Will Bell v. Town of Wells Be Eroded with Time?

Sidney St. F. Thaxter
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I. INTRODUCTION

In 1989, the Maine Law Court issued a landmark decision regarding the ownership of the land between the mean high-water mark and the mean low-water mark (the intertidal zone) in a case entitled Bell v. Town of Wells. This decision was controlled, in part, by the 1986 decision in the same case. Bell I was decided following an appeal by the plaintiff-landowners from the lower court decision dismissing Counts I and II of their Complaint as “barred by sovereign immunity.” The lower court found that “the State has an interest in Moody Beach and in that sense it has title,” but the Law Court, in overruling the lower court, declined to find that there was a public trust in the intertidal zone. Instead, the court found that plaintiffs owned the property in fee simple and that if there were any trustees of the public easement, it was the owners of the property subject to the easement. In finding that the State was not an indispensable party to plaintiff’s quiet title action and declaratory judgment claims, the court found that the Colonial Ordinance of 1647 was part of the common law of Massachusetts, which “must be regarded as incorporated into the common law of Maine.”

Upon remand by the court in Bell I, the remaining plaintiffs (owners of twenty-eight lots on Moody Beach whose ownership ran to the low-water mark) proceeded to defend their titles against claims by the Town and the public and forty individual lot owners known as Tier II Defendants. Commercial campgrounds and other summer tourist interests had overwhelmed the property owners’ good will and patience. With the Town’s help, they had created a legal Never-Never Land where the Town would not enforce the owners’ property rights nor would the police or Town take any responsibility for the beach itself.

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1. Bell v. Town of Wells, 557 A.2d 168 (Me. 1989) [hereinafter Bell II].
2. Bell v. Town of Wells, 510 A.2d 509 (Me. 1986) [hereinafter Bell I]. Bell I and Bell II affirmed a longstanding line of Maine cases interpreting Maine common law as holding that the owners of shorefront property in Maine hold title to the low-water mark or 100 rods, whichever was nearer to the high-water mark, subject to an easement in the public for fishing, fowling and navigation, and activities incidental thereto. The court in Bell II declined to expand the scope of the public easement to include recreation.
3. Id. at 511.
4. Id.
5. Id. at 517.
6. Id. at 514. The Ordinance was completed in 1647 and published in 1648 and will be referred to in this article as the Colonial Ordinance of 1647. For the detailed history of its enactment, see infra Part II, History of the Colonial Ordinance.
After a month of trial and over seventy witnesses, Superior Court Justice William Brodrick, on September 14, 1987, issued his opinion and found that the defendants had not prevailed on either their factual or historical claims and therefore dismissed defendants' claims of custom prescription and dedication. Even though Justice Brodrick concluded that "the Colonial Ordinance reserved for the public the right to fish, fowl and navigate in intertidal zones on Maine's beaches," he found that the Town and public had failed to prove any public right to use Moody Beach through prescription, custom, dedication or allowance.

In *Bell I*, the Law Court had affirmed the lower court's dismissal of the custom, prescription, and declaratory claims and upheld the lower court's ruling on the validity of the Colonial Ordinance. In reaching its decision in *Bell II*, the Law Court also found that the 1986 Public Trust in Intertidal Lands Act was unconstitutional, but on different grounds than the lower court.

In *Bell II*, Chief Justice Vincent L. McKusick concluded: "[T]he state of the title to the intertidal land was never in any doubt under the Maine Constitution and relevant case law, and owners, occupiers, buyers, and sellers of shoreline land were entitled to rely upon their property rights as so defined." Despite this strong statement by the court as to the status of Maine law on the subject, the court's opinion quickly became the subject of much scrutiny and criticism in several Maine Law Review articles. While the articles attack aspects of the court's decision, none analyze its foundations and discuss it in the context of the decision of the lower court. This Article will look at the opinion, the dissent, and the articles critical of the decision in order to explain the legal and factual foundation for the majority opinion in *Bell II*.

The dissent in *Bell II* and the commentators review at some length the history of the enactment of the Colonial Ordinance with a curious mixture of historical and legal arguments. The court in *Bell I*, having found that the Ordinance was part of Maine common law, should have ended the historical debate. The court said:

Thus, the Colonial Ordinance was a rule of Massachusetts common law at the time of the separation of Maine from Massachusetts. By force of article X, § 3 of the Maine Constitution and section 6 of the Act of Separation between Maine and Massachusetts, it must be regarded as incorporated in the common law of Maine.

The elaborate historical arguments raised by the Town played little or no role in the *Bell II* decision. However, because so many historical facts have been taken out of context and the historical record is so compelling, not as legal precedent but as the historical background for the development of Massachusetts and Maine common law, this Article will review the history of the Ordinance. This Article will

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9. *Id.*
not analyze the evidentiary value and appropriateness of historical evidence. The
use of history as evidence or merely to provide a context presents some very dif-
cult questions regarding the reliability of the evidence and the use of secondary
sources. Clearly, the Law Court in *Bell I* took judicial notice of the history of the
Colonial Ordinance as cited in previous cases interpreting the Colonial Ordinance.
What is missing, however, especially in the dissent, is any review of the findings
by the lower court on the historical evidence and the significance of those findings
in *Bell II*. The majority in *Bell II* did not appear to rely on the historical evidence
from the Superior Court, but looked to developed common law as precedence.

Next, I will review the *Bell II* decision itself and the dissent. Finally, I will
comment on the law review articles critical of the decision in *Bell II*.

II. HISTORY OF THE COLONIAL ORDINANCE

A. History of Enactment of Ordinance

The so-called Colonial Ordinance had its origins in the Body of Liberties,
enacted into law in 1641 by the General Court of the Massachusetts Bay Colony.
It reads as follows:

> Every Inhabitant that is an howse holder shall have free fishing & fowling in any
great ponds & Bayes, Coves & Rivers, so farre as the sea ebbes & flowes within
the presinct of the towne where they dwell, unlesse the free men of the same
Towne or the generall Court have otherwise appropriated them, provided that
this shall not be extended to give leave to any man to come upon others proprieties
without there leave.\(^{16}\)

The Body of Liberties was the culmination of early agitation on the part of the
voting members of the Colony (which began in 1634) and which moved forward
when it was agreed in 1635 to have prepared “a body of grounds of laws, in resemblance to a Magna Charta, which . . . should be received for fundamental laws.”\(^{17}\)
In what appears to be Governor Winthrop’s own handwriting is the attestation
statement on the margin of the original manuscript, voted “to stand in force.”\(^{18}\)
This first official collection of colonial laws consisted of 100 provisions, “com-
posed by Mr. Nathaniel Ward . . . formerly a student and practiser in the course of
the common law.”\(^{19}\) They were put together in no logical order and they included
many laws then in force in the Colony. More important, they included numerous
constitutional provisions relating to the relationships between the institutions of
the colony and towns, between church and state, and between the government and

\(^{16}\) *THE COLONIAL LAWS OF MASSACHUSETTS: REPRINTED FROM THE EDITION OF 1660, WITH THE SUPPLEMENTS TO 1672*, at 36 (William H. Whitmore ed., Rockwell & Churchill 1889) (1660) [hereinafter COLONIAL LAWS].


\(^{18}\) MASS RECORDS, supra note 17, at vol. I, 346.

\(^{19}\) WINHROP’S JOURNAL, supra note 17, at vol. II, 48-49.
individual rights. Thus, the Body of Liberties was less a code of laws than a kind of bill of rights, such as became familiar in the early days of the American Republic. It may be compared in this respect with the 1780 Constitution of Massachusetts, the latter being far more detailed, extensive, and logically set forth. "The provisions which make up this instrument [The Body of Liberties] resemble in character those of a modern state constitution rather than a statutory code," writes the late John Dickinson. "Taken as a whole, the code forms...a sort of Bill of Rights or Declaration of Privileges..."

The entire procedure of putting the fundamental laws into writing, together with the work of four committees—the final two committees included membership of representatives from the voters at large—demonstrates that the undertaking was not for the moment or for immediate necessity. The Body of Liberties is a carefully and artificetly drawn document to carry out the original 1635 purpose—to put into writing laws that would be the "Fundamentals" of the colonists' commonwealth. The importance of the written word was deeply ingrained in Puritan thinking both because of Calvinist tradition and their own literal use of the Bible. Moreover, the analogy in 1635 to Magna Charta was no empty comparison but emphasizes the purpose behind the provisions of the colonists' first collection of laws that would be their constitution. To the men of the seventeenth century, the Magna Charta, with its ancient assurances that had been repeated in the coronation oaths of almost countless kings and sovereigns, was a true "palladium of liberties"—a possession forever guaranteed by long accepted rules and procedures of the common law. Fixed customary rules, many reduced to writing, were also a feature of local communities—boroughs and manors—from which the colonists had emigrated. It is therefore hardly an occasion for surprise that these emigrating Englishmen should wish, so soon after settlement, to establish in writing their present and future fundamental rights as Englishmen and to assure to themselves that in law, as in religion, they were establishing their "City upon a Hill."

The Body of Liberties has had a continuing importance in our law, first because its "constitutional" provisions went far beyond contemporary protections afforded by English law to include civil rights such as freedom of speech, double jeopardy, and cruel and barbarous punishments. Second, it has had a continuing importance because nearly all of its provisions were re-enacted or enlarged upon in subsequent collections of the Colony's laws.

Although the Body of Liberties is obviously general in nature, the voters concluded that they wished to have a complete and comprehensive collection of their laws. To that end, a series of committees, including members of the governing

20. For detailed discussion and evaluation, see HASKINS, supra note 17, at 129-31.
21. Id.
23. HASKINS, supra note 17, at 123.
25. For use of this biblical phrase, see A Modell of Christian Charity (1630), in WINTHROP PAPERS vol. II, 295 (Stewart Mitchell ed., Russell & Russell 1968 (1931)).
26. HASKINS, supra note 17, at 129-31.
group as well as representatives of the voters, began work that, except for committee delays, culminated in 1648 and was printed in that year as *The Laws and Liberties of Massachusetts.*

The extent of the work of putting together, editing, revising and adding to the existing laws—chiefly in 1646 and 1647—is impressively demonstrated by the frequent references in the *Records of the Governor and Company of Massachusetts Bay,* to the progress of the committees. The details of most of the new enactments and revisions are in *Mass. Records II.* Some laws were revised or enacted; several—including the “Colonial Ordinance”—enacted in November, 1647, seem to have passed directly from the final committee into the Code, apparently without prior formal enactment by the General Court and hence are absent from the Records.

Nevertheless, the Code was both an authoritative restatement of the most important provisions of existing law and a code for the future. It was no scissors-and-paste performance, as one can see in the thorough revisions and expansion of pre-1641 enactments as well as those from the Body of Liberties. At least one-third of the Code’s provisions can be traced to the period 1646-47 when the Code was being completed, and it reflects the handiwork of prominent magistrates—such as Bellingham, Dudley, Ward, and Winthrop—who were experienced in numerous aspects of English law. Referring to the extensively recognizable common law element in the Code, the distinguished British historian, Professor T.F.T. Plucknett, has remarked that the 1648 Code is a “lawyerly piece of work.”

Among the revisions in the new and distinctive Code of 1648 is the amplified version of No. 16 in the Body of Liberties. *This* is the Colonial Ordinance, specific, detailed, and *inter alia* contrasting rights to the seashore as opposed to those for “Great Ponds” of 10 acres or more. The text, apparently revised in 1647, is as follows:

> Every inhabitant who is an hous-holder shall have free fishing and fowling, in any great Ponds, Bayes, Coves and Rivers so far as the Sea eks and flows, within the precincts of the town where they dwell, unless the Free-men of the same town, or the General Court have otherwise appropriated them. Provided that no town shall appropriate to any particular person or persons, any great Pond containing more than ten acres of land: and that no man shall come upon another's proprietie without their leave otherwise then as hereafter expressed; the which clearly to determin, it is declared that in all creeks, coves and other places, about and upon salt water where the Sea eks and flows, the Proprietor of the land adjoyning shall have proprietie to the low water mark where the Sea doth not ebb above a hun-

28. The latter, known also as the Code of 1648, was published by W. H. Whitmore in 1889. *Id.* The original was first printed in facsimile in 1929. *See The Laws and Liberties of Massachusetts Reprinted from the Copy of the 1648 Edition (Max Farrand ed., 1929)* and later in 1975 as *Book of the General Lawes and Libertyes Concerning the Inhabitants of the Massachusetts* (Thomas G. Barnes ed., 1975) [hereinafter *Lawes and Libertyes*].

29. *See generally Mass. Records,* supra note 17, at vol. II.

30. *See Haskins,* supra note 17, at 132-35 (summarizing the progress of the committees in compiling colony laws).

31. *See generally Mass. Records,* supra note 17, at vol. II.

32. *See, e.g.,* Lawes and Libertyes, supra note 28, at 4, 17-18, 47-49; Haskins, supra note 17, at 269 nn. 144-45.


34. *Lawes and Libertyes,* supra note 28, at 35.
dred rods, and not more wheresoever it ebs farther. Provided that such proprietor shall not by this libertie have power to stop or hinder the passage of boats or other vessels in, or through any sea creeks, or coves to other mens houses or lands. And for great Ponds lying in common though within the bounds of some town, it shall be free for any man to fish and fowl there, and may passe and repasse on foot through any mans proprietie for that end, so they trespass not upon any mans corn or meadow.\textsuperscript{35}

Turning now to the substance of what we may now call the 1647 “Ordinance” (dated as 1647 but printed and published in 1648), its features are both specific and practical. Those features have aided the highest courts in Massachusetts, and later in Maine, to interpret the Ordinance as it was first intended and also to construe it narrowly, as those courts have. The proprietor, that is the owner, of land adjoining all salt water creeks, coves and shores “where the Sea ebbs and flows,”\textsuperscript{36} shall have “proprietie” to low-water mark, or 100 rods, whichever is less, but no farther. Across this intertidal zone, below the “upland” and where the salt tide ebbs and flows, there is nevertheless a restricted right to cross that portion of the property to fish and to hunt birds. In the 1647 Ordinance, this right, or semi-public easement, is restricted first to inhabitants who are householders and, second, to the area “within the precincts of the town where they dwell”\textsuperscript{37} (unless the \textit{freemen} of that Town, or the General Court “have otherwise appropriated them”).\textsuperscript{38} In addition to guaranteeing free coastal navigation, no proprietor of the intertidal area shall “have power to stop or hinder the passage of boats or other vessels in, or through any sea creeks, or coves to other mens houses or lands.”\textsuperscript{39}

Construction of the Ordinance has always been narrow, but never entirely inflexible. A question as to the meaning of the Ordinance was raised in 1649, a year after its enactment in final form. The inhabitants of an unidentified town petitioned the General Court as to whether a town order—agreed to by its members at the time of settlement, and which had set aside twenty acres between a salt marsh and low-water mark for gathering thatching materials for houses—had been rendered invalid by the subsequent enactment of the Ordinance. The General Court replied that its “order” (i.e., the Ordinance) did not “disanull” the preceding order of the town.\textsuperscript{40} In other words, the Ordinance appears to have been prospective insofar as earlier grants had been made by this town pursuant to the 1636 Town law referred to.\textsuperscript{41}

The foregoing rights with respect to the clearly defined saltwater coastal areas are sharply distinguished from rights with respect to “Great Ponds,” which are described as inland bodies of fresh water of ten acres or more. Here, in the case of Great Ponds lying in common, though within the bounds of some town, any man shall be free to fish and fowl there. Further, such fishermen and hunters, as above described and limited, were given the right to pass and repass \textit{on foot} through any man’s property for the stated purposes, provided that they “trespass not upon any mans corn or meadow.”\textsuperscript{42} Trespassing for hunting and fishing purposes, in or

\textsuperscript{35} \textit{Id.}
\textsuperscript{36} \textit{Id.}
\textsuperscript{37} \textit{Id.}
\textsuperscript{38} \textit{Id.}
\textsuperscript{39} \textit{Id.}
\textsuperscript{40} \textit{Mass Records, supra note 17, at vol. II, 284.}
\textsuperscript{41} \textit{Id.}
\textsuperscript{42} \textit{Lawes and Liberties, supra note 28, at 35.}
around a Great Pond is therefore limited to reasonableness insofar as adjoining neighbors’ food or his cattle’s food are concerned. Except for the foregoing described rights with respect to the use of intertidal seashore, Great Ponds and adjoining lands for access, “no man shall come upon another’s proprieitie without their leave [viz. permission].”

The purpose of the “Ordinance” seems plain. First, it was to guarantee local inhabitants two primary sources of basic foods—fish and game—and at the same time to promote and not inhibit navigation. When one compares the succinct original of the Ordinance in the Body of Liberties with the amplified and explicit form, which it became in the Laws and Liberties of 1648, it becomes clear that the colonists set great store by the enumerated constitutional rights, but that they were at the same time intent upon circumscribing them so as not to interfere with private property rights. The latter were as important to the general welfare as were the public rights or “liberties.” The extensive litigation over ownership and boundaries of land in this and later periods bears witness to the importance that the colonists attached to private rights, especially in land.

The importance of individual rights in colonial law, to which many others could be added, underscores the “privatization” of the law in the sense that in one area after another the individual’s legal and civil rights were superior and not subordinated to what might have been the broader or “state” interests of the Colony. Except for unavoidable and necessary supervision of the colonists’ lives to ensure the success of their religious and political ideals, “privatization” of individual rights is one of the hallmarks of colonial life.

By contrast, in England, private rights had been increasingly dominated by the personal “public policy” of an overbearing ruler who, like King James I, could insist that, as rulers by divine right, “kings were the authors and makers of the Lawes, and, not the Lawes of the kings.” In the early part of the seventeenth century, parliament was growing in power, and the House of Commons was slowly gaining the initiative, but the English government was still a power that existed independently of the people and in the hands of a sovereign not yet subject to popular control. Consequently, men of action, as well as thinking people like Sir Edward Coke, were resorting to the doctrine of the “rule of law” in an effort to protect the rights of individuals from the new royal pretensions of unbridled sovereignty claimed by the first Stuart kings. The doctrine was, and still is, a concept that “law” should rule alike those who govern and those who are governed. Coupled with an emerging concept of a social covenant between rules and the ruled, and aided by the growing influence of representation of the people in government, the “rule of law” in England was becoming a cornerstone of English Puritan political thought. To these concepts the Puritans, who founded and were

43. Id.
47. Id.
leaders of the Bay Colony, added ideas of a religious covenant between Man and God; and from the syncretization of these varied elements emerged the "due forme of Government" for which the seventeenth-century Colony stood.48

Reflecting on the government and laws of the colony in 1648, one can see the results of the legislation embodied in the Code of the Laws and Liberties of 1648 as a compromise between "private" and "public" rights under an articulated body of laws that gave wide protection to individuals and yet oversaw the general religious and broad political needs of the community. At that time, the Bay Colony was no "republic" in the sense of a res publica safeguarding public matters. It was a "commonwealth," devoted to the common weal, safeguarding private and individual rights on, the one hand, and assuring, on the other hand, that liberty was to be attained through subjection to authority, and that to obey the law is to be free.49

The colonists recognized "law" as a general phenomenon that took into account the individuality of members as part of a commonwealth or a government empowered to pronounce laws for the common good. This idea is eloquently expressed in the "Epistle" (or "Forward") to the Laws and Liberties of 1648.50

It should be noted that there is no discoverable suggestion in the surviving records of the General Court, or in the 1641 Body of Liberties, that the original Ordinance or its 1648 expansion was the result of fear of reprisals from royal authority (much less from parliament, which had been dissolved in 1629 and, which when reconvened had ahead the prospect of civil war). Indeed, the Massachusetts colonists' charter of 1629 had given the Company power to make laws and ordinances "for the good and welfare of the said Company, and for the government and ordering of the said lands and plantacion ... Soe as such lawes and ordinances be not contrarie or repugnant to the lawes and statutes ... of England."51

There is indeed considerable evidence to the effect that the intertidal zone in England was the property of the upland owner.52 Numerous decisions are collected in Sir Matthew Hale's De Jure Maris et Brachiorum Ejusdem.53 In short, English courts, until at least the eighteenth century, had consistently ruled in favor of private ownership of the foreshore. Moreover, as has been argued by the late Professors Julius Goebel and Joseph Smith, the provision with respect to conformity to English law charters given to trading companies of the time set only general standards.54 The idea has also been expressed that the King's writ did not extend overseas.55 Moreover, it has been stated that the Body of Liberties, viewed as a whole, is a distinctly American document.

By way of amplification it should be added that, on two occasions between the settlement of the Colony in 1630 and the enactment of the Laws and Liberties in 1648, the Colony leaders had apprehensive that stern measures might be

48. HASKINS, supra note 17, at 65.
50. LAWES AND LIBERTYES, supra note 28, at A2.
51. The charter is printed in MASS RECORDS, supra note 17, at vol. I, 3-20.
52. See Bell I, 510 A.2d at 511-12, n.5.
53. A HISTORY OF THE FORESHORE (S.A. Moore ed., 1888) 370, 376-413. See also id. at Introduction, xxxvi-xlii., 781-83 (including footnote), 784-85.
55. See WINTHROP'S JOURNAL, supra note 17, at vol. II, 301.
taken against them by the Crown, but neither incident appears to have altered the course of framing written laws. In the early 1630s, at the instance of Sir Ferdinando Gorges, *quo warranto* proceedings were initiated which gave rise to fears that the charter might be revoked. It is possible that those proceedings led Winthrop to be cautious in his 1635 meeting with a few of the colonists who were demanding written laws, lest the action draw to the attention of the Crown any notable colonial divergencies. At that early date he did state that it was better that law should grow slowly as custom. Nevertheless, the movement for written laws gained headway, committees were appointed, as earlier noted, and the Body of Liberties was completed and accepted by 1641. These open consultations and circulation of drafts of the laws hardly suggest fear of England. Any fear continued to decrease as the English Civil War developed and began in 1642.

No doubt the need for the original Ordinance, as it appeared in 1641, was heightened by the onset of a severe economic depression in New England in 1639 and by the drift toward Civil War in England. Immigration to the Colony slowed down and then virtually stopped. Sellers of surplus produce and exportable commodities, especially fish, lost their chief markets to newcomers and even to overseas trade. The prices of domestic articles, commodities, and produce fell sharply. For example, the value of a cow dropped from twenty pounds to five pounds in a matter of months; money became short, and foreign goods became almost unobtainable. It is clear that there was a rapid rise of a debtor class, and, to meet this threat, as well as to cope with other effects of the depression, prompt steps were taken to regulate trade and stimulate the economy. Special new laws were enacted to provide benefits for those engaged in fishing and for the export of wrought lumber, such as pipesves and planks. Shipbuilding for trade was successfully encouraged. These events and their consequences can hardly have escaped men's thoughts as they put together not only new laws but sought to ensure fishing and fowling as one of the basic "liberties," namely, Number Sixteen in the Body of Liberties, later to be incorporated into the Code of 1648 of the Farrand edition as the "Colonial Ordinance." Apart from economic factors, it is difficult to believe that fishing, fowling, and limited navigational rights then included what we today understand as "recreation." In the first place, even the 1647 Ordinance carefully circumscribes the

57. *See Haskins, supra note 17, at 36.*
58. *Id.*
59. *Id.* at 37.
60. *See id.* at 107.
61. *Id.*
62. *Id.* at 107-08.
64. *Id.* at vol. II, 19.
66. *Id.* at vol. I, 292.
68. *Id.* at 35.
enumerated rights, to the point of restricting fishing and fowling to the designated areas of towns where the inhabitants lived. Second, work was a basic premise of Puritan life. Almost from the outset of settlement, there were laws against idlers, vagrants, and tipplers; while dice, cards, and games such as shuffleboard were prohibited as a waste of precious time. All able-bodied men—and perhaps even women and children—were expected to work or follow some recognized trade or calling. Third, even in Maine today, nearly all persons engaged in fishing—whether for lobsters, mackerel, scallops, or clam-digging—do so for food or for commercial purposes.

B. History of the Ordinance after 1648

Except for differences in spelling, capitalization, and punctuation, no change in the substance of the wording of the 1648 Colonial Ordinance was made in ensuing collections of and supplements to the Colonial Laws of Massachusetts. Under their 1629 Charter, the colonists were authorized “to make, ordeine, and establish all manner of wholesome and reasonable orders, lawes, statutes, ordinances, direccons, and instruccons not contrarie to the lawes of this our realme of England . . . .” This they did with an urgency and determination that is evidenced by the original records of the General Court from 1630-1648.

It should be noted that the portion of the Ordinance that gives the upland seashore proprietor ownership of his beach to low-water mark or 100 rods, whichever is less, appears to be in general accord with English law of that period. In the course of the careful research embodied and set forth in Bell I, the Law Court emphasized that, with the exception of a single aberrant case (in the reign of Charles I), English courts “decided in favor of private ownership of the intertidal zone by the owner of the adjoining upland.” To the same general effect is the statement in Sir Matthew Hale’s seventeenth-century treatise, De Jure Maris:

the common people of England have regularly a liberty of fishing in the sea or creeks or arms thereof, as a public common of piscary, and may not without injury to their right be restrained of it, unless in such places or creeks or navigable rivers, where either the king or some particular subject hath gained a propriety exclusive of that common liberty.

This general common right to the seashore, it should be emphasized, is far less specific than the Colonial Ordinance, which defined and confined rights to the intertidal flats and specified the distance (100 rods or less) to which those rights extended.

71. Haskins, supra note 17, at 102-03.
74. See Bell I, 510 A.2d 509, 513 (Me. 1986).
75. Id. at 511, n.5.
While it may be argued that the Colonial Ordinance was abrogated when the Massachusetts Charter was revoked by the Crown in 1684, the wording of the "reception" provision in Article VI of the Massachusetts Constitution of 1780 incorporated the Ordinance as part of the law of that Commonwealth because it refers to all laws "heretofore adopted," used and approved in the province, colony or State of Massachusetts:

All the laws which have heretofore been adopted, used, and approved in the province, colony, or State of Massachusetts Bay, and usually practised on in the courts of law, shall still remain and be in full force, until altered or repealed by the legislature, such parts only excepted as are repugnant to the rights and liberties contained in this constitution.  

The Ordinance has been held to have continued as a "usage" that "has force as our common law." To the same effect is the report of Austin v. Carter. As the Law Court said in Bell I, the Colonial Ordinance was a rule of Massachusetts law at the time of the separation of Maine from Massachusetts. Accordingly, the Colonial Ordinance "must be regarded as incorporated into the common law of Maine."

In short, the Bell I decision conclusively demonstrates, from a long, consistent course of authoritative decisions, that the intertidal zone of Maine's coastal property presumptively belongs to the upland owner unless, as he can, he has conveyed it to some other person or entity. Any rights that the public may have are in the nature of an easement, which is a non-possessory interest. Any concept of a "public trust" in the shorelands of Maine is a notion imported from decisions in other jurisdictions or from theoretical ideas elaborated by text writers and others unfamiliar with the course of the legal history and laws of this State.

III. THE HISTORICAL ARGUMENTS AS DISCUSSED IN BELL I, BELL II AND BY SUBSEQUENT COMMENTATORS

Bell I discussed the challenge by some twentieth century legal scholars to the accuracy of the construction of the Colonial Ordinance of 1647 and seventeenth century English common law by nineteenth century courts and judges. It is clear from the historical perspective, described above, that nineteenth century judges were merely following a consistent line of legal decisions that interpreted the Colonial Ordinance and Maine common law. The court in Bell I, which was unanimous, found that: "[w]e need not resolve this controversy because the Maine common law of the intertidal zone has not developed directly from English common law but from the Colonial Ordinance of 1641-47."  

78. Storer v. Freeman, 6 Mass. 435, 438 (1810). See also Bell I, 510 A.2d at 513.
79. 1 Mass. (1 Will.) 231, 232 (1804).
80. Bell I, 510 A.2d at 513.
81. See also An Act relating to the Separation of the District of Maine from Massachusetts Proper, and forming the same into a Separate and Independent State, Mass. Laws 1819, Ch. 162; Me. Const., Art. 1, § 3 (1820); Bean v. Central Maine Power Co., 133 Me. 9, 24, 173 A. 498 (1934) (recognizing that residents in the province of Maine adopted the common law of Massachusetts).
82. Bell I, 510 A.2d at 514 (citing Chief Justice Mellen's opinion for a unanimous court in Lapish v. Bangor Bank, 8 Me. 85, 91, 93 (1831)).
83. Id. at 511.
84. Id. at 511-12.
The court goes on to find that the Colonial Ordinance was part of Massachusetts common law and held that: "[By] force of article X, § 3 of the Maine Constitution and of section 6 of the Act of Separation between Maine and Massachusetts, it must be regarded as incorporated in the common law of Maine." It was for this very reason that plaintiffs in Bell II brought a motion in limine seeking to limit the historical evidence. The Law Court, therefore in Bell II, held, as it had three years earlier, that Maine common law must be the basis for the court's interpretation of the rights of the public to the intertidal zone.

The Bell II dissent and the law review articles of Delogu and Cheung attempt to interpret the historical record to argue their position. Indeed, Cheung suggests that "a faithful construction of the history, both that of the Ordinance itself and the colonial society in the Massachusetts Bay Colony, support public ownership of the foreshore." It does not appear, however, that his assertions are supported by the historical record. The legal history demonstrates that the early court decisions were in harmony with the ordinance and its development as part of Massachusetts' and then Maine's common law.

Professor George Haskins in his Law and Authority in Early Massachusetts said:

The task of the historian of law is not merely one of recounting the growth and jurisdiction of courts and legislatures or of detailing the evolution of legal rules and doctrines. It is essential that these matters be related to the political and social environments of particular times and places. Broadly conceived, legal history is concerned with determining how certain types of rules, which we call law, grew out of past social, economic, and psychological conditions, and how they accorded with or accommodated themselves thereto. The sources of legal history therefore include not only the enactments of legislatures and the decisions of courts and other official bodies, but letters, diaries, tracts, and the almost countless varieties of documents that reveal how men lived and thought in an earlier day. Law is not simply a body of rules for the settlement of justiciable controversies; law is both a product of, and a means of classifying and bringing into order, complex social actions and interactions. As Savigny has written, the phenomena of law, language, customs, and government are not separate: "There is but one force and power in people, bound together by its nature; and only our way of thinking gives these a separate existence."

Whether, and how much, courts can and should rely on historical evidence is for another article. It will not be explored here. It should be clear, however, that historical evidence can be, as here, subject to different interpretations by different commentators and its reliability as controlling evidence should be carefully examined. The unanimous court in Bell I and the majority in Bell II avoided any historical controversy because they recognized that the ordinance had long before become part of Maine common law.

The dissent's approach to the history is curious because it purports to rely in part on a finding of the lower court to reach a conclusion that "public rights in the

85. Id. at 513-14.
86. Bell II, trial transcript Appendix at 15 (on file with Author).
88. Cheung, supra note 14, at 121.
89. Haskins, supra note 17, at viii (footnotes omitted) (quoting F. C. Von Savigny, Vom Beruf Unsrer Zeit für Gesetzgebung und Rechtswissenschaft 8 (Heidelberg, 1814)).
intertidal lands existed at common law, long before the Ordinance.\textsuperscript{90} Without discussing the appropriate standard of review, the dissent seeks to overrule the decision of the lower court and write its own legal history. While the dissent further asserts, "Maine did not adopt the Ordinance but rather fashioned the law from the custom and usage that grew out of the Ordinance."\textsuperscript{91} It does not describe how this assertion is supported by the evidence in \textit{Bell II} and how the court \textit{sua sponte} could make such a finding.

Nothing in this history of the ordinance and the colonies during the period of 1632 to 1647 suggests in any way that eighteenth and nineteenth century courts were misguided in their analysis. These courts never have wavered in their remarkably consistent interpretation of history and the legal precedent of this ancient law.

IV. THE \textit{Bell II} DECISION

Although the decision in \textit{Bell II} was by a majority of four justices, it is clear that the majority wanted to leave no doubt that the scope of the public easement granted by the Colonial Ordinance could not be expanded to provide for recreational rights in the public intertidal zone.\textsuperscript{92} The court's conviction is affirmed by its earlier unanimous opinion in \textit{Bell I}. While \textit{Bell I} found that the State was not an indispensable party and that the plaintiff property owners were not barred from proceeding by the doctrine of sovereign immunity,\textsuperscript{93} a necessary part of that finding was the court's statement that the Colonial Ordinance was part of the Maine common law as it was part of Massachusetts common law before Maine became a state.\textsuperscript{94} Justice Caroline Glassman, for a unanimous court in \textit{Bell I}, found that the ordinance had "full power through the state" and went on to quote \textit{Barrows v. Mc Dermott}.\textsuperscript{95}

\begin{quote}
It is not here and now a question whether this ordinance shall be adopted with such modifications as might be deemed proper under the circumstances of the country. It has been long since adopted in all its parts, acted upon by the whole community and its adoption declared by the courts; and now the argument of the plaintiff's counsel aims to have us declare either that it has not the force of law in certain parts of the State, or that the court may change it if satisfied that it does not operate beneficially under present circumstances. We cannot so view it. That which has been the force of common law in one county in this State has the same force in all.\textsuperscript{96}
\end{quote}

The court in \textit{Bell I} found "the public rights of use constitute an easement in the public at large" and that it was merely the scope of the easement that was at issue.\textsuperscript{97} The court in \textit{Bell II}, guided by its own decision of four years earlier, found that the Colonial Ordinance was, as decided in \textit{Bell I}, a part of the common law of Maine. The court said "[W]e have never, however, decided a question of the scope

\begin{itemize}
\item \textsuperscript{90} Bell II, 557 A.2d at 180.
\item \textsuperscript{91} Id. at 184.
\item \textsuperscript{92} Id. at 180.
\item \textsuperscript{93} Bell I, 510 A.2d at 518-19.
\item \textsuperscript{94} Id. at 513-14.
\item \textsuperscript{95} Barrows v. McDermott, 73 Me. 441 (1882).
\item \textsuperscript{96} Id. at 448 (quoted in Bell I, 510 A.2d at 514).
\item \textsuperscript{97} Bell I, 510 A.2d at 517-18.
\end{itemize}
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of the intertidal public easement except by referring to three specific public uses reserved in the Ordinance."98 While it is true that the courts had never discussed general public recreational rights in their previous decisions, the reason such general recreational rights were never discussed was because the discussion was not relevant to the limited activities permitted under the Colonial Ordinance and discussed in the case law. If there had been any kind of public recreational rights, it would of necessity had to have been a seminal part of the opinions in the cases that preceded Bell II.

The limited activities allowed under the Ordinance are fully consistent with the originally declared public rights of "fishing, fowling and navigation."99 The ability to land and moor on bare flats, load and unload cargo and passengers, and be able to walk from the mooring point across other flats to some public area were necessary to "navigation" for practical, commercial, and personal purposes. At an earlier time, merchants needed to be able to get goods from suppliers to the public. Unrestricted landing and passage rights on the flats obviously facilitated these activities.

Similarly, at a time when many people relied on boats and small vessels as their means of transportation, such limited landing and passage rights were reasonable and necessary. If people could not cross the flats to or from a ship, they could not travel. Non-recreational "skating" and travel across ice (e.g., by horse or sleigh) were reasonable activities because in a strict sense "navigation" was impossible when the waters were frozen.100

In sum, case law construing the Ordinance in the nineteenth and early twentieth centuries allowed small, reasonable incidental uses necessary to engage in the enumerated public rights so that the common law of the tideland would conform to the economic necessities and technological innovations of those times. However, any such auxiliary use had to be directly related to the exercise of the enumerated right and could not compromise the ownership interest itself.101

The court in Bell II also discusses at some length the well-reasoned decision of the Massachusetts courts both before and after 1820 when Maine became a state.102 In finding that there was no basis in law or history for declaring a general public recreational easement in the intertidal zone, the court emphasized that the court may not simply change the law if it does not operate beneficially under the present circumstances.103 The court said: "The judicial branch is bound just as much as the legislative branch, by the constitutional prohibition against the taking of private property for public use without compensation."104

The Bell II court's decision on the takings issue is interesting because the lower court had found that the Intertidal Lands Act violated the separation of powers provision of the Maine Constitution Article III Section Two,105 which cer-

98. Bell II, 557 A.2d at 173.
99. Id. at 173-74.
100. Marshall v. Walker, 93 Me. 532, 536, 45 A. 497 (1900).
101. See, e.g., Andrews v. King, 124 Me. 351, 129 A. 298 (1925); Marshall v. Walker, 93 Me. 532, 536, 45 A. 497 (1900); Gerrish v. Proprietors of Union Wharf, 26 Me. 384 (1847).
102. Bell II, 557 A.2d at 174-75.
103. Bell II, 557 A.2d at 176 (quoting Barrows v. McDermott, 73 Me. 441, 449 (1882)).
104. Id.
105. Id. at 152.
tainly would have provided a sound basis for the court’s decision. The separation of powers argument was most forcefully stated by Chief Justice John Marshall in *Marbury v. Madison*, still one of the cornerstones of jurisprudence, when he said: “[i]t is emphatically the province and duty of the judicial department to say what the law is.” While the scope of judicial power is not expressly defined either under the Maine or United States Constitutions, it is nevertheless axiomatic that the judiciary has paramount authority in matters of legal and constitutional interpretation. Because the Maine Constitution explicitly incorporates the separation of powers principle while that principle is only implicitly recognized in the federal constitution, the Law Court has concluded that the concept is “much more rigorous [in Maine] than . . . as applied to the federal government.” If one reviews the language of the Intertidal Lands Act, it is pretty clear, in light of the fact that the Act passed two years after the commencement of the *Bell I* case, that the Act was an obvious legislative attempt to reformulate the common law to establish a public recreational easement in the intertidal zone.

Instead of affirming the lower court, the *Bell II* court, in an attempt to avoid a conflict with the legislature over the powers of the judiciary, avoided the issue and found that the Act was unconstitutional as a taking of private property for public use in violation of both the United States Constitution and the Maine Constitution. Rather than further define and clarify the separation of powers clause or perhaps because there may have been more agreement among the majority, the court did not give much attention to the finding of the lower court. It could have acknowledged that the lower court’s finding was also a valid basis for declaring the Intertidal Lands Act unconstitutional, but instead focused only on the takings issue.

The court further found that allowing for full recreational use of plaintiffs’ land authorized the physical invasion of private property. The court then distinguished the physical taking from a regulatory taking. The court’s reliance on *Nollan v. California Coastal Commission* is appropriate because in both cases the property owners were being forced to give access across their property to members of the public without compensation. Given the court’s finding as to the scope of the Colonial Ordinance, it was inevitable that the Intertidal Lands Act, as a consequence, had to be declared unconstitutional.

Three justices dissented to the majority’s holding in *Bell II*, and while this is apparently the norm in the United States Supreme Court, it is an uncommon occurrence in the Maine Law Court. Curiously, the dissenters who had only four years earlier been part of the unanimous majority in *Bell I* never explain the inconsistency in failing to be bound by the holdings in that case. While one might argue that *Bell I* turned only on whether the state was an indispensable party and whether the plaintiffs were barred by the doctrine of sovereign immunity, it is difficult to understand how the court could, in *Bell I*, have reached the result they did without

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106. 5 U.S. (1 Cranch) 137 (1803).
107. Id. at 177.
108. State v. Hunter, 447 A.2d 797, 799 (Me. 1982); see also Chestnut v. State, 524 A.2d 1216-17, 1220 (Me. 1987).
110. Id. at 176.
111. Id. at 176-78.
finding that the Colonial Ordinance was part of Maine common law, and the long line of cases interpreting it were part of the law of Maine.

The logic of the dissent in Bell II is difficult to follow. The dissent claims initially that the Colonial Ordinance is not the exclusive and preeminent source of all public rights.\textsuperscript{113} The dissent then asserts: “public rights in the intertidal lands existed at common law, long before the Ordinance.”\textsuperscript{114} This statement is in conflict with the holding of Bell I. Then, without discussing the standard of review, the dissent quotes, out of context, one factual holding of the lower court.\textsuperscript{115} Finally, the dissent states “[b]ecause I interpret the common law right of use more flexibly and expansively than the court does, I would vacate the judgment and uphold the constitutionality of the Act on the basis that it merely confirms recreational rights existing as a matter of common law.”\textsuperscript{116}

The dissent then cites a number of cases for the proposition that the ownership of the intertidal lands is in the state. The problem with the argument is that it is not what Shively and Philip hold and it is directly in contradiction with the holding of Bell I, which found that the state did not own the intertidal zone and was not an indispensable party.\textsuperscript{117} In Bell I the court said: “Nor can the State contend that it is the trustee of a public easement in the intertidal zone at Moody Beach. . . . Here, however, because plaintiffs and not the state hold fee simple title the trustees, if any, of Moody Beach would be the plaintiffs.”\textsuperscript{118}

While the dissent claims that “Maine did not adopt the Ordinance but rather fashioned law from the custom and usage that grew out of the Ordinance,” it then goes on to conclude “that the source of the law of private ownership of the Maine shore is this Court’s recognition of usage and public acceptance.”\textsuperscript{119} This simply does not square with the long line of cases cited by the majority, with Bell I, or with the lower court’s decision in Bell II. The dissent does not describe in any logical fashion how this public usage predated the ordinance and on what evidence this is based in part because there was no such evidence or any finding of the lower court supporting this finding of the dissenters. Nor is there the usual discussion of the standard of review that would allow the Law Court to replace the findings of fact of the lower court with selective findings of its own.

Finally, the dissenting opinion does not explain how, since Bell I found the Ordinance was part of Maine common law, the Ordinance and the long line of cases interpreting it can simply be ignored.

\textit{A. The Takings Issue}

In an article in the Maine Law Review entitled Public Trust, Public Use and Just Compensation, the author challenges the Bell II court’s findings on the tak-

\textsuperscript{113} Bell II, 557 A.2d at 180 (Wathen, J., dissenting).
\textsuperscript{114} Id.
\textsuperscript{115} Bell II, trial transcript Appendix at 120-23 (on file with Author). Justice Brodrick, while quoting from one part of the testimony of Professor Barnes, does not make this finding a part of his decision and indeed his decision supports plaintiffs’ position that it was the common law that was binding not legal history of the Ordinance.
\textsuperscript{116} Bell II, 557 A.2d at 180.
\textsuperscript{117} Bell I, 510 A.2d at 517.
\textsuperscript{118} Id.
\textsuperscript{119} Bell II, 557 A.2d at 184.
The author attempts to rewrite *Bell I* to argue that there is a "public trust" in the intertidal zone. As a unanimous court held in *Bell I*, the intertidal zone belongs in fee simple to the upland owners; subject only to the limited easements preserved through the Colonial Ordinance. The author then discusses *Phillips* and *Shively* for the proposition that the public trust doctrine applies to the intertidal zone. The article misses the critical point of the holdings of both *Phillips* and *Shively* which recognize and affirm that each state as it came into the Union brought with it its own laws regarding land ownership of the foreshore and thus Maine and Massachusetts brought with them the Colonial Ordinance.

As to the claim in the article that the ownership of the intertidal zone land was not in a conventional or legally binding sense, this is simply wishful thinking. There was evidence at trial that is undisputed as to the conveyance of the parcels in fee simple to the owners. The Law Court found that by stipulation the "plaintiff oceanfront owners hold title to the parcels described in their deeds in fee simple absolute and that their parcels were bounded by the Atlantic Ocean." This is not some arcane ownership scheme. Indeed, it was shown at trial that Maine real estate lawyers understood the law as articulated in *Bell II* and made conveyances accordingly. The conveyances had been made through deeds conveying title to the upland and intertidal zone to the plaintiff landowners with the intertidal zone being subject to the easements in the public created by the Colonial Ordinance.

The takings argument requires that we look at both the Maine and U. S. Constitutions. Acts of the Maine Legislature must conform to both the Maine and U.S. Constitutions and the majority in *Bell II* confirmed that its analysis was indeed based on both Constitutions. The Fifth Amendment to the U.S. Constitution provides: "nor shall private property be taken for public use, without just compensation." That prohibition applies against the actions of individual states through the Fourteenth Amendment. It is also noteworthy that the Fifth Amendment prohibition against the taking of property without just compensation was the first of the Bill of Rights to be applied to the states through the Fourteenth Amendment.

The U.S. Supreme Court has consistently drawn a distinction in its analysis of takings claims under the Fifth Amendment to the U.S. Constitution between actual invasion of property and mere regulation of an owner's use of that property. The Court has treated physical invasion and occupation of private property con-
ducted or authorized by government as a taking without regard to the economic impact on the property from the action. An inquiry into a property’s diminution in value from a governmental act, on the other hand, is limited to those “regulatory takings” cases such as zoning laws or health and safety regulations, involving restrictions or conditions upon an owner’s use of his land.

In *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, Justice Stevens’ dissent offered a summary of the Court’s treatment of physical as opposed to regulatory takings of property over the past forty years:

While virtually all physical invasions are deemed takings, see, e.g., *Loretto*, supra; *United States v. Causby*, 328 U.S. 256 (1946), a regulatory program that adversely affects property values does not constitute a taking unless it destroys a major portion of the property’s value. See *Keystone Bituminous*, 480 U.S. at 493-502; *Hodel v. Virginia Surface Mining & Reclamation Ass’n, Inc.*, 452 U.S. 264, 296 (1981); *Agins v. Tiburon*, 447 U.S. 255, 260 (1980). This diminution in value inquiry is unique to regulatory takings. Unlike physical invasions, which are relatively rare and easily identifiable without making any economic analysis, regulatory programs constantly affect property values in countless ways, and only the most extreme regulations can constitute takings.

The dissent in *First English* added that a general “rule” exists that “even minimal physical occupations constitute takings which give rise to a duty to compensate.”

As the Court confirmed in its decision in *Nollan v. California Coastal Commission*, one clear theme emerges from the Court’s historical treatment of the takings clause: If the government mandates a permanent physical invasion and occupation of otherwise private land, as opposed to merely restricting an owner’s use of such land through regulation, a fundamental attribute of private property ownership is lost with the result that a taking has occurred. In fact, in language directly on point to the issue at hand in this case, the Court in *Nollan* states that when governmental action goes beyond conditioning an owner’s use of his property on adherence to certain regulatory requirements, and instead “simply require[s] [owners] to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach, ... we have no doubt there would have been a taking.”

The Court in *Loretto* set forth a bright line rule in the takings arena for governmental actions that go beyond mere regulation of an owner’s use of his own property and rise to a level of permanent physical occupation. In that instance, a New


133. *See, e.g., Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (“The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”).


135. *Id. at 329* (Stevens, J., dissenting) (emphasis added); *see also Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 488-89 n.18 (1987).

136. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. at 329 (Stevens, J., dissenting).


York law requiring landlords to permit cable television companies to install cable facilities on their properties was challenged as a governmental taking of private property without just compensation. In language directly on point to the issue of the constitutionality of the Intertidal Lands Act, the Court held as follows:

We conclude that a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve. Our constitutional history confirms the rule, recent cases do not question it, and the purpose of the Takings Clause compels its retention.140

The Court added that "when the physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred. In such a case, 'the character of the government action' not only is an important factor in resolving whether the action works a taking but also is determinative."141 The Court in Loretto added that a permanent physical occupation authorized by state law rises to the level of an unconstitutional taking "without regard to whether the State, or instead a party authorized by the State, is the occupant."142

The Intertidal Lands Act declared the existence of a nearly limitless public recreational easement upon and across all intertidal land in Maine, including those parcels owned by the plaintiffs in Bell. The Bell II court, citing Cushman v. Smith,143 confirmed that its analysis and that of the U. S. Supreme Court were the same.144 The court went on to discuss the Opinion of the Justices of the Massachusetts Supreme Judicial Court, which had already answered the same question.145 The Massachusetts case involved a proposed statute that would have allowed only foot passage along the intertidal zone. The Bell II court relies on the Massachusetts Opinion of the Justices because although the intrusion of the public rights proposed in Massachusetts was far less invasive than the physical taking under the Intertidal Lands Act, the law and analyses were identical.146

In Nollan v. California Coastal Community, the U. S. Supreme Court considered the requirement of the California Coastal Commission that an owner seeking a permit for expansion of a beach house first grant lateral access to the public to pass across the owner's beach property lying between two public beaches.147 The Court, relying on Loretto, found that such a condition upon the permit deprived the owner of an essential right of property ownership, namely, the right to exclude others.148 In considering the impact of a permanent intrusion by beach-goers, the Court concluded that an unconditional taking would occur to the extent of the occupation irrespective of the economic impact on the owner or the importance of the public purpose.149 The Court further stated:

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

140. Loretto v. Teleprompter Manhattan, 458 U.S. at 426.
141. Id.
142. Id. at 432 n.9 (citing Pumpelly v. Green Bay Co., 13 Wall. 166 (1872)).
143. 34 Me. 247 (1852).
144. Bell II, 557 A.2d at 177.
145. Id. at 177-78.
146. Id. (citing Opinion of Justices to the House of Representatives, 313 N.E.2d 561 (Mass. 1974)).
148. See id. at 831.
149. Id. at 831-32.
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fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises.150

It is noteworthy that the Court in Nollan held that a mere "right to pass to and fro" constituted a per se taking. The Intertidal Lands Act declared the existence not only of a right of such recreational access but also a right of nearly limitless recreational occupation.

B. The Equal Footing Doctrine

Professor Orlando Delogu, in his article Intellectual Indifference—Intellectual Dishonesty: The Colonial Ordinance, the Equal Footing Doctrine and the Maine Law Court, argues that the majority in Bell II failed to examine the intent and purpose of the Colonial Ordinance.151 To the extent that the intent and purpose of the Ordinance remained of any importance after it became common law, a careful and proper historical legal analysis as discussed earlier suggests that there has been little doubt in the minds of historians and nineteenth century justices that the intent of the ordinance was to give the public an easement permitting public use only for "fishing, fowling, and navigation."152 As the Bell II court said: "Ever since [the 1810 decision in Storer v. Freeman] as well as long before, the law on this point has been considered as perfectly at rest; and we do not feel ourselves at liberty to discuss it as an open question."153

It seems greatly disingenuous to chide earlier legal scholars and justices as perhaps not having the resources for research of modern justices and scholars when in fact none of the most recent commentators point to any record, evidence, or text that was not available to those earlier justices and scholars. As the court said in Bell II, responding to the equal footing argument: "[a]ny such revisionist view of history comes too late by at least 157 years."154

The second level of Delogu’s equal footing argument is based on Phillips155 and Shively156 where he takes the position that these cases stand for the proposition that upon entering the Union, Maine (and Massachusetts) held title to the intertidal zone. The court in Phillips said:

But it has been long established that the individual States have the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit. Some of the original States, for example, did recognize more private interests in tidelands than did others of the 13 more private interests than were recognized at common law, or the dictates of our public trust cases.157

If one then examines Shively, it becomes clear that Shively was holding that Maine, Massachusetts, and other states that had granted title to the intertidal zone to the upland owners were, pursuant to the "equal footing doctrine," entitled to come into the union on equal footing without altering their laws regarding ownership of the foreshore.158 As Chief Justice Vincent L. McKusick pointed out in Bell

150. Id. at 832.
151. Delogu, supra note 14, at 44.
152. Bell II, 557 A.2d at 173.
153. Id. at 171 (brackets in original).
154. Id. at 172.
II, Justice Gray, who authored the Shively decision, was well aware of the law regarding the Colonial Ordinance and its application to Maine because he had formerly been the Chief Justice of the Massachusetts Supreme Judicial Court.\textsuperscript{159} The Shively Court said:

The governments of the several Colonies, with a view to induce persons to erect wharves for the benefit of navigation and commerce, early allowed to the owners of lands bounding on tide waters greater rights and privileges in the shore below high water mark, than they had in England. But the nature and degree of such rights and privileges differed in the different Colonies, and in some were created by statute, while in others they rested upon usage only.

In Massachusetts, by virtue of an ancient colonial enactment, commonly called the Ordinance of 1641, but really passed in 1647, and remaining in force to this day, the title of the owner of land bounded by tide water extends from high water mark over the shore or flats, to low water mark, if not beyond one hundred rods. The private right thus created in the flats is not a mere easement, but a title in fee, which will support a real action, or an action of trespass \emph{quaer clausum fregit}, and which may be conveyed by its owner with or without the upland; and which he may build upon or enclose, provided he does not impede the public right of way over it for boats and vessels.\textsuperscript{160}

The Shively Court then said:

It is because of the ordinance vesting the title in fee of the flats in the owner of the upland, that a conveyance of his land bounding on the tide water, by whatever name, whether "sea," "bay," "harbor," or "river," has been held to include the land below high water mark, as far as the grantor owns.\textsuperscript{161}

After a lengthy analysis of the ownership rights of the various states in the foreshore, the court concluded:

The court thus stated its final conclusion: "From all this it appears that when the State of Oregon was admitted into the Union, the tide lands became its property and subject to its jurisdiction and disposal; that in the absence of legislation or usage, the common-law rule would govern the rights of the upland proprietor, and by that law the title to them is in the State."\textsuperscript{162}

The title and rights of riparian or littoral proprietors in the soil below high water mark, therefore, are governed by the laws of the several states, subject to the rights granted to the United States by the Constitution.\textsuperscript{163}

\textit{Shively} and \textit{Phillips} recognized and acknowledged that when Maine came into the Union, Maine law was accepted under the "equal footing doctrine" and that the upland owner had title of the intertidal zone subject to the limited public rights to fish, fowl, and navigate. Somehow the amicus curie in the \textit{Bell II} case and Delogu's commentary misinterpret the holdings of both \textit{Shively} and \textit{Phillips}. Delogu's article seems to argue that the Colonial Ordinance was a judicially fashioned rule "even if characterized as common law."\textsuperscript{164} As the court discussed,

\begin{itemize}
\item \textsuperscript{159} See \textit{Bell II}, 557 A.2d at 171-72.
\item \textsuperscript{160} \textit{Shively v. Bowby}, 152 U.S. at 18-19.
\item \textsuperscript{161} \textit{id.} at 19.
\item \textsuperscript{162} \textit{id.} at 56.
\item \textsuperscript{163} \textit{id.} at 57-58.
\item \textsuperscript{164} Delogu, \textit{supra} note 14, at 61.
\end{itemize}
however, in Bell I, if the ordinance was part of the Massachusetts common law, the
Massachusetts common law was adopted in Maine by article X, section three of
the Maine Constitution and section six of the Act of Separation between Maine
and Massachusetts.

The holdings of Shively and Phillips confirm that “prior to separation the com-
monwealth of Massachusetts had already granted to the upland owners fee title in
the intertidal land over its entire territory including Maine.” Maine came into
the Union with the Colonial Ordinance defining the rights to ownership of the
intertidal zone.

V. CONCLUSION

Since the ruling of the Law Court, the Bell II decision has been analyzed on
numerous occasions by commentators who, as a matter of social policy, feel the
foreshore including the beach areas above the high water mark should be public
property. Professor Delogu in his article in this Law Review momentarily accepted
the reality of the Bell II decision when he wrote:

[T]he Moody Beach decisions made clear that the restrictive definition of public
use rights in the intertidal zone is a reality that cannot be altered by wishing it
away, by adopting expansive police power regulations, or by fashioning argu-
ments predicated on the public trust doctrine. These unpleasant facts must be
faced.166

He goes on to advocate for the acquisition of not just the intertidal zone but
the “entire littoral parcel, upland and intertidal zone.” Maine has over thirty-
v-five miles of long, sandy beaches, nineteen of which are already public. Through
funding for the acquisition of land through the program to Secure Lands for Maine
Future Commission, many acquisitions of lake, river, and shorefront land have
been undertaken. These efforts have been a fair, balanced way to secure more
public access to precious natural resources while respecting and securing the prop-
erty rights of land owners through conservation easements and strategic acquisi-
tions.

Of concern, however, was a comment in Eaton v. Town of Wells168 in the
concurring opinion of Chief Justice Leigh Saufley. While the majority had found
that there was a prescriptive recreational easement across the Eaton’s parcel for
the public, it declined to reexamine Bell II. Chief Justice Saufley called for the
court to overrule Bell II and for the application of the Public Trust Doctrine to the
intertidal zone.169 First, such a ruling would be a severe blow to the principle of
stare decisis. The court in Bell II noted:

Over a century ago, this court emphatically rejected the argument “that the court
may change [that legal regime] if satisfied that it does not operate beneficially
under present circumstances.” Barrows v. McDermott, 73 Me. at 449. The judi-
cial branch is bound, just as much as the legislative branch, by the constitutional

165. Bell II, 557 A.2d at 172.
166. Orlando E. Delogu, An Argument to the State of Maine, the Town of Wells, and Other
Maine Towns Similarly Situated: By the Foreshore—Now, 45 Me. L. REV. 243, 244 (1993).
167. Id. at 251.
169. Id. at 290 (Saufley, J., concurring).
prohibition against the taking of private property for public use without compensation. 170

Chief Justice Saufley’s concurrence in the Eaton case is disturbing because it seeks to undermine the very foundation of stare decisis. Chief Justice Saufley argues that there was an unduly narrow construction of the Public Trust Doctrine in Bell II. However, Maine courts have never held that the Public Trust Doctrine applies to private property and the property at issue in Bell II was held in fee simple absolute like most other private real estate in Maine. Certainly a broader interpretation of Maine law would raise serious constitutional questions under both the Maine Constitution and the United States Constitution.

Finally, of concern is the misconception that if the intertidal zone were open to the public, litigation would abate. 171 Indeed the opposite would be true. In the experience at Moody Beach, commercial interests sought to capitalize on and to use others’ private property for their commercial gains. People abused the good will of the owners, littered on their property, and caused numerous confrontations. When the tide comes up so do the people. It is not just the intertidal zone that the people want access to. With 3480 miles of coastline in Maine, as Chief Justice Saufley noted in Eaton, there are numerous unique situations of property ownership and usage that are dependent on the uninterrupted and consistent interpretation of the law. Because of the increasing pressure for public access to the coast, litigation would surely be the order of the day if the Law Court were to erode its decisions in Bell I and Bell II. As the tide came in and the tourists came up with it, so would litigation rise along with the tide. If the court were again confronted with the issue of the scope of the Colonial Ordinance of 1647, it should not depart from the long and consistent line of cases interpreting the Colonial Ordinance and culminating with Bell II. The desire for public access to Maine coast does not justify changing Maine property law and depriving owners of their longstanding, well-established legal rights.

170. Bell II, 557 A.2d at 176.