>

By authorizing the addition of sand to sovereignty lands, the Act prevents further loss of public beaches, protects existing structures, and repairs prior damage. In doing so, the Act promotes the public’s economic, ecological, recreational, and aesthetic interests in the shoreline. On the other hand, the Act benefits private upland owners by restoring beach already lost and by protecting their property from future storm damage and erosion. Moreover, the Act expressly preserves the upland owners’ rights to access, use, and view, including the rights of ingress and egress. The Act also protects the upland owners’ rights to boating, bathing, and fishing. Furthermore, the Act protects the upland owners’ view by prohibiting the State from erecting structures on the new beach except those necessary to prevent erosion.<sup>138</sup>

Thus, the court concluded, in granting title in any new dry land to the State without impairing any of the upland owners’ rights to access, use, or view, the Act does not facially exercise a taking.<sup>139</sup>

Turning next to the decision of the district court of appeals, the Florida Supreme Court faulted the lower court for failing to take into consideration the doctrine of avulsion, which, according to the court’s reasoning, would recognize the public’s right to reclaim its land lost in

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136. See *STBR I*, 998 So. 2d at 1112.

137. *Id.* at 1114. “Florida’s common law attempts to bring order and certainty to this dynamic boundary in a manner that reasonably balances the affected parties’ interests.” *Id.* at 1112.

138. *Id.* at 1115 (citations omitted).

139. *Id.* In case there were any fears that rights would be infringed if the State were not to uphold its end of the bargain, the court added, “the Act provides for the cancellation of the ECL if (1) the beach restoration is not commenced within two years; (2) restoration is halted in excess of a six-month period; or (3) the authorities do not maintain the restored beach.” *Id.*

the avulsive event.<sup>140</sup> This effect of the doctrine of avulsion, explained the court, enables the statute to pass muster under a constitutional analysis.<sup>141</sup> In the court's eyes, the public, by the State in trust, was equally an owner that had lost its land due to the avulsive event and was thereby rightfully reclaiming it by restoring the beach up to the previous MHWL.<sup>142</sup> Because the beachfront had been wiped out in a hurricane, which is an avulsive event, the doctrine of accretion, the court further concluded, did not apply to this case.<sup>143</sup>

Finally, and perhaps most controversially, the court held that *contact* with the water is not a fundamental littoral right in and of itself but rather a corollary to the littoral right of *access* to the water; here, the court reasoned, any alleged loss of *contact* was immaterial, because the right of *access* has been preserved in its entirety.<sup>144</sup>

## 6. Dissent

It was this last bit of reasoning that inflamed the dissent, which lamented what it called the "tortured logic" of the majority opinion that "butchered" Florida law.<sup>145</sup> "To speak of riparian or littoral rights unconnected with ownership of the shore," the dissent asserted, "is to speak a *non sequitur*."<sup>146</sup> Interestingly, in an earlier case addressing related issues, the dissent there had gone on to add, "Hopefully, the Supreme Court will take jurisdiction and extinguish this rather ingenious but *hopelessly illogical hypothesis*."<sup>147</sup> And, indeed, though it had passed on the opportunity in *Belvedere*, this time around the U.S. Supreme Court granted certiorari in the summer of 2009.<sup>148</sup>

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140. *See id.* at 1116-17.

141. *Id.* at 1117.

142. *Id.*

143. *Id.* at 1118-19. Remember that, where there is gradual and imperceptible accretion or reliction, the private ownership rights may expand, but where there is sudden change in the shoreline, the boundary of ownership does not move. *See C.J.S., supra* note 13, § 94.

144. *STBR I*, 998 So. 2d at 1119-20.

145. *Id.* at 1121-22 (Lewis, J., dissenting).

146. *Id.* at 1121 (quoting *Belvedere Dev. Corp. v. Div. of Admin.*, Florida Dep't. of Transp., 413 So. 2d 847, 851 (Fla. App. Ct. 1982) (Hersey, J., concurring specially)).

147. *Id.* at 1122 (citing *Belvedere*, 413 So. 2d at 851 (Hersey, J., specially concurring)).

148. *STBR I*, 998 So. 2d 1102, *cert. granted*, 129 S. Ct. 2792, (U.S. June 15, 2009) (No. 08-1151).

## 7. To the U.S. Supreme Court

Given the excitement it caused among private property advocates and land use planners, *STBR*'s actual decision came as something of an anti-climax when it was handed down in June 2010.<sup>149</sup> With varying amounts of obiter banter about proper takings analysis and the underlying validity or applicability of the judicial takings doctrine, the U.S. Supreme Court unanimously upheld the Florida Supreme Court's decision.<sup>150</sup> What is perhaps most remarkable is how little attention was paid to the provisions of Florida law that would be blasphemy in Maine or Massachusetts.<sup>151</sup> Not even Justice Breyer, a native of the First Circuit, found Florida's interpretation of the public trust doctrine worthy of even a footnote.<sup>152</sup> None of the justices found it even remotely questionable that state law might not recognize a fundamental private property right to contact with the water, much less possible future accretions.<sup>153</sup> The notion that a state actor might cross private property in order to rebuild a public beach where a private beach once existed did not appear to upset the court in the least.<sup>154</sup> In short, an even more expansive version of the sort of public trust rights than the one that Maine's Supreme Judicial Court found so repugnant is apparently wholly unobjectionable in the eyes of the Florida Supreme Court and the U.S. Supreme Court, who found it to be guaranteed by the state constitution, state statute, and a fair balancing of traditional common law rights.

## 8. Lessons Learned

Here, then, is a state court that applied a very deferential standard, perhaps to a fault, to a facial review of a public trust statute. Here, too, thanks in part to a constitutional and a statutory guarantee, but also to a strong common law tradition is a very different balancing of the public and private rights in the shoreline. Here is a vision of the public trust rights in the shoreline so expansive as to allow the state to rebuild a formerly private beach lost in a storm, so expansive as to content itself with the protection of private rights to use, view, and access, without necessarily guaranteeing contact to upland owners. In this view of public

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149. *Stop the Beach Renourishment, Inc. v. Florida Dept. of Env'tl. Prot. (STBR II)*, 130 S. Ct. 2592 (2010).

150. *Id.* at 2613.

151. *See generally STBR II*, 130 S. Ct. 2592.

152. *See id.* at 2618-19 (Breyer, J., concurring).

153. *See generally STBR II*, 130 S. Ct. 2592.

154. *Id.*



trust rights, the court emphasizes the dynamic nature of the shoreline, and the contingency of any possible interests, and there is virtually no mention whatsoever of any right to exclude. Finally, here is a Supreme Court of the United States utterly unfazed by such extensive public rights and unanimously willing to affirm such an expansive public trust doctrine.

*B. Case Study 2: Trespass by Reliction in the Pacific Northwest*

1. Factual Background

While hurricanes were pounding the Gulf Coast of Florida, a much more surreptitious force was at work in the Pacific Northwest. Thanks to steady erosive currents, the high tide line off a portion of the Washington coast was slowly rising, to the point where, in one instance, it subsumed some previously existing “shore defense structures,” which had been built, apparently in vain, to limit erosion.<sup>155</sup> The anti-erosion measures had been taken by private homeowners leasing tidelands from the U.S. government, which held them in trust to the Lummi Nation pursuant to a treaty signed by President Ulysses S. Grant.<sup>156</sup> Claiming that the new high-water mark<sup>157</sup> made the structures trespassory obstacles to navigation in sovereign submerged lands, the United States sued for their removal.<sup>158</sup> The waterfront homeowners challenged the lower court’s order for the removal of the structures, and the United States Court of Appeals for the Ninth Circuit was thus presented with the question “whether a group of waterfront homeowners are liable for common law trespass and violations of the Rivers and Harbors Appropriation Act of 1899<sup>159</sup> . . . because the ambulatory tideland property boundary has come to intersect shore defense structures the homeowners have erected.”<sup>160</sup> Given the dynamic and complex nature of the shoreline environment and the pertinent legal principles, the court was unsurprised that it would be “at the boundary between the tidelands and the uplands that the present dispute finds its locus.”<sup>161</sup>

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155. *United States v. Milner*, 583 F.3d 1174, 1180-81 (9th Cir. 2009).

156. *Id.*

157. As in Florida, the Ninth Circuit measures its tideland boundaries by MHWL as determined over the course of a 18.6-year period. *Id.* at 1181.

158. *Id.* at 1181.

159. 33 U.S.C. § 403 (2010).

160. *Milner*, 583 F.3d at 1180.

161. *Id.* at 1181.

## 2. Conclusions and Dispositive Facts

Among the relevant historic facts behind the complex ownership arrangement of these tidelands was President Grant's explicit expansion in 1873 of the Lummi reservation to include tidelands down to "the low water mark on the shore."<sup>162</sup> Coupled with the fact that the state of Washington had specifically disavowed any claim to submerged tribal lands upon statehood,<sup>163</sup> this explicit and long-recognized exercise of federal jurisdiction persuaded the Ninth Circuit that the otherwise wholly valid equal-footing doctrine would not supersede federal jurisdiction over the Lummi tidelands.<sup>164</sup>

In applying common law principles in this federal context, the court did not find the common enemy doctrine to be dispositive. At the outset of its discussion, the court noted how "recurring and difficult" coastal zone property issues can be given the inherently fluctuating nature of the shoreline and the delicate balance of federal and state interests in submerged lands.<sup>165</sup> Also important, observed the court, was the balance between private and public interests:

On the one hand, courts have long recognized that an owner of riparian or littoral property must accept that the property boundary is ambulatory, subject to gradual loss or gain depending on the whims of the sea. On the other hand, the common law also supports the owner's right to build structures upon the land to protect against erosion.<sup>166</sup>

According to the court, however, the common enemy doctrine was simply inapposite under the circumstances, because "both the Lummi and the Homeowners must accept that . . . both the tidelands and the uplands are subject to diminishment and expansion based on the forces of the sea."<sup>167</sup>

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162. *Id.* at 1180.

163. *Id.* at 1184.

164. *Id.* at 1183.

165. *Id.* at 1186.

166. *Id.* at 1186-87 (internal citations omitted) ("If a landowner whose lands are exposed to inroads of the sea[ ] . . . erects sea walls or dams for the protection of his land, and by so doing causes the tide, the current, or the waves to flow against the land of his neighbor . . . [he] is not responsible in damages to the latter, as he has done no wrong having acted in self-defense, and having a right to protect his land.").

167. *Id.* at 1188. In so holding, the Ninth Circuit panel also specifically rejected the notion that the dry uplands might have more value than tidelands. *Id.* The court explained:

Consequently, the court determined that the initial legal status of the shore defense structures did not foreclose the possibility that the very same structure might, under changed circumstances, subsequently be held in violation of the common law of trespass.<sup>168</sup> In addition, the court found that the homeowners' conscious refusal to comply with an order to remove the riprap in question satisfied the required elements of intent and causation in order to find that a trespass had, in fact, occurred.<sup>169</sup> Finally, the court took on the state-federal balancing question inherent in the federal statutory claims brought against the homeowners. Ultimately, the submerged riprap, which now lay in navigable waters without Corps approval, was held to be in violation of section 10 of the Rivers and Harbors Act (RHA), which prohibits the creation of, "any obstruction not affirmatively authorized by Congress . . . to the navigable capacity of any of the waters of the United States."<sup>170</sup>

Accordingly, the homeowners were ordered to remove their shore defense structures.<sup>171</sup> Spelling out the moral of this controversy, the court admonished would-be private shorefront builders: "[O]ne who develops areas below the MHW line does so at his peril."<sup>172</sup> Thus, with rising seas and eroding shorelines, federal common law principles of trespass can act in concert with federal statutes to supersede private

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the tidelands have played an important role in the Lummi's traditional way of life, and in most other areas, the tidelands are held by the state in trust for the public. These interests are substantial, and the uses they represent are not obviously less 'productive.' ('[Lands under tide waters] are of great value to the public for the purposes of commerce, navigation, and fishery. Their improvement by individuals, when permitted, is incidental or subordinate to the public use and right.').

*Id.*

168. *Id.* at 1183.

169. *Id.* at 1182-1183. Federal common law generally aligns with the Restatement of Torts, under which, "a person is liable for trespass 'if he intentionally . . . causes a thing [to enter land in the possession of another], . . . [or] fails to remove from the land a thing which he is under a duty to remove.' *Id.* (quoting Restatement (Second) of Torts § 158 (2009)); see also Restatement (Second) of Torts § 161; 75 Am. Jur. 2d *Trespass* § 19 (2009) ("A trespass may be committed by the continued presence on the land of a structure, chattel, or other thing that the actor or a predecessor in legal interest has placed on the land and failed to remove."). According to the court, "[i]t is enough that the Homeowners caused the structures to be erected and that the structures subsequently rested on the tidelands." *Milner*, 583 F.3d at 1191.

170. *Id.* (quoting 33 U.S.C. § 403).

171. *Id.* at 1191.

172. *Id.* at 1192 (quoting *Leslie Salt Co. v. Froehlke*, 578 F.2d 742, 753 (9th Cir.1978)).

property interests in favor of a somewhat expansive federal public trust doctrine.

### C. Case Study 3: *Shifting Sands in Hawai'i*

#### 1. Factual Background

Unsurprisingly, the issue of changing shorelines is a persistent one in Hawai'i, too. The most recent case of shifting sands to reach the appellate level there was filed in May 2005 by beachfront landowners on O'ahu, who challenged the constitutionality of Act 73.<sup>173</sup> Act 73, signed into law just two years earlier, had redefined accretion, limited existing claims of private shorefront owners, and asserted state ownership in trust for the Hawai'ian people over any other future accreted lands that could not be claimed by private owners.<sup>174</sup> Plaintiffs alleged, *inter alia*, that Act 73 exercised an unconstitutional taking of the owners' present and future rights to accreted beachfront lands, and damaged their remaining property by cutting it off from the water.<sup>175</sup>

The trial court granted summary judgment to the plaintiffs, finding that Act 73 "represented a sudden change in the common law and effected an uncompensated taking" of both the littoral owners' accreted land, and the littoral owners' right to ownership of future accreted land.<sup>176</sup>

#### 2. Hawai'ian Common Law and Custom

The intermediate court of appeals, after mining longstanding Hawai'ian case law, saw things differently.<sup>177</sup> In 1889, the Hawai'i Supreme Court had held, based on its translations of deed documents bounding waterfront parcels, that land granted "[a] hiki i kahakai" (reaching to high water mark), extended to the sea and that the owner's rights extended with any accretion.<sup>178</sup> The court had concluded in 1968

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173. *Maunalua Bay Beach Ohana 28 v. Hawai'i*, 222 P.3d 441, 441 (Haw. Ct. App. Dec. 30, 2009). The full text of Act 73 can be found at 2003 Haw. Sess. Laws at 128.

174. This came only 18 years after Act 221 declared that private oceanfront owners could not claim any accretions as sufficiently "permanent" to warrant title until the passage of 20 years. An Act Relating to Accretion, 1985 Haw. Sess. Laws at 401; *see also Maunalua Bay*, 222 P.3d at 453-54.

175. *Maunalua Bay*, 222 P.3d at 441-42.

176. *Id.* at 443.

177. *Id.*

178. *Halstead v. Gay*, 7 Haw. 587 (1889); *see also Maunalua Bay*, 222 P.3d 441, 445 (Haw. Ct. App. Dec. 30, 2009) (quoting *Halstead*, 7 Haw. at 589-90).

that the traditional term “make kai,” or “along the sea,” meant that a plot was ultimately bounded not by a surveyor’s azimuths or calculations of mean high water but by the high water mark as determined by the natural vegetation line and the traditional testimony of local, native-born Hawai’ians known as *kamaainas*.<sup>179</sup> A 1973 decision acknowledged an extension of property rights to the high water mark, but determined that the landowners’ rights were subject to such natural forces as erosion, which might make that high water mark, presumptively the edge of the vegetation line, move over time.<sup>180</sup> Citing the public trust doctrine, the court held that any land lost to erosion “below the . . . seaward boundary line . . . belongs to the State of Hawai’i, and the defendants should not be compensated therefore.”<sup>181</sup> The court reaffirmed this holding in 1977, specifying that the disappearance and reappearance of sands in annual cycles cannot be considered “permanent” gain or loss, and that “the specific distances and azimuths given for high water mark in 1951 are not conclusive, but are merely prima facie descriptions of high water mark, presumed accurate until proved otherwise.”<sup>182</sup>

In another 1977 case, the court recalled that, historically, “the people of Hawai’i are the original owners of all Hawai’ian land” and that a system of private title did not emerge until King Kamehameha bowed to the pressure of “foreign” residents.<sup>183</sup> Thus, the court reasoned, a lava extension into the sea vested “when created in the people of Hawai’i, held in public trust by the government for the benefit, use and enjoyment of all the people.”<sup>184</sup> In reaching this conclusion, the court took note that, in California, “it is also well settled that being cut off from contact with the sea is not basis for proper complaint.”<sup>185</sup> Acknowledging the “paucity of land in our island state” and the potential inequitable windfall to a private owner, the court assured the upland owners that they would

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179. *In re Ashford*, 440 P.2d 76 (Haw. 1968); *see also Maunalua Bay*, 222 P.3d at 446 (quoting *Ashford*, 440 P.2d at 77).

180. *Cnty of Hawai’i v. Sotomura*, 517 P.2d 57 (Haw. 1973); *see also Maunalua Bay*, 222 P.3d at 447 (quoting *Sotomura*, 517 P.2d at 60). This rule was later codified in Haw. Rev. Stat. § 205A-1 (2001): “[s]horeline” is defined as the “upper reaches of the wash of the waves, other than storm and seismic waves, at high tide during the season of the year in which the highest wash of the waves occurs, usually evidenced by the edge of vegetarian growth, or the upper limit of debris left by the wash of the waves.”

181. *Sotomura*, 517 P.2d at 62-63.

182. *In re Sanborn*, 562 P.2d 771, 774 (Haw. 1977); *see also Maunalua Bay*, 2009 Haw. App. LEXIS 807, at \*22-24.

183. *Hawai’i v. Zimring*, 566 P.2d 725, 729 (Haw. 1977).

184. *Id.* at 734-35; *see also Maunalua Bay*, 2009 Haw. App. LEXIS 807, at \*32-33.

185. *Maunalua Bay*, 222 P.3d at 451 (quoting *Zimring*, 566 P.2d at 729).

continue to have the same access to the lava extension in question as any other members of the public.<sup>186</sup>

In summary, under Hawai'i common law: (1) the "highest reach of the highest wash of the waves" delineates the boundary between private oceanfront property and public property for ownership purposes . . . (2) land added to oceanfront property through avulsive lava extension belongs to the State; and (3) land added to oceanfront property through accretion belongs to the oceanfront property owner.<sup>187</sup>

### 3. "The Statutory Landscape"

In 1985, just one year before passage of Maine's PTILA,<sup>188</sup> the Hawai'i Legislature enacted Act 221, which prohibited any "structure, retaining wall, dredging, grading, or other use which interferes or may interfere with the future natural course of the beach, including further accretion or erosion."<sup>189</sup> The legislature's express purpose was to protect the public's access to beaches as well as natural processes of beach accretion and erosion.<sup>190</sup> Act 221 allowed private claims to property rights only in accretions demonstrated to be sufficiently permanent, that is, those existing for more than twenty years.<sup>191</sup> Then, almost twenty years later, in 2003, the Hawai'i State Legislature passed Act 73, which provided that owners of oceanfront lands could no longer claim accreted lands unless the accretion restored previously eroded land, and that, henceforth, accreted lands not otherwise awarded shall be considered "[p]ublic lands" or "state land."<sup>192</sup>

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186. *Id.* (quoting *Zimring*, 566 P.2d at 734-35).

187. *Maunalua Bay*, 222 P.3d at 453.

188. *See* Public Trust in Intertidal Lands Act, ME. REV. STAT. ANN. tit. 12 §§ 571-573 (2011).

189. 1985 HAW. SESS. LAWS at 401.

190. *Id.*

191. *Id.*

192. *Maunalua Bay*, 222 P.3d at 458. The reviewing Senate Committee found that: this measure will stop the unlawful taking of public beach land under the guise of fulfilling a nonexistent littoral right supposedly belonging to shorefront property owners. The measure will help Hawai'i's public lands and fragile beaches by ensuring that coastal property owners do not inappropriately claim newly deposited lands makai of their property as their own.

*Id.* (quoting S. Stand. Comm. Rep. No. 1224, in 2003 Senate Journal, at 1546).

#### 4. Conclusions

Plaintiffs in *Maunalua Bay* claimed that Act 73 operated to effect an unconstitutional taking of both their present rights in previously accreted lands, and their rights to accreted lands in the future.<sup>193</sup> The court disagreed, however, explaining that no taking could be found with regards to future accretions, because the notion of future accretions was “purely speculative,” and plaintiffs could thus invoke, at best, merely a contingent interest in such non-existent property.<sup>194</sup> Furthermore, reasoned the court, “Plaintiffs have no vested right to future accretions that may never materialize and, therefore, Act 73 did not effectuate a taking of future accretions without just compensation.”<sup>195</sup> Most importantly, perhaps, the court stressed that, because the state constitution itself called for all natural resources to be held in trust by the State for the benefit of the people, private landowners cannot unduly expect that their interests will prevail over public interests in newly forming beaches.<sup>196</sup>

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193. Article I, section 20 of the Hawai'i State Constitution states: “Private property shall not be taken or damaged for public use without just compensation.” HAW. CONST. art. I, § 20.

194. *Maunalua Bay*, 222 P.3d at 460. “[A] mere expectancy of future benefit, or a contingent interest in property founded on anticipated continuance of existing laws, does not constitute a vested right.” 12 C.J. 955. “Rights are vested, in contradiction to being expectant or contingent . . . when the right to enjoyment, present or prospective, has become the property of some particular person or persons as a present interest. They are expectant, when they depend upon the continued existence of the present condition of things until the happening of some future event. They are contingent, when they are only to come into existence on an event or condition which may not happen or be performed until some other event may prevent their vesting.” *Maunalua Bay*, 222 P.3d at 445 (quoting THOMAS M. COOLEY, PRINCIPLES OF CONSTITUTIONAL LAW, 332 (1880)).

195. *Maunalua Bay*, 222 P.3d at 461.

196. It is instructive that article XI, section 1 of the Hawai'i State Constitution, which was adopted in 1978, twenty-five years before the passage of Act 73, mandates that [f]or the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawai'i's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State. All public natural resources are held in trust by the State for the benefit of the people. *Id.* (quoting HAW. CONST. art. XI, § 1).

*D. Case Study 4: Open Beaches and Rolling Easements on the Gulf Coast of Texas*

1. Factual Background

When Tropical Storm Frances hit the Texas Gulf Coast in 1998 near the Village of Surfside Beach, it marked a significant change in the shorefront vegetation line, in the life of Angela Mae Brannan, and in the state's shorefront policy.<sup>197</sup>

Since 1959, and through its revision in 1991, the state's Open Beaches Act has provided for the public's unrestricted access and use rights in both the foreshore and the dry beaches. These easements assuring public rights extend from the low water mark up to the vegetation line, even as it moves inland due to erosion, storm surge, and sea level rise.<sup>198</sup> Such an easement has come to be referred to as a "rolling easement."<sup>199</sup> The statute further provides for the removal of any structure "seaward of the landward boundary of the easement."<sup>200</sup>

Once Frances had shifted the vegetation line, the commissioner of the General Land Office duly informed the Attorney General, who initially informed the homeowners that their homes would not be subject to removal. However, the Village, also acting pursuant to the statute, refused permits for septic and water to be restored to the homes.<sup>201</sup> When

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197. *Brannan v. Texas*, 2010 Tex. App. LEXIS 799 at \*4 (Tex. Ct. App. 2010). Undoubtedly, Frances impacted many miles of shoreline and scores of homeowners, but it had an uncommon, albeit not unprecedented, effect on several residents of Surfside Beach. *See id.* at \*4. Originally, there were fourteen homeowner complainants, but their number was reduced to three when another "force of nature" made most of their claims moot. *Id.* at \*3. Indeed, even during the pendency of the appeal, another one of the houses in question collapsed during a tidal surge. *Id.* at \*16.

198. TEX. NAT. RES. CODE ANN. § 61.025 (2010); *see generally id.* § 61.011(a).

It is declared and affirmed to be the public policy of this state that the public, individually and collectively, shall have the free and unrestricted right of ingress and egress to and from the state-owned beaches bordering on the seaward shore of the Gulf of Mexico, or if the public has acquired a right of use or easement to or over an area by prescription, dedication, or has retained a right by virtue of continuous right in the public, the public shall have the free and unrestricted right of ingress and egress to the larger area extending from the line of mean low tide to the line of vegetation bordering on the Gulf of Mexico.

*Id.* § 61.011(a).

199. *See Brannan*, 2010 Tex. App. LEXIS 799, at \*36-37 (referring both to a "rolling easement" and the "rolling easement doctrine").

200. TEX. NAT. RES. CODE ANN. § 61.025 (2010).

201. *Brannan*, 2010 Tex. App. LEXIS 799, at \*5. Indeed, one commentator recently argued in these pages for such an approach to shoreline policy, asserting, in accordance



the homeowners sued both the state and the village for a declaratory judgment and damages, the state counterclaimed for an order to remove the houses, as they were “seaward of the landward boundary” of the easement.<sup>202</sup>

## 2. On Appeal

Appealing the resultant judicial order for removal of their homes, the homeowners asserted four arguments:

- (1) that the state had not proven the existence of a public beach easement,
- (2) that, even if such an easement existed, the houses predated the shift of the vegetation line and did not interfere with the public’s use,
- (3) that the removal of their houses would amount to a permanent taking of their property, and
- (4) that the denial of access to utilities and services was a regulatory taking.<sup>203</sup>

But these arguments were unavailing. The court found that the statute unambiguously recognized a public easement for access to, and use of, the beaches in question, and that the bounds of that easement shifted with the vegetation line.<sup>204</sup> With regard to the nature of the public easement, the court found it to have been established by implied dedication, permitting the public to engage in “typical activities such as swimming, fishing, sunbathing, playing, relaxing, beach combing, [and] surfing.”<sup>205</sup> The court further observed that “it is undisputed that under the common law and the Open Beaches Act the easement ‘rolls’ or moves with the shifting of the line of mean low tide and the line of vegetation.”<sup>206</sup>

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with the Texas Supreme Court, that the municipal denial or removal of services does not rise to an unconstitutional taking. See Travis Martay Brennan, Comment, *Redefining the American Coastline: Can the Government Withdraw Basic Services from the Coast and Avoid Takings Claims?* 14 OCEAN & COASTAL L. J. 101 (2008) [hereinafter *Redefining Coastline*].

202. *Brannan*, 2010 Tex. App. LEXIS 799, at \*5.

203. *Id.* at \*3.

204. *Id.* at \*17, \*38.

205. *Id.* at \*23, \*34. On the other hand, the days when the beach had served as a public roadway were over. *Id.* at \*35.

206. *Id.* at \*62-63.

Following other Texas courts, the panel in *Brannan* explained that the ordered removal of a structure under the Open Beaches Act “is not a taking because the Act does not create an easement, but provides a method of enforcing an easement acquired by other means.”<sup>207</sup> It was, the court admonished, not an act of government, but an act of nature that had moved the vegetation line landward.<sup>208</sup>

#### IV. SCIENTIFIC OBSERVATIONS AND ENGINEERING DEVELOPMENTS

##### A. Climate Change Impacts

It is virtually undisputed that our creation of a global greenhouse has led to climatological changes that are bound to have an impact on both private and public property interests on the coast. As the director of NOAA has unequivocally pronounced: “Climate change is real. It is here, and it is happening now, in our backyards and around the globe.”<sup>209</sup> Drawing on findings of the Intergovernmental Panel on Climate Change (IPCC) and the U.S. Environmental Protection Agency (EPA) and examining the probable impact of these consequences on the Florida economy, one team of scientists recently found that an unequivocal global average warming of about 1.0-1.7 degrees Fahrenheit occurred between 1906 and 2005.<sup>210</sup>

As a result of the temperature increase, according to the IPCC, the rate of sea level rise will also increase, which will in turn lead to more floods, storm surge flooding, shoreline erosion, and extreme precipitation

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207. *Id.* at \*64. The court distinguished the claims here from those in *Nollan* on the grounds that, unlike here, the California Coastal Commission was trying to establish an easement that had not previously existed. *Id.* at \*66. Furthermore, the *Brannan* court recalled: “There is a difference between a taking and a limitation upon property use based upon ‘background principles’ of state property law.” *Id.* at \*60 (citing *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1030 (1992)).

208. *Id.* at \*67.

209. NOAA OFFICE OF COASTAL RES. MGMT, ADAPTING TO CLIMATE CHANGE: A PLANNING GUIDE FOR STATE COASTAL MANAGERS iii (2010), available at <http://coastalmanagement.noaa.gov/climate/adaptation.html> [hereinafter OCRM PLANNING GUIDE].

210. See TATIANA BORISOVA, NORMAN BREUER & ROY CARRIKER, ECONOMIC IMPACTS OF CLIMATE CHANGE ON FLORIDA: ESTIMATES FROM TWO STUDIES 2 (2008) [hereinafter CLIMATE CHANGE IMPACTS]; see also INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007 SYNTHESIS REPORT (Pachauri & Reisinger eds. 2007), available at [http://www.ipcc.ch/publications\\_and\\_data/ar4/syr/en/contents.html](http://www.ipcc.ch/publications_and_data/ar4/syr/en/contents.html) [hereinafter IPCC REPORT].

events.<sup>211</sup> In 1987, even before sea level rise had made it onto the public radar screen, the average ocean shore along the Atlantic and Gulf Coasts was eroding two and four feet per year, respectively.<sup>212</sup> At the extreme, erosion rates might meet or exceed the “relentless 6-foot-per-year shoreline retreat rate on South Nags Head, North Carolina.”<sup>213</sup> Add to that a sea level rise of about a foot, and a seven-foot high storm surge could be expected to occur at least three times as frequently as today.<sup>214</sup> On the Atlantic seaboard, warming climate could raise sea level by one to three feet (or twelve to thirty-six inches) over the next century. In Florida, “even a one-foot increase has the potential to erode 100 to 200 feet of the state’s beaches, and lead to inundation of the coastal areas.”<sup>215</sup>

It goes without saying that none of these consequences bodes well for the status quo of seashore communities, but the projections are still startling. For instance, “for every 3.3 feet (one meter) of sea level rise, the economic damages from hurricanes double.”<sup>216</sup> Florida’s projected hurricane damages for 2050 fall between \$24 billion and \$49 billion, with between eighteen and thirty-seven deaths.<sup>217</sup> Projected losses from four climate change impacts—tourism reduction, hurricane damages, real estate losses, and increased costs of electricity generation—may reach \$345 billion by the end of the twenty-first century.<sup>218</sup>

The projections are not much better in Maine.<sup>219</sup> A 2008 study warns that, while sea level rise is projected at anywhere from ten inches to over four feet, “[r]ecent analysis of ice data from Greenland suggests sea level rise could occur very quickly.”<sup>220</sup> It predicts the same exacerbation of

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211. *Id.* at 2; see also PETE GRANNIS ET AL., NEW YORK STATE SEA LEVEL RISE TASK FORCE REPORT TO THE LEGISLATURE 19 (2010), available at [http://www.dec.ny.gov/docs/administration\\_pdf/slrffinalrep.pdf](http://www.dec.ny.gov/docs/administration_pdf/slrffinalrep.pdf) [hereinafter NY TASK FORCE] (“With higher baseline sea levels, the effects of storm surge will be felt further inland. Increased storm intensity will compound coastal erosion and damage from storm surge. With rising sea levels, the expected increase in the frequency, intensity, and inland reach of storm surge events will compound coastal damages and erosion.”).

212. See MARINE BOARD, NATIONAL RESEARCH COUNCIL, RESPONDING TO CHANGES IN SEA LEVEL: ENGINEERING IMPLICATIONS 50 (1987).

213. RULES OF THE SEA, *supra* note 26, at xi.

214. *Id.*

215. *Id.* at 2.

216. CLIMATE CHANGE IMPACTS, *supra* note 210, at 5.

217. *Id.*

218. *Id.* at 7.

219. See, e.g., Charles S. Colgan & Samuel B. Merrill, *The Effects of Climate Change on Economic Activity in Maine: Coastal York County Case Study* 17 MAINE POLICY REVIEW 2 (2008), available at [http://mcspolicycenter.umaine.edu/?q=colganMerrill\\_V17N2](http://mcspolicycenter.umaine.edu/?q=colganMerrill_V17N2) [hereinafter CLIMATE CHANGE IN MAINE].

220. *Id.*

storm intensity and frequency, as well as storm surges up to twelve feet above normal tides.<sup>221</sup> In 2006, the Maine Geological Study analyzed the probable impacts of sea level rise on two topographically similar beaches in close proximity to Moody Beach.<sup>222</sup> The resulting report found that the “estimated 2 ft rise in sea level will have dramatic impacts along Maine’s coastlines in terms of sensitive geographic areas including beaches and dunes, wetlands, and nearshore habitats.”<sup>223</sup> In an area that already sees minor flooding and overwash during storms, predictions about the potential effects of a storm that coincided with high tide, on top of higher sea levels, were even more grave.<sup>224</sup>

### B. Demographics

While storm surge and sea level rise pose great risks to the seashore, it is landward pressures that promise to compound the impacts of these seaward threats. Soon after the *Moody Beach Cases* were decided, one team of coastal geologists remarked that they were less struck by increases in the rate of sea level rise and erosion than they were by the “dramatic, rapid population increase in the coastal zone” since the 1950s.<sup>225</sup> The narrow fringe comprising 17 percent of the contiguous U.S. land area is now home to more than half of the nation’s population.<sup>226</sup> Between 1980 and 2003, population in coastal counties grew by 33 million people, a 28 percent increase.<sup>227</sup> As a result of these demographic shifts, the nation’s beaches are more crowded than ever, hosting approximately 180 million people for two billion visits annually, more than twice the number of visits to the country’s national and state parks combined.<sup>228</sup>

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221. *Id.*

222. PETER SLOVINSKY & STEPHEN DICKSON, MAINE GEOLOGICAL SURVEY: IMPACTS OF FUTURE SEA LEVEL RISE ON THE COASTAL FLOODPLAIN (2006), available at <http://www.maine.gov/doc/nrimc/mgs/explore/marine/sea-level/contents.htm> [hereinafter MGS REPORT].

223. *Id.* at 1. “Even a 1 ft rise in sea level may have major implications regarding the future flooding of private property and public infrastructure.” *Id.* at 6. With a rise in sea level of two feet, the report continued, “flooding becomes more pronounced and starts to inhibit emergency access to portions of the island.” *Id.*

224. *Id.*

225. RULES OF THE SEA, *supra* note 26, at 2.

226. NOAA Facts, *supra* note 1.

227. *Id.*

228. JAMES HOUSTON, U.S. ARMY ENGINEER RESEARCH AND DEVELOPMENT CENTER, THE ECONOMIC VALUE OF BEACHES—A 2002 UPDATE (2002), available at [http://www.netlobby.com/pdf/value\\_of\\_beaches2.pdf](http://www.netlobby.com/pdf/value_of_beaches2.pdf); see also *Ocean Facts on Coastal*

Moreover, whether state courts recognize it or not—and the vast majority outside of Maine do—more Americans are going to the shore more often to pursue increasingly varied pastimes.<sup>229</sup> “Beaches, resorts, marinas, harbors and the general lure of the waters bring people to the coasts in droves to fish, surf, bathe, sunbathe, sail, build, stroll and live their time-honored ‘pursuit of happiness.’”<sup>230</sup> Thus, even as coastlines are projected to be exposed to increasing risks due to climate change and sea level rise, “the effect will be exacerbated by increasing human-induced pressures on coastal areas.”<sup>231</sup> Ultimately, though, as many observers have noted, it is these same humans who will have to realize the impacts of their behavior and devise successful mitigation and restoration strategies.<sup>232</sup>

### C. Coastal Engineering

One such strategy, though its success is at the very least arguable, has called for the implementation of so-called “shoreline stabilization techniques.” As with many of our common law doctrines, this strategy can also be traced back to the classical Roman era.<sup>233</sup> And it is not hard to guess why. The coastal area has long been recognized as “a highly dynamic environment,” plagued by flooding and erosion.<sup>234</sup>

It was the turn of the nineteenth century, however, that marked the great age of coastal engineering in the United States.<sup>235</sup> A series of devastating hurricanes in the 1890s prompted settlements like Diamond

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*Tourism*, NAT’L OCEANIC AND ATMOSPHERIC ADMIN., <http://www.yoto98.noaa.gov/facts/tourism.htm> (last visited April 28, 2010).

229. See, e.g., *Borough of Neptune City v. Borough of Avon-by-the-Sea*, 294 A.2d 47, 53 (N.J. 1972) (deeming the public trust in the shore “a deeply inherent right” and recreational uses to be rightfully ever-evolving); *Marks v. Whitney*, 491 P.2d 374, 380 (Cal. 1971) (deeming the public uses to which tidelands are subject “sufficiently flexible to encompass changing public needs”).

230. COASTAL STATES ORG., *supra* note 17, at xii.

231. IPCC REPORT, *supra* note 210, at 26.

232. See, e.g., THE H. JOHN HEINZ III CTR. FOR SCI., ECONS. AND THE ENV’T, HUMAN LINKS TO COASTAL DISASTERS 12-13 (2002), available at [http://heinzhome.heinzctrinfo.net/publications/PDF/Full\\_report\\_human\\_links.pdf](http://heinzhome.heinzctrinfo.net/publications/PDF/Full_report_human_links.pdf) (“As the coasts become increasingly populated, more and more people are placed in harm’s way. Thus far, science has not found effective ways to reduce most hazards . . . . In the end, it is human decisions on such matters as land use planning and community priorities that will build ultimately stronger, safer, and better communities.”).

233. RULES OF THE SEA, *supra* note 26, at 70.

234. COASTAL STATES ORG., *supra* note 17, at 341.

235. RULES OF THE SEA, *supra* note 26, at 66.

City, North Carolina, and Edingsville Beach, South Carolina, to give up and move.<sup>236</sup> But not every community responded quite as malleably. When, in 1888, the Brighton Beach Hotel on Coney Island, faced the imminent consequences of an eroding shoreline, it was moved back from the shore line using steam locomotives.<sup>237</sup> And when a 1900 hurricane struck Galveston Island, Texas, leaving 6,000 people dead, the city's response was to build an enormous seawall.<sup>238</sup> "It was humans against the elements, and no one doubted that humans could out-engineer the forces of nature."<sup>239</sup> The emerging coastal engineering strategies have usually taken one of two approaches, which have come to be known as "hard stabilization" and "soft stabilization."

### 1. Hard Stabilization

Congress, apparently moved by a similarly tenacious spirit, passed the Rivers and Harbors Act of 1889, which charged the U.S. Army Corps of Engineers (USACE, or the Corps) with the maintenance of navigable waterways.<sup>240</sup> The Corps, meanwhile, also began building a variety of structures meant to counter the effects of shoreline erosion.<sup>241</sup> Through experimentation all over the American coastline, the USACE developed three basic categories of hard stabilization: "1) shore-parallel structures on land, such as seawalls [or bulkheads]; 2) shore-parallel structures offshore, such as breakwaters; 3) shore-perpendicular structures, such as groins and jetties."<sup>242</sup>

But the results of these hard stabilization techniques are actually the opposite of those desired. As it turns out, beaches in front of seawalls are consistently narrower than beaches without seawalls.<sup>243</sup> The same is true of breakwaters, which eventually led the city of Palm Beach, Florida, at great expense, to remove its breakwater in 1995.<sup>244</sup> Sea Bright, New Jersey, stands as another example of just how far awry these initial hard stabilization approaches could go.<sup>245</sup> In Sea Bright, remains

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236. *Id.*

237. *Id.*

238. *Id.* at 66-67.

239. *Id.* at 66.

240. *Id.*

241. RULES OF THE SEA, *supra* note 26, at 67.

242. *Id.* at 70. Additional measures to ward off the waves include: revetments, riprap, filter cloths, sandbags, and gabions. *Id.* at 72.

243. *Id.* at 76.

244. *See id.* at 77.

245. *Id.* at 68.

of ancient beach are held in place by long groins but in either direction of the groins “virtually no beach remains” in front of the mammoth seawall that towers over the thin strip of buildings it was designed to protect.<sup>246</sup> In effect, the beach is “robbed” of its natural and local resupply of sand by the seawall.<sup>247</sup> What’s more, in 1984, a severe nor’easter caused \$82 million in damages, essentially equal to all property protected.<sup>248</sup> Thus, although designed with the intent to preserve shorelines, these hard stabilization techniques shared one fatal flaw in the final analysis: “directly or indirectly they contributed to the loss of the beach that fronted the structure. . . .”<sup>249</sup>

## 2. Soft Stabilization

Having learned these hard lessons through experience, “coastal management practices nationwide generally discourage, and often prohibit through regulatory programs, the use of ‘hard’ erosion control structures such as seawalls, bulkheads, riprap, groins, and jetties.”<sup>250</sup> Undaunted, though, engineers and planners have turned their attention to alternative methods known as soft stabilization. These include dune reconstruction and a technique referred to alternately as beach replenishment, renourishment, or restoration.<sup>251</sup> “Artificial nourishment” has, to a large extent, become “the modern method of maintaining a healthy beach to help protect buildings as well as provide a recreational resource.”<sup>252</sup>

The most obvious benefit of beach “renourishment,” of course, is the preservation of an otherwise vanishing place for the public to meet the

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246. *Id.* at 68.

247. *Id.* As a result, important coastal habitats and public access areas are bound to be lost where shoreline barriers, like sea walls and bulkheads prevent wetlands, beaches, and other intertidal from migrating inland as sea level rises. Office of Ocean and Coastal Res. Mgmt., Nat’l Oceanic and Atmospheric Admin., U.S. Dep’t of Commerce, *Coastal Issues: Climate Change*, OCEAN AND COASTAL RESOURCE MGMT., <http://coastalmanagement.noaa.gov/climate.html#climatefour> (last visited Feb. 26, 2011) [hereinafter NOAA *Coastal Issues*].

248. RULES OF THE SEA, *supra* note 26, at 68.

249. *Id.*

250. COASTAL STATES ORG., *supra* note 17, at 341.

251. See RULES OF THE SEA, *supra* note 26, at 80.

252. *Id.* “Beach replenishment involves placing new sand, from some outside source, on the beach. Reconstructing the beach is usually carried out by dredging, but sometimes dump trucks are used to bring in sand . . . . Sources of sand are the continental shelf, inlets and associated tidal deltas, lagoons . . . and inland sand pits. Beach replenishment is the most important, though not the only, form of soft stabilization.” *Id.* at 80-81.

ocean and recreate—and to keep crucial tourist dollars coming into coastal communities.<sup>253</sup> In the three decades between 1965 and 1995, well over one hundred beaches were replenished on the eastern seaboard.<sup>254</sup> In one notable example, despite the hesitation of many businesses on the strip, Miami Beach was replenished in 1981 to great early acclaim, yielding impressive before-and-after photos.<sup>255</sup>

Nevertheless, beach renourishment comes with its share of costs, which are often hidden in the “storm-protection” and tourism preservation pitch to coastal towns.<sup>256</sup> First there is the financial cost: \$1 million per mile at a bare minimum.<sup>257</sup> Indeed, the Miami Beach restoration cost over \$5 million per mile.<sup>258</sup> But these significant initial investments are not the only costs, because replenished beaches only have a life span between two and nine years.<sup>259</sup> In the second half of the twentieth century and the first three years of the twenty-first century, even with beach nourishment only just catching on, over \$2.4 billion was spent on USACE shoreline protection projects, and it is estimated that it will require \$3 billion to keep New Jersey beaches replenished over the next fifty years.<sup>260</sup>

As it turns out, in addition to the immediate and recurring financial costs involved, there are also identifiable concerns about the impact of the dredging, which may either cancel out the effect of the replenishment by increasing wave action, or cause turbidity, which can kill off fish and coral.<sup>261</sup> Recently, the disappearance of sand from one Connecticut beach was attributed to “natural causes,” even though dredges had just

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253. See Home Page Design and Construction Co., Nat’l Oceanic and Atmospheric Admin., U.S. Dep’t of Commerce, *Ocean Facts on Coastal Tourism*, INT’L YEAR OF THE OCEAN, <http://www.yoto98.noaa.gov/facts/tourism.htm> (last visited Apr. 28, 2010) (In the United States, “aquatic and beach activities provide 28.3 million jobs and annually generate \$54 billion in goods and services.” And more tourists visit Miami Beach annually than the Yellowstone, Grand Canyon, and Yosemite National Parks combined).

254. RULES OF THE SEA, *supra* note 26, at 81.

255. *Id.* at 80.

256. *Id.* at 81.

257. *Id.*

258. *Id.* at 80.

259. *Id.* at 81.

260. THEODORE M. HILLYER, U.S. ARMY CORPS OF ENG’RS INST. FOR WATER RES., *THE CORPS OF ENGINEERS AND SHORE PROTECTION: HISTORY, PROJECTS, COSTS* v-vi (2003), available at [http://www.iwr.usace.army.mil/docs/iwrreports/IWR03\\_NSMS\\_1.pdf](http://www.iwr.usace.army.mil/docs/iwrreports/IWR03_NSMS_1.pdf); see also RULES OF THE SEA, *supra* note 26, at 81.

261. See *id.* at 17.



finished mining sand offshore not long before.<sup>262</sup> The new beach sand, moreover, may be too hard for nesting sea turtles.<sup>263</sup>

All in all, while there is no doubt about fast-rising sea levels and population levels, there would appear to remain much doubt about the efficacy of coastal *armoring* and soft stabilization. Taken together, the tremendous cost, and ultimate failure, of both hard and soft stabilization techniques would seem to point to an obvious moral: “Society must move from engineering against nature to working with nature.”<sup>264</sup> Otherwise, as a result of misguided attempts to prevent any change to the shoreline’s profile, the very beaches we are trying to protect could drown under the rising sea.<sup>265</sup>

#### D. Case Study: Plum Island

For a glimpse of shoreline legal regimes and engineering practices that are teetering—along with homes—in the face of oceanic realities, one need look no farther than the very state whose pre-colonial ordinance and common law tradition of private tideland ownership were heralded by the *Bell* decisions. In Newburyport, Massachusetts, a number of houses on Plum Island have already been lost, and many more, some “perched precariously over the sand,” remain threatened by the erosive forces of wind, waves, and tide.<sup>266</sup> These privately owned houses have even been protected by the injection of millions of dollars of public money into a beach renourishment program, which, at best, promised only to delay eventual property loss by four or five years.<sup>267</sup>

Less than two months after the renourishment project was finished, at least one-tenth, and perhaps up to one-third, of the newly deposited

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262. KAUFMAN & PILKEY, *supra* note 3, at 40.

263. RULES OF THE SEA, *supra* note 26, at 83.

264. *Id.* at 70.

265. NOAA *Coastal Issues*, *supra* note 247.

266. Mary Jo Shafer, *Beach Nourishment Project Gets Under Way*, NEWBURYPORT CURRENT (Sept. 16, 2010), <http://www.wickedlocal.com/newburyport/features/x1129162493/Beach-nourishment-project-to-get-underway>.

267. Gillian Swart, *Beach Nourishment Cost More Than Benefit Says Corps of Engineers*, EXAMINER.COM (July 20, 2009, 12:20 PM), <http://www.examiner.com/north-boston-political-buzz-in-boston/beach-nourishment-cost-more-than-benefit-says-corps-of-engineers>. According to the chief of the engineering section for the U.S. Army Corps of Engineers’ New England region, the cost of just the beach nourishment part of the project would amount to \$1.8 million and yield a benefit valued at only \$1 million insofar as it might temporarily delay the inevitable loss of property. *Id.* While the dredging portion of the project was funded by the federal government, the cost for the nourishment was to be split between the towns and the Commonwealth of Massachusetts. *Id.*

sand was washed away in a storm.<sup>268</sup> In January 2011, another house was ordered demolished before it could become a public safety risk to beachgoers, and the town began planning for the installation of giant sandbags as an emergency protective measure for two other locations.<sup>269</sup> It seems doubtful that any of these measures, taken at great public expense, will have even the minimal private benefit sought.

As it turns out, though, this is far from the first time that residents of Plum Island have been abuzz about the shifting sands under their homes. The U.S. Army Corps of Engineers has been surveying the island's protean profile since at least 1827, and it first constructed the jetties at the heart of today's controversy in 1883.<sup>270</sup> Plum Island in and of itself became a veritable study in the vicious cycles of erosion and accretion throughout the twentieth century.<sup>271</sup> "Chewed" away by waves and currents and buffeted by storms, shorelines vanished by reliction or by avulsion, only to reappear on some other portion of the island that had been diminished just a decade before.<sup>272</sup>

And yet, no matter how predictable the pattern on a large scale, the island residents continue to ignore it, bringing more and more resources to bear to try and fight the natural cycle.<sup>273</sup> Nowhere was this more evident than in the 1970s, when, according to one observer, things were at least as bad as they are now.<sup>274</sup> The majority of the 13,000 sand bags filled and stacked in 1972 were swept to sea.<sup>275</sup> In 1974, up to \$14 million was spent "trying to hold back Mother Nature."<sup>276</sup> The following year, over thirty concrete blocks weighing more than two tons each were

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268. Victor Tine, 'Concern, but not alarm': Rebuilt Plum Island Beach Showing Wear and Tear, THE DAILY NEWS OF NEWBURYPORT (Dec. 5, 2010), <http://www.newburyportnews.com/local/x622288401/Concern-but-not-alarm>.

269. See Jim Armstrong, *Another Plum Island House Destroyed*, CBS BOSTON (Jan. 10, 2011, 6:00 PM), <http://boston.cbslocal.com/2011/01/10/another-plum-island-house-destroyed/>; Victor Tine, *Sandbag Project to Restore Public Plum Island Beach Access*, GLOUCESTER TIMES, Jan. 30, 2011, <http://www.gloucestertimes.com/local/x135632621/Sandbag-project-to-restore-public-Plum-Island-beach-access>.

270. John Macone, 'How many times are we going to save something?': Beach Erosion, Regrowth an Endless Pattern, GLOUCESTER TIMES, Mar. 17, 2008, <http://www.gloucestertimes.com/local/x845838867/How-many-times-are-we-going-to-save-something-Beach-erosion-regrowth-an-endless-pattern> [hereinafter Macone, *Endless Pattern*].

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.*

275. *Id.*

276. *Id.*

brought in to protect a single cottage, only to be carried away by waves that went on to topple the cottage.<sup>277</sup>

According to the former mayor, “[i]t was the same situation you have today. It’s like *deja-vu* . . . . It’s never going to cease.”<sup>278</sup> In other words, “Plum Island, like every sandy shoreline, is a constantly changing land mass—eroding in some places, growing in others, always at the mercy of tides, current, and weather.”<sup>279</sup>

## V. PLOTTING A POSITION, CHARTING A NEW COURSE

### *A. Plotting a Position*

As both a practical matter and a matter of policy, the current position of Maine law with regards to the state’s tidelands is untenable. Some common law doctrines are crumbling under the stress of evolving technological developments, as well as climatological and demographic pressures. Distinctions between accretion and avulsion grow less and less relevant as human intervention in once natural systems grows in scale and complexity. Likewise, the notion of uniting against a common enemy becomes increasingly nonsensical when the common enemy is ourselves. Similarly, colonial ordinances once relied upon for economic development are now obsolete. And there is no sign that any of these pressures will be letting up soon.

Irreversible trends and indicators point to ever-increasing public demand for habitation and recreation on the coast. Irreversible trends and indicators, though, also point to an ever-changing, mostly receding, coastline. The next several years will likely bring more frequent and intense storms, along with higher tides and storm surges, with both erosive and avulsive effect. Attempts to armor the coast against such eventualities have thus far proven counterproductive, and soft stabilization techniques have thus far proven cost prohibitive and, at best, only temporarily effective.

As we have seen, though, courts in other states have responded by ordering the removal of man-made structures that block navigable waters and alter shoreline erosion and accretion patterns. Whether they do this under trespass theory and federal statute, as in Washington, under constitutionally recognized public trust theory, as in Florida and Hawai’i, or under statutorily recognized, custom-based rolling easements, as in

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277. *Id.*

278. *Id.*

279. *Id.*

Texas, the judicial panels in these states have consistently honored the particular public interest in the shoreline over private claims. This principle was so firmly embedded in Hawai'ian tradition that, even today, the fluid concept of *make kai* and the testimony of *kamaainas* outweigh any surveyor's azimuths, and the courts recognize that the vegetation line reflects the sea's reach more accurately than any 18.6-year average. It is a principle that has been articulated and enforced for decades even in notoriously libertarian Texas, perhaps because that state's Gulf Coast communities have had to learn to adapt to the forces of the sea more than most. Florida's court was accused of taking the premise to an extreme, but the U.S. Supreme Court unanimously declared that the deprivation of contact with sea or possible future accretions did not represent an unconstitutional taking. At every corner of the country, and at every level and branch of government, it is recognized that the state can no longer guarantee, to either private owners or the public, any more than access to the ever-changing, dynamic waterfront.

Except, still, in Maine.

The increasing demand and decreasing availability of public beaches is a nationwide phenomenon, but it may reach its starkest contrast in Maine. Measuring 3,500 miles, Maine's coastline is the third longest in the country, yet only 7 percent of it is in public ownership, and less than 2 percent is publicly-owned sandy beach.<sup>280</sup> Traditional shoreline access points are increasingly built upon, fenced off, posted, or purchased by new owners unwilling to allow old patterns of usage.<sup>281</sup> Regardless of who owns the property, though, "most waterfront homes are within 100 to 200 feet of the high water mark, and most shores erode 100 to 200 feet for every foot of sea level rise."<sup>282</sup> Thus, a one-foot rise would force a whole new dilemma onto private landowners and town or state officials, for example: the choice between moving the houses at risk, or replacing the tidelands with a wall.<sup>283</sup>

Sea Bright, New Jersey chose the wall, but the costs of this decision have been heavy. It was, moreover, like the Colonial Ordinance, a choice made in a different era. Today, owners of private tidelands must obtain an array of necessary local, state, and federal permits prior to any

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280. MLI GUIDE 2004, *supra* note 111, at 2.

281. *Id.* at 7.

282. See James G. Titus et al., *Rising Seas, Coastal Erosion, and Takings*, 15 MD. L. REV. 1279, 1304 (1998).

283. *Id.*

tideland development, and environmental laws prevent most construction activities in tidelands.<sup>284</sup>

A careful consideration of the realities of Moody Beach further reveals the absurdity of trying to draw legal lines in its sands.<sup>285</sup> To the extent that they reinforce such irrational use of the beachfront, the *Bell* decisions fly in the face of logic, common sense, and the natural order. Intentionally or not, their effect goes beyond a mere delineation of rights in a plot of land to reinforce the hubris of landowners and developers who insist on tearing up the landscape to erect seawalls and bulkheads without adequately contemplating the damage done to a fragile limnal habitat, the real risks of installing themselves so close to a rising sea, or the long-term private and public costs of maintaining such a precarious situation. In so doing, the *Bell* decisions rejected an ancient and time-tested common law doctrine and a contemporary exercise of positive law in favor of an irrefutably outdated pre-colonial one. More importantly, they combined bad facts with bad theory to make bad law that would bedevil shoreline zones, and especially the rare beaches, up and down the coast of Maine for decades.

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284. MLI GUIDE 2004, *supra* note 111, at 8; *see also* Maine Department of Environmental Protection's (MDEP) *Coastal Sand Dune Rules*, which take rising sea level (approximately two feet in the next 100 years) into account when issuing permits for activities within sand dune systems. 06-096 ME. CODE R. § 355 (LexisNexis 2006).

285. Author Site Visit, *supra* note 95. In front of the beachfront homes, the "swash," or seaweed, line lies just a few feet from the foot of the seawalls, which stand, in turn, just feet from the porches and sliding doors of most of the homes on the beach. Sand piles up, apparently placed there by higher tides, at the foot of the seawall, which would more rightly be described as a continuous assemblage of fifty-foot sections of privately maintained seawalls in various states of renovation or disrepair. Even to the layman's eyes, it is clear that these walls take a beating each year and regularly require repairs. Indeed, one section proudly displayed obviously fresh concrete, and a large back hoe was in the midst of excavating another lot, digging a deep trench in which to place a number of enormous boulders in order to protect whatever house would replace the one that had recently been razed.

All of which goes to show how precariously and presumptuously situated these oceanfront homes really are, separated from the visible high tide line by only a few feet. It also shows how the supposedly private Moody Beach is seamlessly connected to the public beach of the Town of Ogunquit, without any discernible division of any kind. Finally, one also cannot help but note the extensive salt marsh wetlands on the inland side of Ocean Avenue. Because wetlands help prevent flooding and shoreline erosion while providing critical habitat for a myriad of species, they should rightfully occupy an undisturbed buffer zone where the ocean meets flat shoreline.

In sum, the current shoreline policy position nationwide, but especially in Maine, has grown unsustainable in the face of shifting sands, shifting social priorities, new scientific understandings, and rising sea levels. To ignore this reality and quibble about who can do what on the wet sand that already disappears for several hours a day, on a beach that is likely to disappear in the next century, is akin to rearranging the proverbial deck furniture on the *Titanic*.

But this state of affairs need not persist. The Law Court has recently heard argument in two cases that both raised questions challenging the Moody Beach decisions; it has decided one without addressing the issue, but the second decision has not yet come down, and a third case may be headed to the Law Court soon. Interestingly, the PTILA still remains on the books, unrepealed by the state's legislature, and ripe for any needed amendment. Meanwhile, the Maine Geological Survey and the USACE are hard at work on a number of studies and projects designed to improve information gathering and dissemination about Maine's shoreline, as well as more adaptive responses to sea level rise.

#### B. *Charting a New Course*

In addressing where to go from here, property theorists, scientists, and policymakers alike seem to be pointing in the same direction. Legislatures and courts throughout the country are signaling a principled, strategic retreat from the shoreline, leaving the sea and fragile wetlands to strike their own tenuous balance with less and less human interference. This is demonstrably the case in state and federal courts in Washington, Hawai'i, Florida, Texas, and even in the halls of the U.S. Supreme Court. It is likewise true in Rhode Island,<sup>286</sup> in North Carolina,<sup>287</sup> and even in

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286. To protect the sediment source of its beaches and preserve natural sand transport, the Rhode Island Coastal Resources Management Council has all but banned the installation of revetments, bulkheads, seawalls, groins, breakwaters, jetties, and other erosion control structures along all barriers and ocean facing coastline. Structures predating the regulations are allowed to remain, but any structure that is more than 50 percent damaged by a storm or other process must comply with current programmatic requirements and may not be rebuilt. OCRM PLANNING GUIDE, *supra* note 209, at 80; *see also* Rhode Island Coastal Resources Management Program (as amended) § 300.7 (June 14, 2000), *available at* [www.crmc.ri.gov/regulations.html](http://www.crmc.ri.gov/regulations.html).

287. In North Carolina, permanent erosion control structures are prohibited on the oceanfront since they "may cause significant adverse impacts on the value and enjoyment of adjacent properties or public access to and use of the ocean beach." Included in this ban are bulkheads, seawalls, revetments, jetties, groins, and breakwaters. Such structures may be permitted only under certain circumstances, such as to protect an erosion-threatened bridge that provides the only existing road access to a substantial population

Massachusetts, where despite pre-colonial predilections, the courts have more recently shown little sympathy for ongoing coastal armoring,<sup>288</sup> and the experiences of Plum Island testify to the futility of shoreline stabilization techniques. Throughout its 2010 coastal management guide, the national Office of Coastal Resource Management has emphasized the value of learning from others.<sup>289</sup> Maine's lawmakers, in the state house and in the judiciary, would do well to heed this call to apply comprehensive and consistent policies that recognize the new realities crashing upon the shore.

Even as the Maine legislature and highest court were doing battle over the foreshore of Moody Beach, a 1985 conference on "America's Eroding Shoreline" brought together scientists, engineers, attorneys, planners, and environmentalists to discuss a national strategy for beach preservation.<sup>290</sup> A theme gaining increasing currency today could be found among the conference findings and recommendations over two decades ago: "Sea level is rising and the American shoreline is retreating. We face economic and environmental realities that leave us two choices: 1) plan a strategic retreat now, or 2) undertake a vastly expensive program of armoring the coastline and, as required, retreating through a series of unpredictable disasters."<sup>291</sup>

In one proposed compromise, engineers and managers at the conference suggested combining the gradual removal and relocation of buildings, while using an array of damage mitigation options to protect beachfront property, including abandonment, relocation, soft stabilization, hard stabilization, modifications of developments and

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on a barrier island or to maintain an existing commercial navigation channel of regional significance. In such cases, the erosion-control structure must not adversely affect adjacent private properties, coastal resources, or public use of the beach. OCRM PLANNING GUIDE, *supra* note 209, at 79.

288. When private landowners on Cape Cod challenged the state's denial of a permit to erect shoreline defense structure, the Supreme Judicial Court of Massachusetts concluded that such a denial did not effect an unconstitutional taking, even though the landowners lost their homes to the ocean while waiting for an administrative hearing. *See Wilson v. Commonwealth*, 413 Mass. 352 (1992); *see also* Megan Higgins, *Legal and Policy Impacts of Sea Level Rise to Beaches and Coastal Property*, 1 SEAGRANT L. & POL. J. 43, 61 (2008).

289. OCRM PLANNING GUIDE, *supra* note 209, at 80.

290. RULES OF THE SEA, *supra* note 26, at 101.

291. *Id.* (summarizing the findings of the Skidaway Conference). It seems worth noting that, at the very moment that Maine's high court was accusing the state legislature of a regulatory taking, coastal planning experts were more concerned about how much shoreline was being taken by the sea.

infrastructures, zoning, and land-use planning tools like setbacks.<sup>292</sup> While the stabilization techniques may offer some comfort, it must be remembered that these can only provide temporary protection in the short term. Not far down the road from Moody Beach lies a vivid image at Camp Ellis of what lies in store for southern Maine beaches that try in vain to armor themselves against the erosive forces of the sea.<sup>293</sup> Moreover, by alienating public interests in the tidelands, private landowners are likely to meet with much less sympathy and public support when the inevitable call comes for beach renourishment, seawall restoration, or, more likely some other adaptation, or relocation aid. In other words, in order to beat a principled, strategic retreat from the rising seas, policymakers in all branches of government will also need to beat a principled, strategic retreat from the *Bell II* decision.

The fact that advocates of the public trust doctrine did not obtain the result they sought in *Bell II*, does not mean the public interest has packed up and left the seashore. By no means did the court foreclose every avenue of protecting the public's own bundle of seaside rights. For one, though it expressed some reluctance to do so, the court did not expressly rule out the possibility for a future finding of an easement by custom in similar cases.<sup>294</sup> More promisingly, although a public easement was not found by either prescription or dedication at Moody Beach, ten years later, when presented with the opportunity to uphold such a public easement just down the road from Moody Beach, the court did exactly that.<sup>295</sup>

Alternatively, since the *Bell* court's objections to the PTILA revolved around the lack of limitations on public uses and the lack of compensation to private owners, the legislature could very well amend the PTILA to include more specific public use restrictions, or some minimal *Loretto*-style compensation for the loss of the right to exclude certain members of the public during certain months of the year during the few hours each day when the tidal zone is uncovered. Any number of financing mechanisms might be applied fairly and rationally to provide for such compensation.

Although the legislature has not yet attempted such a redrafting of the Public Trust in Intertidal Lands Act, it has nevertheless expanded

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292. RULES OF THE SEA, *supra* note 26, at 69.

293. See Maine Geological Survey, Aerial Photo of Camp Ellis Beach, Saco, Maine, <http://www.maine.gov/doc/nrimc/mgs/explore/hazards/erosion/campellis.htm> (depicting the lots already lost to erosion and inundation since 1908 and the lots facing a similar fate as the shoreline advances inland).

294. See *Bell v. Town of Wells (Bell II)*, 557 A.2d 168, 179 (Me. 1989).

295. See *Eaton v. Town of Wells*, 760 A.2d 232, 244-47 (Me. 2000).



public protections to other aspects of the coastal zone. And administrative agencies have stayed busy making and enforcing rules pursuant to these policies. One commentator has advocated a transfer tax, which would add extra tax on the sale of all shorefront properties in order to fund the repurchase of public beaches.<sup>296</sup> Another has argued, in line with the rolling easement approach taken in Texas, for public reclamation of coastal lands through incremental withdrawal of utilities and services.<sup>297</sup> Still others call for the implementation of zoning techniques—including incentive zoning, bonus zoning, transferrable development rights (TDRs), exactions, and impact fees—to induce private owners at the shoreline to convert their property to public ownership.<sup>298</sup>

James Titus, who has served for years as the EPA's sea level rise expert, has long pushed for coordinated use of all these tools by a variety of stakeholders in both the private and public realms.<sup>299</sup> But his particular emphasis has been on the implementation of rolling easements similar to those enshrined in Texas' Open Beaches Act.<sup>300</sup> Rolling easements, he explains, can be implemented with eminent domain purchases of options, easements, covenants, or defeasible estates, or, as in Texas, by statutes that accomplish the same result.<sup>301</sup> Titus acknowledges that no legislation can eliminate the resentment that arises when two groups have long assumed that they possess rights that are in fact mutually exclusive. "But," he persists, "purchasing or legislatively creating rolling easements can minimize the conflict by laying out the rules of the game at least a generation before they take effect. As the article argues, people's ideas of fairness depend mostly on their expectations."<sup>302</sup> Titus goes on to propose a concerted effort by state, local, and private bodies, not unlike the effort which their Maine

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296. Thompson, *supra* note 90, at 71.

297. See generally *Redefining Coastline*, *supra* note 201.

298. COASTAL STATES ORG, *supra* note 17, at 368-69. The passage includes a more in-depth analysis of takings issues and makes the following recommendations for avoiding takings claims in legislation and regulation: (1) assure the availability of administrative remedies; (2) avoid rendering property valueless, and; (3) watch "the denominator" for conceptual severance purposes. *Id.*

299. James G. Titus, *Rising Seas, Coastal Erosion, and the Takings Clause: How to Save Wetlands and Beaches without Hurting Property Owners*, 57 MD. L. REV. 1279 (1998).

300. *Id.*

301. *Id.* at 1329.

302. *Id.*

equivalents have all been working on to establish more sustainable approaches to our natural frontiers with the rising sea.<sup>303</sup>

It is, unfortunately, the one body that Titus leaves out—the courts—which have thus far clung in Maine to the now irrelevant rationale of a 300-year-old colonial ordinance, to the great detriment of everyone concerned. So long as the Maine courts maintain such an outdated and inflexible policy of private tideland ownership, then both the public and the private owners will suffer needless consequences. But the fact “[t]hat generations of trustees have slept on public rights does not foreclose their successors from awakening.”<sup>304</sup> A quarter century after the *Moody Beach Cases*, it is high time to set aside the missteps and excesses of the past on all sides of the issue and find some practical, productive, and sustainable policy solutions, and the courts must play a role in this process.<sup>305</sup>

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303. *Id.* at 1391-94.

304. *Arizona Ctr. for Law in the Pub. Interest v. Hassell*, 837 P.2d 158, 171 (1991).

305. Indeed, the Law Court will have a chance to correct course towards a more sustainable shoreline legal regime in one case still pending before it now and another probably on its way. *See McGarvey v. Whittredge*, WASHSC-CV-08-42 (Me. Super. Ct., Wash. Cnty., Jan. 21, 2010); *Almeder v. Town of Kennebunkport*, No. RE-09-111 (Me. Super. Ct. York Cnty., filed Oct. 23, 2009).