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McGarvey v. Whittredge: Continued Uncertainty in Maine's Intertidal Zone

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MCGARVEY V. WHITTREDGE: CONTINUED
UNCERTAINTY IN MAINE'S INTERTIDAL ZONE

Benjamin Donahue

- I. INTRODUCTION
- II. THE LAW
 - A. *Applicable Maine State Law*
 - B. *Perspective*
- III. THE *MCGARVEY* CASE
- IV. ANALYSIS
 - A. *The Law Court's Reasoning*
 - B. *Critique and Impact*
 - 1. *The Ordinance Does Not Limit the Public's Uses of Intertidal Land to Fishing, Fowling, and Navigation*
 - 2. *The Public's Easement Should Evolve to Serve the Purpose for which It Was Granted*
 - 3. *Allowing the Scope of the Public's Easement to Evolve Will Not Result in an Unconstitutional Taking*
 - 4. *Stare Decisis Should not Prevent the Law Court from Re-examining Bell II*
- V. CONCLUSION

MCGARVEY V. WHITTREDGE: CONTINUED UNCERTAINTY IN MAINE'S INTERTIDAL ZONE

*Benjamin Donahue**

I. INTRODUCTION

In 2008, William McGarvey and Mary Klientop filed a declaratory judgment seeking a determination that their neighbor, Jonathan Bird, had no right to cross their intertidal land to reach the ocean to scuba dive.¹ McGarvey and Kleintop own property that borders Passamaquoddy Bay in the Town of Eastport.² As upland owners of oceanfront property in Maine, their title extends through the intertidal zone to the low water mark in fee simple.³ The intertidal land they own also stretches in front of Bird's property, bordering his property just below the high water mark.⁴ This configuration creates a strip that separates Jonathan Bird's property from the bay, allowing him access to the ocean from his property only if he crosses over McGarvey's intertidal land.⁵

The Washington County Superior Court granted Bird's motion for summary judgment, declaring that Bird had engaged in a permitted use of the privately owned intertidal land.⁶ In doing so, the court held that scuba diving was within the scope of the public's right to use the intertidal land for navigation.⁷ McGarvey appealed to the Maine Supreme Judicial Court, sitting as the Law Court, which unanimously affirmed the lower court opinion on this point.⁸ The Court however, was sharply divided (3-3) in its reasoning.⁹

Private ownership of intertidal land in Maine is derived from a Colonial Ordinance enacted by the General Court of the Massachusetts Colony in 1647 ("the Ordinance").¹⁰ The Ordinance was introduced to promote the private development of intertidal land,¹¹ by facilitating private ownership of intertidal land that

* J.D. Candidate 2013. The author would like to thank Professor Orlando E. Delogu for his advice and wisdom, and Daphne for being the smartest.

1. *McGarvey v. Whittredge*, 2011 ME 97, ¶ 6, 28 A.3d 620 (Saufley, C.J., concurring) (plurality opinion). William McGarvey and Mary Kleintop are members of the same family that own the disputed strip of intertidal land. *Id.* ¶ 2. Mary Kleintop filed the declaratory judgment and appealed the Washington County Superior Court's ruling, but passed away before her appeal was heard by the Law Court. *Id.* In this Note both individuals will be referred to as McGarvey.

2. *Id.* ¶ 3.

3. *Id.* ¶ 9.

4. *Id.* ¶ 4.

5. *Id.* Although Jonathan Bird and Steven Whittredge are named as defendants in the *McGarvey* case, the dispute over the strip of intertidal land was between Bird and McGarvey. *Id.* ¶ 6.

6. *Id.* ¶ 7.

7. *Id.* ¶ 2.

8. *Id.* ¶ 1.

9. *Id.* Justice Silver recused himself from participating in the *McGarvey* decision.

10. *Id.* ¶ 26.

11. THE BOOK OF THE GENERAL LAWS AND LIBERTIES CONCERNING THE INHABITANTS OF THE MASSACHUSETTS 5 (1648), reprinted in THE BOOK OF THE GENERAL LAWS AND LIBERTIES CONCERNING THE INHABITANTS OF THE MASSACHUSETTS 35 (Thomas G. Barnes ed., 1975).

previously belonged to the Crown and was held in trust for the public.¹² The Ordinance also attempted to protect the public's rights in the intertidal zone, by reserving an easement for the public to use intertidal land to fish, fowl, and navigate.¹³ After the revolutionary war, the Ordinance was adopted into Massachusetts common law, and subsequently into Maine common law when Maine gained statehood in 1820.¹⁴

In Maine, the common law that has flowed from the Ordinance has allowed the public a broad degree of access to the intertidal zone for over 160 years.¹⁵ In recent years, however (since the *Bell* cases),¹⁶ the public's access has been curtailed by the Law Court's holding that the scope of the public's easement in the intertidal zone includes only those uses specifically enumerated in the Ordinance, i.e., fishing, fowling, and navigation.¹⁷ Outside of Maine, the public's right to access the intertidal zone and the shoreline varies. In many states the upland owner's property rights extend only to the high-water mark.¹⁸ In these states the entire intertidal zone is held for the general public.¹⁹ In other states, the upland owner holds title to the low water mark (as in Maine), but with a broad easement in the intertidal zone for public use.²⁰ Few states restrict the scope of the public's easement to "fishing, fowling, and navigation" as Maine does.²¹

This Note will examine the history of the public's right to use intertidal land in Maine, including the relevant common law and statutes. It will examine the development of these rights in other states and the scope of the public's right to access the intertidal zone and shoreline in those states. After discussing the Law Court's reasoning in *McGarvey*, this Note will argue that the entire Court should have joined Justice Saufley's reasoning in affirming the lower court opinion because Justice Levy's reasoning is not supported by either case law or public trust principles, only by the narrow holding of *Bell II*, a decision that should no longer be considered authority. Next, it will argue that contrary to the reasoning of Justice Levy and the *Bell II* Court, the uses set forth in the Ordinance were examples of permitted uses, not an exhaustive list. It will then argue that these uses should evolve with time, and doing so will not result in an unconstitutional taking of private property. Finally, this Note will argue that the conditions put forth by the Law Court in *Myrak v. James* for breaking away from the doctrine of *stare decisis* are present, and therefore *Bell II* should be reexamined.

12. *See id.*

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

14. *McGarvey*, 2011 ME 97, ¶¶ 29, 31, 28 A.2d 620 (Saufley, C.J., concurring).

15. *See discussion infra* Part IV.B.1.

16. The *Bell* cases, *Bell v. Town of Wells (Bell I)*, 510 A.2d 509 (Me. 1986), and *Bell v. Town of Wells (Bell II)*, 557 A.2d 168 (Me. 1989), are two Law Court decisions that had a significant impact in Maine's public trust doctrine jurisprudence. *See discussion infra* Part II.A.

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

18. *See discussion infra* Part II.B.

19. Robin Kundis Craig, *A Comparative Guide to the Eastern Public Trust Doctrines: Classifications of States, Property Rights, and State Summaries*, 16 PENN ST. ENVTL. L. REV. 1, 18 (2007) [hereinafter Craig I].

20. *See discussion infra* Part II.B.

21. Craig I, *supra* note 19, at 17.

II. THE LAW

A. *Applicable Maine State Law*

The origins of Maine's public trust doctrine trace back to the Justinian codes, a principle source of Roman law.²² Roman civilization depended on sea-based commerce for survival.²³ In order to maintain freedom of navigation and access to the sea, Roman jurisprudence recognized the public's right to the sea.²⁴ The Roman authority on public common rights was the Justinian Code. Justinian Code 2.1.1 reads as follows:

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.²⁵

Roman law recognized that private land rights should not be exclusive in this area.²⁶ It allowed the public to use the seashore, banks of the sea, or a navigable river for commerce, fishing, navigation, lateral passage, and other uses.²⁷

As the Roman Empire declined, the public's right of common ownership waned as feudalism led to an increase in private ownership,²⁸ but in 1215 when the Magna Carta was signed, the concept of a public right to common land resurfaced.²⁹ The Magna Carta included provisions that limited the power of the nobility to lay claim to fisheries or obstruct navigation.³⁰ Out of these restrictions arose the predecessor to the public trust doctrine, initially developed by Lord Hale and incorporated into his famous treatise *De Jure Maris et Brachiorum Ejusdem*, which borrowed from the Justinian codes.³¹ Under Lord Hale's theory, intertidal land was held by the Crown, but with a public interest in the *jus publicum* (land vested in the King and the public).³² This theory eventually developed into the public trust doctrine.³³ Under that doctrine, the Crown owned the intertidal land, but held it subject to the public's right of use.³⁴ These same principles applied in colonial America; the King of England possessed all vacant lands in a trust for the

22. Mitchell M. Tannenbaum, *The Public Trust Doctrine in Maine's Submerged Lands: Public Rights, State Obligation and the Role of the Courts*, 37 ME. L. REV. 105, 108 (1985).

23. See Lynda L. Butler, *The Commons Concept: An Historical Concept with Modern Relevance*, 23 WM. & MARY L. REV. 835, 849 (1982).

24. *Id.*

25. *Id.* at 849-50 (quoting Inst. Just. 2.1.1).

26. *Id.* at 852.

27. *Id.*

28. Tannenbaum, *supra* note 22, at 108.

29. *Id.* at 109.

30. *Id.*

31. Butler, *supra* note 23, at 860, 862.

32. *Id.* at 862.

33. *Id.*

34. See *Shively v. Bowlby*, 152 U.S. 1, 13 (1894).

nation.³⁵ After the American Revolution, the intertidal zone, previously held by the Crown, became the property of the sovereign states.³⁶

The decision that has had the greatest impact on the public's right to Maine's intertidal zone and shoreline took place before the American Revolution. Under English law and the principles of the public trust doctrine, the Crown had the discretion to seize every building or wharf that was built below the high-water mark.³⁷ This made private landowners hesitant to invest in structures that ventured below the high water mark.³⁸ In an effort to promote waterfront development, governments of certain colonies, including Massachusetts, allowed the owners of upland property greater rights below the high water mark.³⁹ In 1647, the General Court of the Massachusetts Bay Colony enacted an ordinance granting upland owners property rights down to the low water mark.⁴⁰ When Massachusetts became a state, the principles of the Ordinance were incorporated into its common law.⁴¹ In 1820, when Maine was granted statehood, the principles of the Ordinance were said to be adopted into Maine's common law under Article X of the Maine Constitution, which incorporated the laws of Massachusetts into Maine's common law.⁴² Maine did not adopt the language of the ordinance itself, only the custom of private ownership of intertidal land, created by the Ordinance and sustained by the judiciary.⁴³

Public access to Maine's intertidal land and shoreline has varied throughout Maine's history, as the Law Court's interpretation of the Ordinance has changed with time. Since the beginning, the Court has accepted the traditional uses of "fishing, fowling, and navigation" and their derivatives,⁴⁴ but early on the Law Court demonstrated that it would not be bound by the literal uses put forth in the Ordinance. For example, the Law Court has found that the public's rights in the intertidal zone include the right to use it as a public highway when frozen,⁴⁵ for recreational purposes,⁴⁶ and to allow the public to not only navigate over the

35. *Id.* at 14.

36. *Id.* at 15. "When the Revolution took place, the people of each State became themselves sovereign, and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use, subject only to the rights since surrendered by the Constitution to the general government." *Id.* at 16 (quoting *Martin v. Waddell*, 41 U.S. 367, 367 (1842)).

37. *Id.* at 13.

38. STUART A. MOORE, A HISTORY OF THE FORESHORE AND THE LAW RELATING THERETO 318 (3d Ed. 1888).

39. *Shively*, 152 U.S. at 18.

40. THE BOOK OF THE GENERAL LAUS AND LIBERTYES CONCERNING THE INHABITANTS OF THE MASSACHUSETTS, *supra* note 11, at 35.

41. *Storer v. Freeman*, 6 Mass. 435, 438 (1810).

42. ME. CONST. art. X, §§ 3, 5; *Lapish v. Bangor Bank*, 8 Me. 85, 93 (1831). Only laws "not repugnant" to the interests of the new state were received, and no Maine legislative enactment has embraced the Ordinance. ME. CONST. art. X, § 3.

43. *Bell II*, 557 A.2d 168, 184 (Me. 1989).

44. *Barrows v. McDermott*, 73 Me. 441, 447 (1882).

45. *French v. Camp*, 18 Me. 433, 434 (1841).

46. *Smart v. Aroostock Lumber Co.*, 103 Me. 37, 48, 68 A. 527, 532 (1907); *see also Deering v. Long Wharf*, 25 Me. 51, 65 (1845).

intertidal zone, but to land a vessel, and offload that vessel.⁴⁷ In 1985, the Maine Legislature for the first time addressed the intertidal zone, and enacted the Public Trust in Intertidal Land Act in an attempt to codify and clearly define the public's rights on intertidal lands.⁴⁸ The legislature included as public trust rights, not only the traditional uses of fishing, fowling and navigation, but the right to use intertidal land for recreation, and any other trust rights to use intertidal land recognized by the Maine common law and not specifically abrogated by statute.⁴⁹

Despite these precedents, which clearly showed a departure from the three uses included in the language of the Ordinance (fishing, fowling, and navigation), the Law Court's 1989 decision in *Bell II* limited the scope of the public's rights to these three uses, negating both the holdings of previous courts and the Maine Legislature's attempt to define the scope of the public's rights in the intertidal zone.⁵⁰ The holding in *Bell II* was the first time the Court found "fishing, fowling, and navigation" to be the only permitted uses.⁵¹ In doing so, the Court did not overrule the prior Maine case law, but limited it, and in the process declared the Public Trust in Intertidal Land Act unconstitutional.⁵² After *Bell II*, public rights in the intertidal zone were defined as an easement "only for fishing, fowling, and navigation."⁵³

B. Perspective

Nationally, there is no consensus on the scope of the public's rights to access the intertidal zone and the shoreline. In western states, where public trust jurisprudence developed after the U.S. Supreme Court addressed the issue in *Shively v. Bowlby*, there is a general uniformity; public use rights in the intertidal zone are broadly defined and protected.⁵⁴ In eastern states, where courts and legislatures addressed intertidal property rights long before the U.S. Supreme Court examined the matter, the public's right to access intertidal land and the shoreline varies greatly from state to state.⁵⁵

The U.S. Supreme Court held that a private landowner cannot be the grantee of a property right below the high-water mark unless the grantor is the state itself.⁵⁶ The Court limited a state's right to make such a grant when it held that the state of Illinois could not grant all of the land below the high water line in Chicago Harbor

47. *Marshall v. Walker*, 93 Me. 532, 536, 45 A. 497, 498 (1900) ("Others may sail over [the intertidal zone], may sail over them, may moor their craft upon them, may allow their vessels to rest upon the soil when bare, may land and walk upon them . . .").

48. P.L. 1985, ch. 782 (codified at ME REV. STAT. tit. 12, §§ 571-573).

49. ME REV. STAT. tit. 12, § 571.

50. *Bell II*, 557 A.2d 168, 177 (Me. 1989).

51. See *McGarvey*, 2011 ME 97, ¶ 39, 28 A.3d 620 (Saufley, C.J., concurring) ("We had not, until *Bell II*, restricted the activities allowed by the *jus publicum* to the specific references in the Colonial Ordinance.").

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

53. *Id.* at 173. The public's rights in the intertidal zone have been referred to as an easement in previous Law Court cases, but were only defined as such in the *Bell* cases. See *id.*

54. Craig I, *supra* note 19, at 19.

55. *Id.* at 11.

56. *Shively v. Bowlby*, 152 U.S. 1, 13 (1894).

to the Illinois Central Railroad Company.⁵⁷ It has also recognized three basic uses of the public trust: fishing, navigation, and commerce.⁵⁸ These holdings are reflected in western states' public trust doctrines where in the vast majority of states, the private landowner owns only to the high water line.⁵⁹ Although most western states initially accepted the three basic uses of fishing, navigation, and commerce, almost all have since expanded their public trust doctrines to include recreation as a permitted use.⁶⁰

In many eastern states, the upland owner only owns to the high water line.⁶¹ In these states the public has unfettered rights on intertidal land.⁶² In other states, like Maine, the upland owner has qualified title to the low water mark, subject to a reserved public easement.⁶³ In some eastern states where the intertidal zone is privately owned, the public's rights in the intertidal zone are nevertheless very broad. For example, New Jersey has expanded on the traditional public trust rights of fishing and navigating to include modern activities like sun bathing, swimming, and other shore activities.⁶⁴ In *Neptune City v. Avon*, when the New Jersey Supreme Court held that the public trust doctrine protects these modern activities, it noted that, "[t]he public trust doctrine, like all other 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."⁶⁵ Other states have expanded on traditional uses as well. New Hampshire, whose public trust doctrine originally mirrored Maine's, has expanded on "fishing, fowling and navigation" by including "all useful purposes."⁶⁶ Few states have limited the scope of the public's easement within the intertidal zone to traditional uses. Of the states that have followed this path, only Delaware has a public trust doctrine that restricts the public's rights in the intertidal zone as narrowly as Maine.⁶⁷ Even

57. Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 464 (1892).

58. *Shively*, 152 U.S. at 57.

59. Only lands that border a "navigable" body of water are subject to the *Jus Publicum* and a particular state's public trust doctrine. *Martin v. Waddell*, 41 U.S. 367, 413 (1842). In England, only property subject to the ebb and flow of the tide was considered "navigable." *Id.* at 414. In the United States, navigable waters are not limited to those influenced by the tide. *Id.* Whether or not a body of water is navigable raises questions of federal and state law. Robin Kundis Craig, *A Comparative Guide to the Western States' Public Trust Doctrines: Public Values, Private Rights, and the Evolution Toward an Ecological Public Trust*, 37 *ECOLOGICAL L.Q.* 53, 61 (2010) [hereinafter Craig II]. How a state defines what is a navigable waterway will determine what bodies of water are subject to the public trust doctrine. *Id.* at 62. Many tests for navigability focus on whether a water way can be used for commerce. *Id.* at 65. Different definitions of navigability allow the public trust doctrine to be applied in states that do not have coastline or tidally influenced bodies of water. *See id.*

60. *See* Craig II, *supra* note 61, at 82.

61. Craig I, *supra* note 19, at 16-17. *See also, e.g.*, *Leydon v. Town of Greenwich*, 777 A.2d 552, 564 (Conn. 2001).

62. Craig I, *supra* note 19, at 17-18.

63. *Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc.*, 879 A.2d 112, 121 (N.J. 2005).

64. *Neptune City v. Avon*, 294 A.2d 47, 54-55 (N.J. 1972).

65. *Id.* at 54.

66. *Concord Mfg. Co. v. Robertson*, 25 A. 718, 721 (N.H. 1890).

67. In Delaware, the upland owner owns to the low-water mark. The public has an easement to fish and navigate. *Groves v. Dep't of Natural Res.*, No. 92A-10-003, 1994 WL 89804, at *5-6 (Del. Super. Ct. Feb. 8, 1994).

Massachusetts, a state that derives its intertidal land law from the same colonial ordinance as Maine, has public trust rights slightly more expansive than Maine's.⁶⁸

III. THE *MCGARVEY* CASE

To access the ocean from his property and operate commercial scuba diving tours, Bird and his clients walk across intertidal land owned by McGarvey.⁶⁹ McGarvey also alleged that Bird engaged in social activities on the intertidal land.⁷⁰ At no point during the scuba dives did Bird or his clients use a boat, or engage in any activities that could be construed as fishing or fowling.⁷¹ In November of 2008, McGarvey sought a determination that Bird had no right to cross his intertidal land, asserting that Bird's actions did not fall within the scope of the public's easement within the intertidal zone.⁷² Bird counterclaimed, seeking a declaration that his uses were lawful.⁷³ He argued that the scope of the public's easement encompassed scuba diving, because scuba diving falls within the meaning of "navigation."⁷⁴

In January of 2010, the Washington County Superior Court granted a summary judgment in favor of Bird.⁷⁵ The court declared that crossing intertidal land to scuba dive, for either recreational or commercial purposes, was within the scope of the public's right to navigate on intertidal land.⁷⁶ The court also determined that the social activities that Bird and his clients engaged in after scuba diving were not within the scope of the public's easement, and therefore constituted trespassing.⁷⁷ The court awarded McGarvey nominal damages of one dollar, plus interest.⁷⁸

IV. ANALYSIS

A. *The Law Court's Reasoning*

The *McGarvey* case presented a vehicle for the Law Court to reexamine their narrow holding in *Bell II* and the public's rights within the intertidal zone. On appeal, appellees Jonathan Bird and Steven Whittredge made only the narrow argument that scuba diving falls under the definition of "navigation" as defined by the colonial ordinance.⁷⁹ The Court unanimously accepted the argument that crossing the intertidal zone to scuba dive was a permissible use by the public, but was split on whether to affirm the lower court by accepting the argument put forth

68. *Anderson v. De Vries*, 93 N.E.2d 251, 255-56 (Mass. 1950). The Massachusetts Judicial Supreme Court has wavered in its interpretation of the Colonial Ordinance. Although it has refused to recognize a general recreational easement, it has recognized a right of the public to bath or swim. *Id.*

69. *McGarvey*, 2011 ME 97, ¶¶ 4-5, 28 A.3d 620 (Saufley, C.J., concurring).

70. *Id.* ¶ 6.

71. *Id.*

72. *Id.*

73. *Id.*

74. Brief of Appellee at 1, *McGarvey*, 2011 ME 97, 28 A.3d 620 (No. Was-10-83).

75. *McGarvey*, 2011 ME 97, ¶ 7, 28 A.3d 620 (Saufley, C.J., concurring).

76. *Id.*

77. *Id.*

78. *Id.*

79. Brief of Appellee, *supra* note 74, at 1.

by several amici, i.e., the Surfrider foundation, the State of Maine and Professor O.E. Delogu, that *Bell II* should be reexamined and that the public's rights in the intertidal zone should be expanded beyond the narrowly defined "fishing, fowling, and navigation only" easement fashioned in *Bell II*.⁸⁰

In her separate opinion, Chief Justice Saufley accepted this argument, but fell short of the necessary votes to make a more meaningful change in Maine's intertidal land law.⁸¹ In affirming the lower court and finding that the public has a right to walk across the intertidal zone to scuba dive, the Saufley opinion went beyond the Appellee's argument that scuba diving could be shoehorned into the definition of navigation.⁸² Chief Justice Saufley found instead that Maine's public trust doctrine reaches back to Lord Hale's treatise,⁸³ and includes the public right to walk across intertidal land and engage in water related recreation activities.⁸⁴ This argument, if adopted by the majority of the Court, would expand *Bell II*'s reasoning and the public's rights in the intertidal zone beyond the traditional uses of "fishing, fowling, and navigation."

To support the argument that Maine's public trust doctrine includes this additional right, the Saufley opinion looks back in time before *Bell II*, and acknowledges that the limiting language we rely upon today to define the public's rights in the intertidal zone did not arise from the language of the Ordinance, or Law Court precedent prior to *Bell II*, but from the *Bell II* decision itself.⁸⁵ Chief Justice Saufley's opinion refused to confirm the fixed and narrow interpretation of the Ordinance in *Bell II*, recognizing how impracticable it would be if the public's use of the intertidal zone was forever "so severely limited that only a person with a fishing rod, a gun, or a boat could walk upon that land."⁸⁶ Instead, the Saufley opinion argued that the common law must be allowed to evolve to "reflect the realities of a changing world,"⁸⁷ rejecting the argument made by amici Thaxter and the Justice Levy, that *stare decisis* prohibits the Law Court from expanding on the limited uses defined in *Bell II*.⁸⁸

Justice Levy's separate opinion inexplicably stood by the holding of *Bell II*, refusing to expand on the permitted public uses in the intertidal zone as defined in that case.⁸⁹ The Levy opinion accepted the appellee's argument that scuba diving should be included in the definition of "navigation," but refused to accept the argument put forth by the State, Delogu, and by Chief Justice Saufley, that the public's rights in the intertidal zone should be expanded beyond those examples set forth in the Ordinance.⁹⁰

80. *McGarvey*, 2011 ME 97, ¶ 48, 28 A.3d 620 (Saufley, C.J., concurring).

81. *Id.* ¶ 53.

82. *Id.*

83. *Id.* ¶ 36.

84. *Id.* ¶ 58.

85. *Id.* ¶ 56.

86. *Id.* ¶ 55.

87. *Id.* ¶ 9.

88. *Id.* ¶ 63 (Levy, J., concurring).

89. *Id.* ¶ 59.

90. *Id.* ¶ 78.

The Levy opinion focused on a number of different principles in its reasoning, but relied most heavily on *stare decisis*.⁹¹ In rejecting the proposition that the public's rights in the intertidal zone should be expanded upon, it stressed that the principles of *stare decisis* and respect for legal precedent lend stability to the law and enable "the public to place reasonable reliance on judicial decisions affecting important matters."⁹² It noted that these principles are especially important when a decision concerns "the stability of the legal concepts of property in the State."⁹³

The Levy opinion argued further that *Bell II* did not represent a change in Maine's intertidal land law. It contended that *Bell II* was not the first Law Court decision to limit the public's right in the intertidal zone to fishing, fowling, and navigation and that these basic rights have been the only permitted public trust rights throughout Maine's history due to the limiting nature of the Ordinance.⁹⁴ It concluded that because of the uniform precedent, the principles of *stare decisis* firmly applied, and no justification existed to reexamine *Bell II*.⁹⁵ Accordingly, the Levy opinion went on to note that expanding the public's rights within the intertidal zone would result in an unconstitutional taking of private upland owners' property.⁹⁶

Instead of affirming the lower court by including scuba diving as a permitted public trust use alongside fishing, fowling, and navigation, the Levy opinion turned to the language of *Bell II* that limits the scope of the public's easement to fishing, fowling, and navigation, but requires that these terms should be given a generous interpretation.⁹⁷ Relying on this language, Justice Levy found that scuba diving falls within the meaning of "navigation."⁹⁸ Although scuba diving is arguably a complicated form of bathing (a prohibited use),⁹⁹ the Levy opinion distinguished scuba diving from basic bathing.¹⁰⁰ To accomplish this, it turned to a 1907 decision of the Massachusetts Supreme Court that defined navigation as "passing freely over and through the water without the use of any of the land underneath."¹⁰¹ The Levy opinion reasoned that scuba diving is not bathing because it involves "passing freely over and through the water without any use of the land underneath," has qualities of navigation, and requires complicated equipment and the use of underwater navigational aids such as watches, depth gauges and compasses.¹⁰² Finally, the Levy opinion found that because the public has a right to walk across privately held intertidal land to engage in "navigation," crossing over the intertidal

91. *Id.* ¶ 63.

92. *Id.*

93. *Id.* ¶ 65 (quoting *Bell I*, 510 A.2d 509, 518 (Me. 1986)).

94. *Id.*

95. *Id.* ¶ 66.

96. *Id.* ¶ 65.

97. *Id.* ¶ 65.

98. *Id.* ¶ 77.

99. Because *Bell II* makes it clear that "bathing" is not a permitted use, if scuba diving falls within the definition of "bathing" instead of "navigation," it would not be considered within the public's rights in the intertidal zone. *Bell II*, 557 A.2d 168, 174 (Me. 1989).

100. *McGarvey*, 2011 ME 97, ¶ 75, 28 A.3d 620 (Levy, J., concurring).

101. *Id.* ¶ 73 (quoting *Butler v. Attorney Gen.*, 80 N.E. 688, 689 (Mass. 1967)).

102. *Id.* ¶ 75 (quoting *Butler*, 80 N.E. at 689).

zone to scuba dive is within the scope of the public's easement in the intertidal zone.¹⁰³

In sum, although both separate opinions affirmed the lower court, they took different routes to achieve this result. One, Chief Justice Saufley's, leaves the door open to the possibility that the public's rights in the intertidal zone will not forever be defined by the limiting holding of *Bell II*. The other, Justice Levy's, accepts the limiting language of *Bell II* that constrains the public's rights to those uses enumerated in the 1647 Colonial Ordinance.

B. Critique and Impact

In this writer's view, the Law Court should no longer rely upon the precedent set forth in *Bell II* and the limiting language that arose from that case to define the public's rights within the intertidal zone. The Court cannot forever interpret the term "navigation" to encompass new uses. While the Saufley separate opinion attempts to modernize Maine's public trust doctrine and break free from the narrow holding of *Bell II*, the Levy separate opinion strictly adheres to *Bell II* and reads into the Ordinance artificial language not found in its text. It refuses to allow the public's easement to evolve to serve the purpose for which it was granted, fails to recognize that the *Myrick* criteria for overriding *stare decisis* have been met, and continues to apply *stare decisis* blindly.

1. The Ordinance Does Not Limit the Public's Uses of Intertidal Land to Fishing, Fowling, and Navigation

If the wording of the Ordinance continues to define property boundaries at the high and low water marks and the public's rights in the intertidal zone covering Maine's almost 3500 miles of coastline,¹⁰⁴ its language should be subject to scrutiny. The Law Court's interpretation in *Bell II* should not forever define the public's rights in the intertidal zone. The Ordinance itself uses the terms "fishing, fowling, and navigation" as examples of public uses within the intertidal zone common to the mid-1600s,¹⁰⁵ there is no indication that these terms were intended henceforth to be exhaustive of all public uses.¹⁰⁶ If the holding of *Bell II* is ignored and the language of the Ordinance examined, no limiting language is found. The Ordinance reads as follows:

Everie Inhabitant who is an Hou[se]-holder [s]hall have free fi[s]hing and fowling, in any great Ponds, Bayes, Coves and Rivers [s]o far as the Sea ebs and flows, within the precincts of the town where they dwell, unles[s] the Free-men of the [s]ame town, or the General Court have otherwise

103. *Id.* ¶ 77.

104. 1995 ALMANAC 495 (48th ed. 1995).

105. This is consistent with the proper rules of statutory construction. See Orlando E. Delogu, *Friend of the Court: An Array of Arguments to Urge Reconsideration of the Moody Beach Cases and Expand Public Use Rights in Maine's Intertidal Zone*, 16 OCEAN & COASTAL L.J. 47, 93 (2010).

106. Historically, the Colonial Ordinance had never been treated as permanently defining the public's right to the intertidal zone. *McGarvey*, 2011 ME 97, ¶ 38, 28 A.3d 620 (Saufley, C.J., concurring). The words "only" and "delimit" are not found in prior Maine case law dealing with public use of intertidal land, they are fashioned out of whole cloth by the *Bell II* court. See Delogu, *supra* note 105, at 93.

appropriated them. Provided that no town [s]hall appropriate to any particular per[s]on or per[s]ons, any great pond containing more th[a]n ten acres of land: and that no man [s]hall come upon anothers proprietie without their leave otherwi[s]e then as hereafter expre[ss]ed; the which clearly to determin, it is declared that in all creeks, coves and other places, about and upon falt water where the Sea ebs and flows, the Proprietor of the land adjo[i]ning [s]hall have proprietie to the low water mark where the Sea doth not ebb above a hundred rods, and not more wherefoeever it ebs farther. Provided that [s]uch Proprieto[r]; [s]hall not by this libertie have power to [s]top of hinder the passage of boats or other ve[ss]els in, or through any [s]ea creeks, or coves to other mens hou[s]es or lands. And fore great Ponds lying in common though within the bounds of [s]ome town, it [s]hall be free for any man to fi[s]h and fowl there, and may pa[ss] and repa[ss] on foot through any mans proprietie for that end, [s]o they tre[s]pa[ss] not upon any mans corn or meadow.¹⁰⁷

The word “only,” is absent from the Ordinance. It did not surface in Maine’s public trust doctrine jurisprudence until the narrow judicial construction in *Bell II*.¹⁰⁸ Law Court cases prior to *Bell II* recognized the lack of limiting language and showed a willingness to stray from the language of the Ordinance; no case treated the language of the Ordinance as “permanently defining” or limiting the public’s rights.¹⁰⁹ In 1882, the Law Court expressly stated that it would not be bound by the literal uses put forth by the Ordinance.¹¹⁰ This sentiment prevailed prior to *Bell II*, as permitted public trust uses evolved to reflect changes in society and technology that resulted in different public needs within the intertidal zone.¹¹¹ Those cases acknowledge that the *jus publicum* represents public rights that are not static, but that evolve and change with time.¹¹² Only in *Bell II* did the Law Court interpret the Ordinance to constrain the public’s rights to those uses enumerated in the Ordinance.¹¹³

107. THE BOOK OF THE GENERAL LAUUS AND LIBERTYES CONCERNING THE INHABITANTS OF THE MASSACHUSETTS, *supra* note 11, at 35.

108. Delogu, *supra* note 105, at 93. See also *Eaton v. Town of Wells*, 2000 ME 176, ¶ 51, 760 A.2d 232 (Saufley, C.J., concurring) (“By our unduly narrow judicial construction of the time-honored public trust doctrine, our holding in [*Bell II*] restricted the public’s right to peaceful enjoyment of one of this state’s major resources, the intertidal zones.”).

109. *McGarvey*, 2011 ME 97, ¶ 38, 28 A.3d 620 (Saufley, C.J., concurring).

110. *Barrows v. McDermott*, 73 Me. 441 (1882) (“[i]t is clear that the courts in Maine have adopted a rule in relation to the flats which is peculiar to our jurisdiction, showing that we are not bound by the literal expression of the ordinance, even as a common law rule.”).

111. See, e.g., *French v. Camp*, 18 Me. 433, 434 (1841) (travel permitted on frozen intertidal zone); *Marshall v. Walker*, 93 Me. 532, 536, 45 A. 497, 498 (1900) (“[The public] may sail over [the intertidal zone], may moor their craft upon them, may allow their vessels to rest upon the soil when bare, may land and walk upon them.”).

112. See Delogu, *supra* note 105, at 96 (“The [concept of the public trust doctrine] has never been a static one. Public uses of critical, unique intertidal lands have continuously changed over time; they must continue to do so. *Bell II* has the effect of freezing the public use rights at a point in time nearly 350 years ago.”).

113. *Id.*

2. *The Public's Easement Should Evolve to Serve the Purpose for which it Was Granted*

If the public's rights within the intertidal zone are defined as an easement, the Law Court should allow the easement's scope to evolve to serve the purpose for which it was granted. Maine property law has long recognized that easements should be construed to permit uses other than those originally reserved by the grantor, as long as the new uses are consistent with the purpose for which the easement was originally granted.¹¹⁴ In *Guild v. Himen*, the Law Court stated that: "The use of an easement 'may vary from time to time with what is necessary to constitute full enjoyment of the premises,' and an express easement may accommodate modern developments. Any change in use however must be consistent with the purpose for which the easement was originally granted."¹¹⁵ If it is accepted that the Ordinance was a grant, then the purpose of the easement reserved for the public to fish, fowl and navigate was to preserve the public trust doctrine, protect the *jus publicum*, and the public's right to use intertidal land and access the shoreline in the wake of the upland owner's newly acquired property rights.¹¹⁶ Fishing, fowling, and navigation were the common public uses in the intertidal zone at the time the easement was created, not the purpose for which the easement was granted.¹¹⁷

Before *Bell II*, the Law Court facilitated the evolution of the public's easement, permitting uses besides those included in the language of the Ordinance.¹¹⁸ Only in *Bell II* did the Law Court narrow the scope of the public's easement to only include the uses enumerated in 1647.¹¹⁹ If this limited and incorrect interpretation of the public's easement is forever accepted by Maine's courts, it will eventually result in a contraction in the scope of the public's easement within the intertidal zone. When there are no fish or fowl left, or their exploitation is no longer permitted, the public's access to the intertidal zone will be limited to navigation or a derivative thereof that has been allowed by the Court. At this point it will be the public, not the private landowner, that will suffer a loss of property rights.¹²⁰ The public should be allowed to enjoy the use of its easement for the purpose for which it was granted: use of the intertidal zone, access to the ocean, and preservation of the *jus publicum*.

114. See *Stevens v. Anderson*, 393 A.2d 158, 159 (Me. 1978) (holding that an easement that originally reserved the right to pass across a lot of land for "cattle teams and foot passengers" should be construed to include motor vehicles).

115. *Guild v. Hinman*, 1997 ME 120, ¶ 6, 695 A.2d 1190 (quoting *Willband v. Knox Cnty. Grain Co.*, 128 Me. 62, 71, 145 A. 405, 409 (1929)); *Stevens v. Anderson*, 393 A.2d 158, 159 (Me. 1978).

116. Delogu, *supra* note 105, at 93.

117. *Id.*

118. *Bell II*, 557 A.2d 168, 187-89 (Me. 1989) (Wathen, J., dissenting).

119. *Eaton v. Town of Wells*, 2000 ME 176, ¶ 51, 760 A.2d 232 (Saufley, J., concurring).

120. Justice Levy argues that allowing the scope of the public's easement to evolve will cause upland owners to suffer a taking. See discussion *infra* Part.IV.B.3.

3. *Allowing the Scope of the Public's Easement to Evolve Will Not Result in an Unconstitutional Taking*

The Levy opinion, guided by *Bell II*, argues that if the scope of the public's easement is expanded beyond the traditional uses of fishing, fowling, and navigation, there will be an unconstitutional taking of private property, regardless of whether the change comes from the legislature or the judiciary.¹²¹ This argument is based on the premise that allowing the public's easement in the intertidal zone to evolve beyond its original scope will burden the upland landowner's servient estate and therefore result in a taking.¹²² It overlooks the principles of Maine property law put forth in the section above.¹²³ If the public's easement evolves to encompass new uses that serve the original purpose of the easement, this change will not result in a transfer of property rights and therefore will not burden the upland owner's servient estate.¹²⁴ The public's easement in the intertidal zone was established to protect the *jus publicum*, the public's right to access the intertidal zone and the shoreline. Allowing an easement to evolve to serve this purpose will not be considered a taking of property.

4. *Stare Decisis Should Not Prevent the Law Court from Re-examining Bell II*

Contrary to the dogmatic application of *stare decisis* in the Levy opinion, the Law Court is not prevented from re-examining *Bell II*. Though the Law Court has stressed the need for the "uniformity and certainty" that *stare decisis* provides, it has also recognized the dangers that arise from the blind application of bad or incorrect law.¹²⁵ The Law Court has acknowledged that there are circumstances in which it is appropriate for the Court to set the doctrine aside.¹²⁶ In *Myrick v. James*,¹²⁷ the Law Court laid out a five-factor test to determine when it is appropriate to reconsider the holding of a previous decision.¹²⁸ The factors are as follows:

- (1) [T]he court is convinced that the rule of the prior decision operates harshly, unjustly and erratically to produce, in its case-by-case application, results that are not consonant with prevailing, well-established conceptions of fundamental fairness and rationally-based justice, (2) that

121. *McGarvey*, 2011 ME 97, ¶ 65, 28 A.3d 620 (Levy, J., concurring).

122. *See Bell II*, 557 A.2d at 176-77.

123. *See discussion supra* Part IV.B.2.

124. *Guild v. Hinman*, 1997 ME 120, ¶ 6, 695 A.2d 1190.

125. *Adams v. Buffalo Forge Co.*, 443 A.2d 932, 935 (Me. 1982).

126. *Id.* The doctrine, however, "is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience." *Id.* (quoting *Helvering v. Hallock*, 309 U.S. 106, 119 (1940))

127. 444 A.2d 987 (Me. 1982).

128. We have repeatedly held that the doctrine of *stare decisis* is not an inflexible rule requiring this court to blindly follow precedents and adhere to prior decisions and that when it appears that public policy and social needs require a departure from prior decisions, it is our duty as a court of last resort to overrule those decisions and establish a rule consonant with our present day concepts of right and justice.

Id. at 998 (quoting *Molitor v. Kaneland Cmty. Unit Dist. No. 302*, 163 N.E.2d 89, 96 (Ill. 1959)).

conviction is buttressed by more than the commitment of the individual justices to their mere personal policy preferences, that is, by the substantial erosion of the concepts and authorities upon which the former rule is founded and that erosion is exemplified by disapproval of those conceptions and authorities “in the better-considered recent cases and in authoritative scholarly writings,” (3) the former rule is the creation of the court itself in the legitimate performance of its function in filling the interstices of statutory language by interpretation and construction of vague, indefinite and generic statutory terms, (4) the Legislature has not, subsequent to the court’s articulation of the former rule, established by its own definitive and legitimate pronouncement either specific acceptance, rejection or revision of the former rule as articulated by the court, and (5) the court can avoid the most severe impact of an overruling decision upon reliance interests that may have come into being during the existence of the former rule by creatively shaping the temporal effect of the new rule articulated by the holding of the overruling case.¹²⁹

Applying the factors to *Bell II*, it becomes clear that all the requirements have been met.¹³⁰ The Levy opinion seems to ignore these facts.

By limiting the public’s easement to “fishing, fowling, and navigation only,” the *Bell II* court attempted to settle and clarify the public’s rights in the intertidal zone, but its effect was to stifle the evolution of Maine’s intertidal land law. The result is a precedent that will continue to produce unfair and erratic results for the public attempting to make use of Maine’s intertidal zone and shoreline. To determine whether a use or activity is within the scope of the public’s easement under *Bell II*, a Maine court must either attempt to “shoehorn” that use into one of the above terms or conclude that the use is impermissible. As evidenced by the *McGarvey* case, future litigation will turn on the meaning of “navigation,” and the Law Court will have to draw arbitrary lines with certain uses falling within the definition of “navigation” while others are excluded. In *McGarvey*, the Levy opinion reasoned that scuba diving falls under the definition of navigation.¹³¹ While this may be accurate, the framework used to determine this outcome is primitive. If this is how future challenged uses are analyzed, the results will indeed be erratic at best, or worse, will unduly narrow public use of intertidal lands.

The argument that the narrow holding of *Bell II* will lead to unpredictable and unfair litigation, although most frequently voiced by Chief Justice Saufley,¹³² has

129. *Id.* at 1000.

130. Additionally, Chief Justice Saufley has argued that all the *Myrick* factors have been met. *Eaton v. Town of Wells*, 2000 ME 176, ¶ 54 n.9, 760 A.2d 232 (Saufley, J., concurring).

131. *McGarvey*, 2011 ME 97, ¶ 76, 28 A.3d 620 (Levy, J., concurring). The Levy separate opinion distinguishes scuba diving from the Massachusetts Supreme Court’s definition of bathing (an impermissible use) in *Butler v. Attorney Gen.*, 80 N.E. 688, 689 (1907), by noting that scuba diving involves “passing freely over and through the water without any use of the land underneath.” *McGarvey*, 2011 ME 97, ¶ 74, 28 A.3d 620. The opinion also notes that “as a matter of function” scuba diving has qualities of navigation because it is only possible with the external apparatus such as breathing gas regulators, swim fins, weight belts, and buoyancy compensators. *Id.* ¶ 75.

132. In addition to the Saufley separate opinion in *McGarvey*, see Justice Saufley’s concurrence in *Eaton*, 2000 ME 176, ¶ 52, 760 A.2d 232 (Saufley, J., concurring) (“[E]ach time that the public and a private land owner clash over the scope of allowed recreational use of intertidal zones, the resolution will be uncertain.”).

been raised extensively by other Law Court justices and commentators. Justice Wathen raised the same points relied on by the Saufley opinion in this case during his passionate dissent in *Bell II*.¹³³ In his dissent, he argued that the holding of *Bell II* was a drastic change in precedent that would result in unfair and arbitrary outcomes for litigants.¹³⁴ Justice Wathen reasoned that the public's rights in the intertidal zone are not static, and should be flexible like any easement.¹³⁵ He also noted the impracticality of adopting bright line rules in this area of the law,¹³⁶ criticizing the *Bell II* holding as creating "absurd and easily thwarted distinctions between permissible and impermissible activities."¹³⁷ Justice Wathen wrote for three members of the Court.¹³⁸

Following Justice Wathen's dissent in *Bell II*, many commentators have likewise urged the Law Court to re-examine the narrow holding of *Bell II*.¹³⁹ The arguments of most commentators criticize the narrow holding of the case, and frame it as an outlier that incorrectly interprets the Ordinance to the detriment of the public's rights.¹⁴⁰ Joining these commentators has been the State of Maine, who at every opportunity has urged the Law Court to reconsider the holding of *Bell II*.¹⁴¹

The limiting language in *Bell II* is clearly a result of statutory interpretation. The Court drew from a 350-year old ordinance full of vague and ambiguous statutory language when it limited the public's rights in the intertidal zone to fishing, fowling, and navigation.¹⁴² As stated above, the Ordinance does not include language that would limit the public's rights in the intertidal zone to these

133. *Bell II*, 557 A.2d 168, 180-81 (1989) (Wathen, J., dissenting).

134. *See id.* at 188-89.

135. *Id.*

136. *Id.* at 189 ("I would not attempt to provide a comprehensive definition of the recreational activities that could fall within the common law rights of the public.")

137. *Id.* Justice Wathen quoted *Maine Law Review's* discussion of how the narrow holding of *Bell II* would create unjust results:

[A] narrow view would recognize the right to picnic in a rowboat while resting on the foreshore but brand as a trespass the same activities performed while sitting on a blanket spread on the foreshore. The narrow view taken by the Massachusetts court does not exclude the public from walking on the foreshore as it purports; it merely requires that a person desiring to stroll along the foreshores of that state take with him a fishing line or net. In keeping with the apparent purpose of the Colony Ordinance and its past decisions, the Maine Supreme Judicial Court can refuse to draw such a delicate distinction between the rights expressly reserved in the ordinance and similar recreational activities. With such a refusal the court will avoid the anomalous result of declaring the same man a trespasser for bathing, who was no trespasser when up to his knees or neck in water, in search of a lobster, a crab, or a shrimp.

Jeffrey D. Curtis, *Coastal Recreation: Legal Methods for Securing Public Rights in the Seashore*, 33 ME. L. REV. 69, 83 (1981) (internal quotations omitted).

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

139. *See, e.g.*, Delogu, *supra* note 105, at 96-97; Orlando E. Delogu, *Recent Developments: Eaton v. Town of Wells: A Critical Comment*, 6 OCEAN & COASTAL L.J. 225, 228 (2001); Robert George, *The "Public Access Doctrine": Our Constitutional Right to Sun, Surf, and Sand*, 11 OCEAN AND COASTAL L.J. 73, 82 (2005).

140. *See* articles cited *supra* note 139.

141. *See, e.g.*, Brief for the State of Maine as Amici Curiae Supporting Appellee, *McGarvey*, 2011 ME 97, 28 A.3d 620 (No. Was-10-83).

142. *Bell II*, 557 A.2d 168.

three uses. The word “only” did not appear in Maine’s public trust jurisprudence until the *Bell II* decision.¹⁴³

Finally, Justice Levy’s argument that if the Law Court revisits *Bell II* property rights reliance interests will be upset, is simply incorrect. Upland owners’ title to intertidal land has always been subject to a public easement.¹⁴⁴ If the public’s easement evolves to serve its original purpose, no taking arises because the property rights of upland property owners will not be infringed upon.¹⁴⁵ The public’s easement was created to protect the *jus publicum*, a property right that changes with time.¹⁴⁶ The Law Court can assure that it will not adversely affect reliance interests by only adopting uses that serve the purpose of the public easement, and the *jus publicum*, when it reexamines *Bell II*. Additionally, only twenty-two years have passed since *Bell II* was decided. Because of this relatively short time period, modifying *Bell II* will not upset a long line of precedent or upland owner expectations.¹⁴⁷

V. CONCLUSION

Although scuba diving is now expressly permitted, the public’s right to access and use the intertidal zone has changed little as neither Chief Justice Saufley nor Justice Levy managed to muster the necessary votes for a majority. *McGarvey* demonstrates that at least part of the Law Court is ready to expand Maine’s public trust doctrine beyond those uses envisioned in 1647 and the restrictive holding of *Bell II*. The Saufley separate opinion should be seen as a clear indication of this, while the Levy separate opinion is a reminder that part of the Court remains bound by the past, and *Bell II*’s errors.

If Chief Justice Saufley gets another vote next time the Law Court has the occasion to address the public’s rights within the intertidal zone, the public’s easement in Maine’s intertidal zone will likely include the right to engage in accepted recreational uses of the day. Until then, Maine’s public trust doctrine remains bound to the language of the past.

143. If the Ordinance were interpreted literally, rights to access the intertidal zone would be limited to those who own a house. The rights of homeowners would be limiting to fishing, fowling, and sailing. See THE BOOK OF THE GENERAL LAUUS AND LIBERTYES CONCERNING THE INHABITANTS OF THE MASSACHUSETTS, *supra* note 11, at 35.

144. *McGarvey*, 2011 ME 97, ¶ 9, 28 A.3d 620 (Saufley, C.J., concurring).

145. See discussion *supra* Parts IV.B.2, B.3.

146. Delogu, *supra* note 105, at 96.

147. See *Adams v. Buffalo Forge Co.*, 443 A.2d 932, 935 (Me. 1982).