

January 2019

Book Review: An Examination of Maine's Public Beach Access

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Recommended Citation

Ariel A. Hampton, *Book Review: An Examination of Maine's Public Beach Access*, 24 *Ocean & Coastal L.J.* 104 (2019).

Available at: <https://digitalcommons.maineraw.maine.edu/oclj/vol24/iss1/6>

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BOOK REVIEW

AN EXAMINATION OF MAINE'S PUBLIC BEACH ACCESS

MAINE'S BEACHES ARE PUBLIC PROPERTY: THE BELL CASES MUST BE
REEXAMINED. By Orlando E. Delogu. Standish, Me.: Tower Publishing.
2017. Pp. xv, 268. \$24.95.

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*Reviewed by Ariel A. Hampton*¹

I. INTRODUCTION

People frequently enjoy access to public resources when they engage in activities such as walking along the beach, picnicking, or sunbathing. Often, people do not realize that many of the resources that the public relies upon can be taken away through privatization. While people have long considered rights to certain resources, such as air and water, to be guaranteed, there is now an element of uncertainty to these access rights. It is not until access is diminished that the public realizes that these resources and the access to them cannot be taken for granted. This especially rings true in the State of Maine, where two Supreme Judicial Court decisions have limited the public's right to access beaches through the intertidal zone.² This Review details the public use rights and Professor Orlando E. Delogu's analysis of precedent that addresses why most of the intertidal lands should be held in trust for the public.³

II. HISTORICAL BACKGROUND

The term *jus publicum* refers to the public's right to use certain resources, such as water and air but also shorelines and harbors.⁴ There is a long tradition of preserving these necessary features of human life and

1. J.D. Candidate, 2019, University of Maine School of Law.

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

3. ORLANDO E. DELOGU, MAINE'S BEACHES ARE PUBLIC PROPERTY: THE BELL CASES MUST BE REEXAMINED 8 (2017).

4. *Id.* at x.

society as being “incapable of [being held under] private ownership.”⁵ Nevertheless, this tradition came under fire through the 1641-1647 Massachusetts Colonial Ordinance.⁶

A district of Massachusetts since colonial times, Maine became a state in 1820.⁷ This newly formed State of Maine had the right to create its own laws under the equal footing doctrine;⁸ however, prior to Maine entering the Union, Massachusetts had a Colonial Ordinance.⁹ This Ordinance ceded the title of intertidal lands to the upland property owners despite the fact that this portion of the Ordinance was only intended to relinquish the title for the necessity of the commercial shipping industry.¹⁰ This act of cession meant private property owners could consider some uses of the intertidal zone by the public as a trespass, thus limiting public access.¹¹

III. ANALYSIS

Since the late 1980s, private landowners held title to the State of Maine’s intertidal land.¹² According to Delogu, this is the result of the faulty judicial reasoning in two Maine Supreme Judicial Court (“Law Court”) cases: *Bell v. Town of Wells* (Me. 1986) and *Bell v. Town of Wells* (Me. 1989) (“the *Bell* cases”).¹³ The upland property owners in these cases believed the Town of Wells to be complicit in allowing members of the public to continuously trespass on their property.¹⁴ The owners argued that they held title to the intertidal lands via the Colonial Ordinance.¹⁵ While the property owners did not fare well in the trial court, they received a favorable decision on appeal to the Law Court.¹⁶ Accordingly, as a result

5. *Id.* This tradition spans from Roman codes to English common law to the present. *Id.* at 43-45.

6. *See id.* at x, 9.

7. *Id.*

8. *Id.* at 223-24. The equal footing doctrine is read into the United States’ Constitution under Article IV, section 3. *Id.* at 224.

9. *Id.* at 36-37 n.22.

10. *See id.* at xi, 124 n.2. The reasoning behind the cession of title for the intertidal lands is not expressly given within the Colonial Ordinance nor was a reason given for the broad extension to relinquish all of the intertidal lands to private owners as a “unilateral gift” rather than just the land necessary for commercial shipping. *Id.* at xi, 24.

11. *See id.* at 1-2.

12. *Id.* at 8, 15.

13. *Id.* at ix, 9.

14. *Id.* at 1-2. The municipal actions that plaintiffs took issue with included the Town providing transport to the beach area and the employment of lifeguards. *Id.* at 1.

15. *Id.* at 1.

16. *Id.* at 7, 9.

of the *Bell* cases, the Court determined that the upland property owners in the State of Maine held the adjacent intertidal land title in fee simple and that the public's right to use these intertidal lands was limited to fishing, fowling, and navigation.¹⁷

Much of Delogu's book is an analysis of the *Bell* cases and an explanation of why he believes they were wrongly decided.¹⁸ He primarily relies on *jus publicum* principles as well as the United States Supreme Court case *Illinois Central Railroad Company v. Illinois*. In *Illinois Central*, the Court revoked the title of the submerged land in Chicago Harbor from the railroad company in order to return the title back to the government.¹⁹ The Court determined that the government is incapable of transferring title to the railroad company because this transfer would result in a significant impairment of the public interest.²⁰ In Maine, where the Law Court's interpretation of the Colonial Ordinance seemingly grants a unilateral gift to all upland property owners without taking into account the public interest outside of the enumerated public use rights, finding a significant impairment of the public interest is critical.²¹

Delogu refers to five guiding principles developed from Maine case law concerning the appropriateness of reviewing cases on a *stare decisis* basis.²² These guiding principles consider the fairness of the decision, whether the context under which the decision was made has changed, what role the court had in the creation of the decision, what decisions the legislature has made regarding said decision, and whether the court is able to avoid harsh impacts for those who have relied upon the decision.²³ Delogu makes it clear that it is insufficient to simply expand the public use rights that were narrowly construed in the *Bell* cases.²⁴ Instead, he advocates for the necessity of revocation.²⁵ Delogu's solution—that the State revoke the title of the intertidal property from private owners—

17. *Id.* at 5, 8. This narrow reading of the public use rights is particularly odd because even at the time of the Ordinance's adoption people engaged in uses like grazing and lateral passage that the drafters did not expressly enumerate. *Id.* at 5. Also, because the Massachusetts Bay Colonial Ordinance was effectively "annulled," the conveyance continued by "judicial adoption." *Id.* at 124 n.2.

18. *Id.* at ix.

19. *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 463-64 (1892).

20. *Id.* at 455-56.

21. *See* Delogu, *supra* note 3, at xi.

22. *Id.* at 23.

23. *Id.* at 23-30.

24. *Id.* at 33.

25. *Id.*

would result in the state holding the land in trust for the public with the limited exception for commercial shipping.²⁶

IV. EVALUATION

Delogu provides an extensive analysis surrounding the historical context of the issue regarding intertidal land through the principle of *jus publicum* as well as the Colonial Ordinance itself. Delogu's historical reading of the Colonial Ordinance seems appropriate given the text and the later application of the text do not speak fully to the intentions of its drafters and rather represents a past that does not necessarily suit people of today.²⁷ Delogu also makes a compelling argument concerning the applicability of Massachusetts law to the State of Maine. It certainly seems strange that Massachusetts law would dictate Maine law as if the State of Maine is still subservient to Massachusetts as it was prior to 1820.

However, Delogu's analysis does not dive into the concomitant setting in which the court found itself and does not explicitly address the underlying intentions of the Law Court in the *Bell* decisions. Rather, Delogu determines that the majority's conclusions are facially erroneous.²⁸ Delogu characterizes the Court's analysis of the material facts in both *Bell* cases as negligent and contends the Court performed a superficial examination of the material facts and relied on tangentially related cases while ignoring more relevant cases such as *Illinois Central*.²⁹ A more robust consideration of the Law Court's reasoning in the *Bell* cases

26. *Id.* at 15, 25. The limited exception for commercial shipping would apply only when the owner needs the title to the intertidal land for purposes of navigation and actually fills the intertidal land for such a purpose. *Id.* The other exceptions are purposes authorized by statute that convey a public benefit. *Id.* at 243 n.1.

27. *See id.* at 127 n.52.

28. *See id.* at 23-34.

29. *See id.* at 10, 122. The opinions of the Law Court in the legal analysis of *Bell II* suggest that the Law Court in the *McGarvey* case found fault with the prior court's analysis to some extent as well. *Id.* at 240, 244 n.23. One could argue that the grant of intertidal land to the upland owners was not for the sake of public use and, therefore, no implied condition of revocability existed once the grantee fails to stay in keeping with the purpose of the grant. *See id.* at 18-19 n.34, 65-66, 117. The characterization of the grant as a defeasible estate or a fee simple subject to a condition subsequent seems to rely at least in part on the grant being for a public purpose. *See id.* at 63-64, 66, 75 n.19. Perhaps, the Law Court in the *Bell* cases recognized there was no public purpose being furthered by the unqualified grant of all the intertidal land, much of which could not be used for wharfing purposes anyway, to the upland owners and thought it unnecessary to reference *Illinois Central*. *See id.* at 69.

could strengthen Delogu's argument and improve the prospects of overturning the *Bell* decisions, which is his ultimate goal.

Furthermore, Delogu touched only briefly on the importance of Maine retaining the title of the intertidal lands for the protection of such a vulnerable ecosystem.³⁰ While the environmental issue is not the focus of the book, it is certainly one of substantial public interest to the State and could bolster the argument that the *Bell* precedent is bad for Maine. By limiting the analysis to a primarily historical public use argument and legal precedent, Delogu misses the opportunity to broaden the argument to include the public interest aspect that is crucial in *Illinois Central*.

V. CONCLUSION

Overall, *Maine's Beaches Are Public Property* provides exhaustive research into the history of ancient and recent law concerning intertidal lands. Delogu provides a thorough analysis of the Colonial Ordinance and the principle of *jus publicum*. However, the analysis may have benefited from a deeper dive into the Law Court's underlying intentions and reasoning and thus provide further insight into the Court's potential distinction between the *Bell* cases and *Illinois Central*. Delogu's analysis relies heavily on a public access argument while his true desire appears to be for the State to have title to most of the intertidal lands and thus the lands be held in trust for the public. Regardless of the emphasis, Professor Delogu makes a forceful and compelling case for the reversal of the *Bell* cases.

30. *Id.* at 238.