STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Docket No. YOR-12-599

ROBERT F. ALMEDER, et al.,

Plaintiffs-Appellants

v.

TOWN OF KENNEBUNKPORT, et al,

Defendants-Appellees

On Appeal from Maine Superior Court
(York County)

BRIEF OF APPELLEE/CROSS-APPELLANT STATE OF MAINE

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INTRODUCTION

Once again, this Court is presented with the controversy over the application of the public trust doctrine to Maine's 3,500 mile long intertidal area. Just two years ago, in a 3-3 split, the Court approved of scuba diving as a public trust use to cross the intertidal zone but by two different paths. *McGarvey v. Whittredge,* 2011 ME 97. The *Saufley Opinion* would overturn the *Bell* decisions (*Bell v. Town of Wells,* 510 A.2d 509 (Me. 1986) ("*Bell* I"), and 557 A.2d 168 (Me. 1989) ("*Bell II*")), and, instead, apply a two-prong test: first, whether the disputed public use falls readily within the "fishing, fowling or navigation" descriptors, and, second, if not, whether "our common law has regularly accommodated the public's right to" engage in the disputed activity even where that activity does not fall within the three descriptors, such as for crossing the intertidal zone to reach the ocean. The *Levy Opinion* attempts to save the *Bell* decisions pursuant to the doctrine of *stare decisis* by giving them an extraordinarily generous reading, reasoning that scuba diving is "navigation." Commentators generally condemn the *Bell* decisions,[1] but Appellants boldly argue that *Bell II's* four-Justice majority opinion continues to control Maine's coastline. *Appellants' Br.,* 70-71. With these three approaches

[1] Benjamin Donahue, *McGarvey v. Whittredge: Continued Uncertainty in Maine's Intertidal Zone,* 64 Me. L. Rev. 593 (2012); Jose Fernandez, *Untwisting the Common Law: Public Trust and the Massachusetts Colonial Ordinance,* 62 Alb. L. Rev. 623 (1998); Orlando E. Delogu, *Intellectual Indifference-Intellectual Dishonesty, the Equal Footing Doctrine and the Maine Court,* 42 Me. L. Rev. 43 (1990); Alison Rieser, *Public Trust, Public Use and Just Compensation,* 42 Me. L. Rev. 5, 13-14, 28-30, 32-41 (1990); Mark Cheung, *Rethinking the History of the Seventeenth Century Colonial Ordinance: A Reinterpretation of an Ancient Statute,* 42 Me. L. Rev. 115 (1990); *but see* Sidney Thaxter, *Will Bell v. Town of Wells Be Eroded With Time?*, 57 Me. L. Rev. 117 (2005).

in play and the dispute spawned by *Bell* over public activities in the intertidal zone not going away, this area of the law clearly requires clarification *now*.

The development of the public trust doctrine in Maine is marked by split Law Court decisions with opposing opinions. It is true that one opinion stated quite clearly that the Colonial Ordinance "gave to the riparian proprietor, bounded by tide waters, the fee of the soil to low water mark … subject *only* to the express reservations specified in the Act." (Emphasis in original). The opposing opinion in that case did not embrace this view, instead stating: public trust uses are not lost "unless it be so clearly and fully expressed as to be incapable of any other reasonable construction." These opinions were written in *1854* in the case of *Moulton v. Libbey,* 37 Me. 472. And, the first opinion is the *dissent* of Justice Hathaway writing for himself, *id.* at 498, while the latter is the *majority* opinion of Chief Justice Shepley joined in by all of the other Justices, *id.* at 488. No Maine case undermined or questioned the majority or agreed with the minority in *Moulton* over the next 180+ years until the *Bell* decisions in the late 1980's. Indeed, the opposite is true – in 1973, this Court stated most clearly that there were public trust rights in addition to those noted in the Colonial Ordinance. *Blaney v. Rittal,* 312 A.2d 522, 528 n.7 (Me. 1973). The *1981 Opinion of the Justices,* 437 A.2d 597 (Me. 1981) ("*1981 Opinion*"), honored this precedent, and the State relied upon that *Opinion* in giving away public rights in many millions of dollars worth of filled coastal lands. Simply put, if *stare decisis* had been properly applied in the late 1980's,

we would not be here yet again, seeking to overturn *Bells'* wrong application of the public trust doctrine.

The State on behalf of the public, therefore, urges the Court to tackle the public trust issues before the others public use claims (*e.g.,* prescription) in order to provide clear guidance. The *Bell* decisions are fundamentally flawed from every perspective – historic, legal and common sense. It is in the public interest to address the public trust doctrine *now*.

BACKGROUND

The State incorporates by reference the procedural history, factual background and arguments in the briefs of the Town, the TMF parties and other intervenors. The State has created a record in this case of the variety of public trust activities and their impacts on the intertidal area. The State will provide more detail when discussing each of the public trust uses.

The Superior Court (Brennan, J.) took on the task of attempting to harmonize the Law Court's decisions on the public trust doctrine – *Bell* and the two opinions in *McGarvey*. (Appendix ("A.") 365-69). The court concluded:

> the public has the right to engage in, or cross over in order to engage in "ocean-based activities" which can be categorized as fishing, fowling or navigating in the intertidal zone. [*McGarvey,* 2011 Me 97, ¶¶ 51, 71.] This includes the right to cross the intertidal zone for such "ocean-based," water-borne activities as jet-skiing; water-skiing, knee-boarding or tubing; surfing; windsurfing; boogie boarding; rafting; tubing, paddleboarding; and snorkeling. This does not include swimming, bathing or wading; walking, picnicking or playing games in the intertidal zone.

(A.368-69). Appellants appealed, and the State cross-appealed to the extent the decision denied particular trust uses.

STATEMENT OF ISSUES

I. Whether the State is a proper party?

II. Whether the Court should address the public trust doctrine issues in the present case?

III. Whether *stare decisis* prevents overturning *Bell*?

IV. Whether the following common, transitory public activities in the intertidal zone are public trust uses:

> to engage in jet-skiing;
>
> to engage in water-skiing and similar activities;
>
> to engage in modern navigational activities with surfboards, windsurfboards, paddle boards, boogie boards, inflated tubes, rafts and other water-related devices;
>
> to engage in snorkeling activities;
>
> to engage in swimming and bathing activities as they actually have occurred and continue to occur in the intertidal zone;
>
> to walk (*i.e,* stroll) in the intertidal zone unrelated to any other activity;
>
> to wade in the intertidal zone;
>
> to play games in the intertidal zone; and
>
> to sit, walk, eat and stand as incidental to these and other recognized public trust uses?

SUMMARY OF ARGUMENT

The Law Court reviews the Superior Court's findings regarding the types of uses engaged in by the public for clear error and "will affirm those findings if there is competent evidence in the record to support them even though the

evidence could support alternative factual findings." *Eaton v. Town of Wells,* 2000 ME 176, ¶ 33, 760 A.2d 232. The Superior Court's conclusions insofar as the scope of the public trust doctrine are reviewed *de novo.*

The State is a proper party because it is the trustee of the public trust rights in the intertidal zone. One of the fundamental errors in *Bell I*, which is the foundation for *Bell II*, was the conclusion that the State was not the trustee. This Court should take the opportunity, afforded by Appellants' argument that the State should not even be allowed in this litigation, to overturn *Bell I* on this point, and thereby secure the benefits of the Filled Lands Act. Otherwise, the cloud over the titles of many coastal property owners, including the entire Portland waterfront, will be dark indeed.

All six Justices in *McGarvey* adopted use-by-use analyses regarding the public trust doctrine as applied to the intertidal zone. 2011 ME 97, ¶¶ 10-11, 72. The public's actual use is evidence of the evolution of public trust uses which all Justices in *McGarvey* found to be a viable process. *Id.* at ¶¶ 56, 68.

The Court should resolve the public trust issue before the other issues for several obvious reasons. The *1981 Opinion,* the *Bell* decisions and the two opinions in *McGarvey* have created substantial confusion regarding the application of the public trust doctrine to the intertidal zone and the status of public rights under the Filled Lands Act. The present state of the Court's opinions will foster more conflict along Maine's storied oceanfront. This Court should provide clear guidance to the public and the oceanfront property owners. Failure to do so as in *Eaton,* is simply "kicking the can down the

intertidal zone." And worse, delay in revisiting the issues has been the tactic of the small minority of beachfront owners who seek to create private recreational parks for themselves – the longer the delay is, the stronger they believe their arguments become based upon the doctrines of *stare decisis* and judicial takings. In the present context, neither doctrine prevents this Court from clarifying this area of the law.

The doctrine of *stare decisis* does not present a bar to this Court's full consideration of the public trust issues. It is the *Bell* decisions that represent a dramatic departure from the long line of decisions and opinions that preceded them. Consideration of all of the identified factors to overcome *stare decisis* fully supports rejection of the *Bell* decisions as recent anomalies that were founded upon unsupported historical and legal theories which ignore clear statements by the Court prior to *Bell*.

Regarding the merits, the restrictive approach adopted in the *Bell* decisions for the first time in Maine must be rejected because it is unsupported at every level. The public trust doctrine's introduction into and evolution in Maine have been a function of the common law – the recognition by the courts of the state of a particular aspect of society as gleaned from the actions and acceptance of the public itself. Although the fabled Colonial Ordinance is part of that evolution, it is not and never has been the defining document in Maine until the *Bell* decisions and, upon accurate examination, stands as an exception to the doctrine. After all, the only reason for the Ordinance's "giveaway" of the fee in the intertidal zone was to foster private development of

wharves – not to create private parks along Maine's coastline. Before the *Bell* decisions, the Law Court recognized that narrow purpose for the upland owners' rights in the intertidal zone, and generally agreed that transitory public activities were within the public trust.

For the first time in *Bell I*, and in clear contravention of prior Maine case law, the Court read the Colonial Ordinance as a deed to be read strictly *against* the public, swept aside every accepted and applicable rule regarding preservation of public trust rights, and did so based upon a novel misreading of history. The *Bell II* majority and the *Levy Opinion* rest their adherence to the "fishing, fowling or navigation" descriptors in large part upon the argument that no prior Maine cases tackled directly public uses such as swimming, walking and wading in the intertidal zones before the 1980s (which is incorrect at least for walking). A *nondecision* is not binding precedent. It is more likely that no cases were litigated because these activities were accepted public uses.

Moreover, to the extent certain public uses, such as swimming, were not specifically litigated prior to the late 1980's in Maine does not resolve the issue – the nature of the public trust rights is determined by the evolution of our society. A review of the history and case law in Maine, and applying common sense, demands approval of transitory public uses such as walking, wading and swimming. This comports with Maine common law and common sense – the cornerstones of the public trust doctrine.

The State's brief, while continuing the effort to overturn the *Bell* decisions, will apply the approaches of both the *Saufley* and *Levy Opinions* to the particular public uses at issue here. Under each of those approaches, the varied transitory activities in dispute should be confirmed as public trust uses.

ARGUMENT

I. THE STATE OF MAINE IS THE TRUSTEE OF THE PUBLIC TRUST RIGHTS IN THE INTERTIDAL ZONE.

Appellants argue that the State should not be allowed in this lawsuit to determine the scope and extent of the public's trust rights in the intertidal zone. *Appellants' Br.,* 67-70. Appellants are wrong.

In light of *Cushing v. State of Maine,* 434 A.2d 486 (Me. 1981), the Superior Court in *Bell* initially dismissed the complaint as barred by sovereign immunity. On appeal, instead of holding that sovereign immunity did not bar disputes with the State over property rights, as it later did in *Welch v. State,* 2004 ME 84, 853 A.2d 214, the Law Court embarked on an unprecedented, largely *sua sponte* journey, revising both history and the universally understood nature of the public trust doctrine.

The Maine courts (indeed, all American courts) before *Bell I* recognized that the *jus publicum* in the intertidal zone is held for the benefit of the public by the sovereign.[2] Without a doubt, the *Bell* decisions linked Maine, for the first time, to the Massachusetts decision of *Butler v. Attorney General,* 80 N.E. 688 (Mass. 1907). The title of that decision makes it plain that the state,

[2] *See e.g. Appleby v. City of New York,* 271 U.S. 364, 381 (1926); *1981 Opinion,* 437 A.2d at 605; *State v. Leavitt,* 105 Me. 76, 78-79 (1909).

through its Attorney General, is a proper participant in a dispute over public trust rights in the intertidal zone. Stating the obvious, the Massachusetts court noted: "Questions arose at the hearing in regard to rights, claimed by owners of neighboring estates along the shore, and by the Attorney General *in behalf of the general public*, to use the beach …." *Id.* at 81-12 (emphasis added). *Bell I* dismissed the import of *Butler* on this point in a footnote, 510 A.2d at 519 n.20, even though *Butler* was a cornerstone of *Bell II's* decision on the merits, 557 A.2d at 175.[3]

The State discusses below, at pages 16-18, in some detail the radical departure from established case law and history of *Bell I's* reasoning that no one really knows who owned the intertidal zone in colonial times and therefore the strict rules against loss of public rights do not apply to the intertidal area. In addition, *Bell I* creates an enormous problem for coastal property owners. In the 1970's and early 1980's, public property rights came to the forefront. Inland, the public timber and grass rights in the so-called public lots – tracts of land in the unorganized areas of Maine – were reclaimed. *Cushing, supra.* As a result, Maine obtained money as well as recreational and timber lands.

Along the coast, due to issues in Portland Harbor, those who believed they owned filled-in portions of intertidal and submerged lands came to the Legislature seeking a release of all public rights therein. At the same time, a few upland owners were beginning to suggest that public recreational rights in the intertidal zone were limited. The Legislature passed "AN ACT to Clarify the

[3] In other words, under *Bell I* the Attorney General on behalf of the Commonwealth was not a proper party in *Butler,* but *Bell II* followed *Butler* on the merits.

Status of Certain Real Estate Titles in the State," also referred to as the "Filled Lands Act."[4] The legislation sought to release any public trust interest the State had in the *intertidal* and submerged lands that had been filled.

Before signing the bill and therefore conveying away public rights in many miles of intertidal and submerged lands, Governor Joseph E. Brennan sought an Opinion of the Justices asking whether such a release comported with the public trust doctrine, and for clarification of the nature of the public trust rights. *1981 Opinion,* 437 A.2d at 599-600. The Justices assumed that the statute "accomplishes the *release of the State's public trust rights* in any and all *intertidal* and submerged lands that were filled as of October 1, 1975." *Id.* at 605 (emphasis added). The Justices opined that the legislation needed to meet a "high and demanding" standard in order to allow the release by the Legislature of public trust rights in the intertidal and submerged lands, and that this legislation would not violate the public trust doctrine as subsumed within the Legislative Powers Clause. *Id.* at 607-10. In light of the *Opinion*, Governor Brennan signed the bill into law.[5] The Court specifically confirmed the *1981 Opinion's* conclusions in *James v. Inhabitants of Town of West Bath,* 437 A.2d 863, 865 n.5 (Me. 1981) ("The continued vitality of the public trust doctrine was recently reaffirmed in" the *1981 Opinion*). The Court explained: "A

[4] P.L. 1981, ch. 532, originally codified at 12 M.R.S. § 559, later recodified by P.L. 1997, ch. 678, § 13, at 12 M.R.S. § 1865.

[5] It remains at least uncertain whether the Governor would have signed the bill if the Justices had indicated that *Butler,* which was not even mentioned by the Justices, was to be followed in Maine, particularly in view of the manner in which the State was dealing with the rights in public lots in order to, *inter alia,* increase recreational opportunities in the interior of Maine.

consistent theme in the decisional law is the concept that Maine's tidal lands and resources ... are held by the State in a public trust for the people of the State." *Id.* at 865.

If the State is not the trustee of such rights in the intertidal zone, then quite simply the public trust rights therein could not have been released pursuant to the Filled Lands Act, and such rights still exist in the filled lands along Maine's coastline, including in particular the entire Portland waterfront.[6] In the *Levy Opinion,* much is made of the importance of *stare decisis* regarding property interests. The State and coastal property owners relied upon the law *prior* to *Bell I* in support of those releases. It is proper and necessary in order to secure land titles along Maine's coast for the Court to take the opportunity *now* to correct *Bell I's* error insofar, at the very least, that Maine is not the trustee.[7]

II. THE COURT SHOULD DECIDE THE PUBLIC TRUST ISSUES.

The Court should consider the public trust issues now, regardless of its conclusions on issues such as prescription, because the *Bell* decisions are

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[6] Also, we are left with the mystery of who exactly is the trustee. The suggestion in *Bell I* that the upland owner may be the trustee is absurd, as this litigation makes clear.

[7] Should the Court decide not to reach the "trustee" issue, the State is still a proper party in this matter. The issue here involves the scope of the *public* trust rights. Generally, the Attorney General represents the Maine public when its rights are at issue. *Lund ex rel. Wilbur v. Pratt,* 308 A.2d 554, 558 (Me. 1973); *see also Bell I*, 510 A.2d at 519.

wrong, there is now great uncertainty in Maine law, and the issue obviously will fester creating more disputes and litigation along Maine's coast.[8]

The *Bell* decisions have been criticized by Justices of the Law Court and Superior Court,[9] and generally condemned by commentators.[10] The difficulties and confusion created by the combination of the *Bell II* and the *McGarvey* opinions are manifest and demand clarification *now*, not decades down the road. What are the upland owners and public to do in the intertidal zone, and what are their lawyers to advise regarding the three different approaches of the *Bell II* majority, the *Saufley Opinion,* and the *Levy Opinion*? Clarification is necessary for the upland owners and the public.

There is no court rule which requires the Court to forego consideration of public trust issues now.[11] The Court has a choice of which of the several nonconstitutional issues to address first – it should be the public trust doctrine. We understand that the Court generally prefers to decide an appeal on the narrowest of the issues. Both opinions in *McGarvey* call for a use-by-use approach, and the State has attempted to litigate and present to this Court the primary uses in which the public engages in the intertidal zone. The public

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[8] At least two disputes are presently percolating – in Cumberland and Washington Counties.

[9] *McGarvey,* 2011 ME 97, ¶ 53; *Eaton,* 2000 ME 176, ¶¶ 50-55 (Saufley, J., concurring); *Flaherty v. Muther,* Cumb. Docket. No. RE-08-098, at 25-30 (July 30, 2008) (Crowley, J.), *rev'd on other grounds* 2011 ME 32.

[10] *See* note 1, *supra.*

[11] The policy that courts should address constitutional issues as a last resort, *Driggin v. Town of Wells*, 509 A.2d 1171, 1175 n.5 (Me. 1986), does not apply here because the public trust doctrine is not a constitutional issue – rather, it is a matter of the common law, just as are prescription and custom.

trust doctrine, therefore, is presented on a use-by-use basis, which is no more broad than the prescription or custom issues.

As we have seen, when disputes arise along Maine's coast between a minority of oceanfront property owners[12] and the public, a "kitchen sink" approach is taken where every imaginable argument, doctrine and theory is tendered. If the Court waits for another case to come before it where the *only* issue is the public trust doctrine, as was the situation in *McGarvey*, it is unlikely the Court would have the opportunity to consider the doctrine for another 22 years, or until 2035, the time it took between *Bell II* and *McGarvey.* There is no sound public or judicial policy supporting this delay.

From the time of the *Bell* decisions the State has attempted at every opportunity to have the courts revisit the public trust issue, including in *Eaton* just 10 years after *Bell II.* The *Bell* decisions have provoked, not resolved, dispute over public use of the intertidal area. *Bell* has spawned, not abated, litigation. At least four suits since, including this one, have been brought over these issues – *McGarvey, Eaton,* and *Flaherty v. Muther,* Cumb. Docket. No. RE-08-098 (July 30, 2008) (Crowley, J.), *rev'd on other grounds* 2011 ME 32. Others are likely.[13] *Bell* has emboldened a minority of upland owners who seek to exclude at their whim the public from the intertidal zone along the State's coastline. There would be more cases but for the cost.

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[12] Here, 33 out of 95 oceanfront owners along Goose Rocks Beach brought suit (*Appellants' Br.,* 3). In *Bell,* a mere 28 lot owners out of over 100 were plaintiffs. *Bell II,* 557 A.2d at 170.

[13] *See e.g.,* "Public response grows as Harpswell beach owner blocks access," The Forecaster (July 7, 2010), *available at* http://www.theforecaster.net/content/m-harp-cedarbeach-3.

Obviously, the continuing controversy created by *Bell* causes "huge" emotional, financial and psychological burdens on all sides, unfortunately creating tension between former friends.[14] A decision by the Law Court on the public trusts uses in this case will go a long way towards making further litigation unnecessary. There is no public policy supporting further postponement.

III. *STARE DECISIS* IS NOT A BARRIER TO GETTING IT RIGHT.

With due respect to those Justices of the *Levy Opinion,* the doctrine of *stare decisis* is not the insurmountable obstacle suggested therein. The State will not reiterate the extensive history of the public trust doctrine recounted in its brief filed in *McGarvey*.[15] "Whether [*stare decisis*] should be applied or avoided is a decision which rests in the discretion of the court" and "that discretion must be exercised with a view to whether adherence to past error or departure from precedent constitutes the greater evil to be suffered." *Adams v. Buffalo Forge Company*, 443 A.2d 932, 935 (Me. 1982); Cheung, *supra,* 42 Me. L. Rev. at 155-56. The five principles regarding application of *stare decisis* strongly support the overturn of *Bell*.

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[14] *E.g.,* Plaintiff Rice (A.693 at 28-29) (financially); Plaintiff Zagoren (A.748 at 249) (emotional burden); Plaintiff Eaton (A.762 at 39) (emotional and financial burden); Plaintiff Forrest (A.1953 at 439) (litigation created a lot of tension); Cohen (A.1164-65) (loss of friendship); Gustin (A.1818) (emotional burden); Pearce (A.1420); Driver (A.1482); *see also Flaherty v. Muther,* Cumb. Docket. No. RE-08-098, at 27, *supra* (huge).

[15] The State is not blind to the fact that one sitting Justice did not participate in the *McGarvey* decision. However, that Justice did participate in *Flaherty v. Muther* in which public trust issues were also raised, and therefore had the opportunity to consider these arguments as similarly set forth in the State's brief in that matter.

A. *Bell I and II* "harshly, unjustly [and] erratically" on many levels "produce, in [their] case-by-case application, results that are not consonant with prevailing, well-established conceptions of fundamental fairness and rationally-based justice." *Eaton,* 2000 ME 176, ¶ 54 n.9.

The State of Maine gave away public trust rights in the intertidal area and submerged lands in 1981 based upon the *1981 Opinion* and the caselaw in Maine that preceded it, such as *Moulton, Conant v. Jordan,* 107 Me. 227 (1910), and *Blaney*. Nowhere in the Maine pre-*Bell* case law can be found a holding or language suggesting that the public trust rights in the intertidal area are limited to fishing, fowling or navigation. Indeed, *Moulton* expressly rejected that view, and *Blaney* noted that there were rights in addition.

The *Bell* approach is: dismiss the *1981 Opinion* as non-binding (which is true in a precedential sense); *sua sponte* rewrite history by suggesting no one knew who owned the intertidal zone, in order to avoid entirely the normal rules regarding preservation of public trust rights; thereby read the Colonial Ordinance as a deed strictly in favor of the upland owner; and then suggest the resolution is for the people of the Maine to pay for recreational rights in the intertidal area by eminent domain. In other words, the public through its Legislature "gave away" many millions of dollars of rights in intertidal and submerged lands based upon the Justices' *1981* reading of the public trust doctrine, only to be told by the four-Justice *Bell II* majority in *1989* that the public should buy recreational rights in the intertidal zone based upon a rejection of the *1981 Opinion*. There is fundamental and unacceptable

unfairness in this extraordinary situation. The *Bell* cases are nothing but harsh, unjust and erratic.

Bell obviously has disrupted the Maine coast and causes litigation. The *Bell* construct requires a trial on prescription, dedication and/or custom at every spot along Maine's 3,500 mile coastline where members of the public may want to walk or sit unrelated to fishing, fowling or navigation in the intertidal zone – unless purchased by the public.

B. The reasons to overturn *Bell I* and *Bell II* are supported "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...." *Eaton,* 2000 ME 176, ¶ 54 n.9.

This principle focuses on the critical role of the Court and its Justices in the evolution of society. The *Bell* decisions stand out as anomalous at every level, at odds with historical reality and the sum of the case law that preceded them. Prior to *Bell I,* the universally accepted view of legal history was that the sovereign, be it the Crown or colony, owned the intertidal zone.[16] Therefore, any attempted conveyance of interests therein had to be for a public purpose

[16] *United States v. Grand River Dam Authority,* 363 U.S. 226, 236 (1960); *Appleby v. City of New York,* 271 U.S. 364, 381 (1926); *Illinois Central R. Co. v. Illinois,* 146 U.S. 387 (1892); *United States v. Oregon,* 295 U.S. 1, 14 (1935); *Martin v. Waddell* , 41 U.S. 367, 411 (1842); *Charles River Bridge v. Warren Bridge,* 36 U.S. 420, 544-46 (1837); *Bell II,* 557 A.2d at 181-83 (dissent); *1981 Opinion,* 437 A.2d at 605; *Cushing v. State,* 434 A.2d 486, 500 (Me. 1981); *State v. Leavitt,* 105 Me. 76, 78-79 (1909); *Marshall v. Walker,* 93 Me. 532, 536 (1900); *Moulton,* 37 Me. at 485-87; *Storer v. Freeman,* 6 Mass. 435, 438 (1810) (involving land in Cape Elizabeth, the court explained "all the land below [the ordinary high water mark] belonged of common right to the king."); 3 Sands, *Sutherland Statutory Construction* § 64.07 (4th ed. 1974); *Fernandez,* 62 Alb. L. Rev. at 633.

and was to be strictly construed against the grantee and in favor of the government.[17] Nor could public rights be lost by passage of time.[18]

The cornerstone of the *Bell* construct is that the established case law protecting public trust rights in the intertidal zone discussed by the Law Court previously, for example in *Moulton* in 1854, does not apply in Maine because it was *unclear* whether the Crown owned the intertidal land or not. *Bell II,* 557 A.2d at 172-73; *Bell I,* 510 A.2d at 511-12 n.5.[19] The Court reached this unprecedented and singular conclusion *sua sponte*.[20] The *Bell* decisions, therefore, stand alone in case law *anywhere* in finding that the Crown did not own the intertidal area in England or the colonies.[21] And, regardless of whether the Crown owned the intertidal zone in England, the Crown owned *everything* in the New World, including in particular the intertidal zone,

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[17] *Shively v. Bowlby,* 152 U.S. 1, 10 (1894) (no public rights are lost "beyond what [the] grant by necessary and unavoidable construction shall take away."); *1981 Opinion*, 437 A.2d at 607 (accord); *Moulton v. Libbey*, 37 Me. at 488 (public trust rights not conveyed "unless it be so clearly and fully expressed as to be incapable of any other reasonable construction.")

[18] *Britton v. Department of Conservation,* 2009 ME 60, ¶ 11 n.6, 974 A.2d 303; *United States v. Burrill,* 78 A. 568, 569 (Me. 1910).

[19] While the *Bell II* majority did not question this fundamental historical and legal error, certainly the dissent did. *Compare* 557 A.2d at 172-73 (majority), *with* 180-82 (dissent).

[20] Indeed, in their brief, the *Bell* Plaintiffs fully agreed with the State on this point. The *Bell* plaintiffs argued:

> Under English common law, title in tidelands was vested in the Crown.... The right to alienate the jus publicum was vested in Parliament.... The Commonwealth of Massachusetts subsequently modified this common law scheme of ownership by enacting the Colony Ordinance of 1641-47 to promote navigation and commerce by inducing the erection of wharves....

Brief of Plaintiffs-Appellants Bell, *et al,* at 8-9 (citations omitted), *Bell I,* 510 A.2d 509 (Me. 1986) (available at the Law and Legislative Reference Library, Augusta, Maine).

[21] *See e.g., Bell II,* 557 A.2d at 181-83 (dissent); *1981 Opinion,* 437 A.2d at 605; *Shively,* 152 U.S. at 10; *Commonwealth v. Roxbury,* 75 Mass. 451, 452 (1857); *Blundell v. Catterall,* 106 Eng. Rep. 1190 (K.B. 1821); Cheung, *supra,* 42 Me. L. Rev. at 142.

pursuant to, *inter alia,* the right of discovery.[22] Indeed, the very existence of the "grant" of the intertidal zone in the Colonial Ordinance evinces the Puritan government's understanding of the state of the law that such a grant to benefit the upland owners was necessary because it was special land and such grants were out of the ordinary – *i.e.,* in contravention of the sovereign rights in such land.

The balance of public and private rights in the intertidal zone is not a function of the Colonial Ordinance but rather how it has been incorporated into Maine by the common law. *E.g., Conant*, 107 Me. at 230; *Moulton,* 37 Me. at 488. There is no dispute that the only reason for the Colonial Ordinance was to promote wharf building,[23] not promote private recreational enclaves.

Prior to *Bell,* the Maine courts had *never* found that transitory, public recreational activities such as swimming, wading, walking or sitting were prohibited in the intertidal zone. No case prior to the *Bell* decisions, held that the public rights were limited to "fishing, fowling and navigation." The cases cited by the *Bell II* majority for the proposition that the *jus publicum* rights are limited to fishing, fowling and navigation, 557 A.2d at 173, and relied upon *sub*

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[22] *See Bell II,* 557 A.2d at 181-83 (dissent); *Shively,* 152 U.S. at 14-15 (under the "right of discovery" this part of North America, including the tidelands, was claimed and held by the King of England, and the only source of title was a grant from the Crown); *see also Phillips Petroleum v. Mississippi*, 484 U.S. 472, 477 (1988) ("we will not now enter the debate as to what English law *was* with respect to the land under such waters, for it is perfectly clear how this Court understood the doctrine of royal ownership, and what the Court considered the rights of the original and later entering states to be.") (Emphasis in original).

[23] *See* Fernandez, *supra,* 62 Alb. L. Rev. at 633; Cheung, *supra,* 42 Me. L. Rev. at 143-44; *see also, Commonwealth v. City of Roxbury,* 75 Mass. 451, 515 n.13 (1857); *Commonwealth v. Alger*, 61 Mass 435 (1851); *Commonwealth v. Inhabitants of Charlestown,* 18 Mass. 180, 188 (1822); *Storer v. Freeman*, 6 Mass. 435 (1810) (Cape Elizabeth); *Bell v. Town of Wells,* 1987 Me. Super. LEXIS 256, *8, *11.

silentio by the *Levy Opinion*, do not carry that weight because, quite simply, none of them state those were the "only" rights, and the cases did not deal with general walking, swimming, wading or sitting.[24] To the contrary, in *Blaney*, 312 A.2d at 528 n.7, the unanimous Court explained that "[a]lthough the extent of the public rights under the ordinance to tidal flats is not entirely clear there are certain rights which apparently were includable in addition to navigation." In the context of the case, it is clear that *Blaney* was not referring only to fishing and fowling. Neither the *Bell* decisions[25] nor the *Levy Opinion* so much as refer to this case.

The *1981 Opinion* was specifically confirmed in *James v. Inhabitants of Town of West Bath,* 437 A.2d 863, 865 (Me. 1981). This confirmation is not mentioned in the *Bell* decisions or the *Levy Opinion.*

In sum, the two *Bell* decisions are out of line with applicable rules of public trust preservation, statements of the Maine courts, every law review article written on the subject other than one penned by Appellants' counsel,

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[24] The cases dealt with the specific disputes before them – no more, no less. *State v. Lemar,* 147 Me. 405 (1952) (regulation of worm-digging); *Andrews v. King*, 124 Me. 361 (1925) (landing a boat for pleasure); *State v. Leavitt,* 105 Me. 76 (1909) (regulation of clamming); *McFadden v. Haynes & De Witt Ice Co.,* 86 Me. 319 (1894) (depositing ice scrapings); *Marshall,* 93 Me. 532 (1900); *State v. Wilson,* 42 Me. 9 (1856) (indictment against owner for trespass regarding his right to build a wharf that interfered with a landing place); *Moulton,* 37 Me. 472 (regulation of clamming); *French v. Camp,* 18 Me. 433 (1841) (because public had right to travel on river when unfrozen for pleasure, can do as well when frozen). The *Bell II* majority seems to seek some additional support from *McFadden.* 557 A.2d at 173 n.16. That case dealt with depositing of ice scrapings on the intertidal zone, something that connotes a more permanent intrusion not akin to other more transitory accepted public uses and rights. Certainly, it does not stand for the proposition that the public cannot sit or walk without a fishing pole, gun or boat.

[25] Therefore, unless precedent is to be ignored as inconvenient, the *Bell II* majority's holding that the limitation of rights to "fishing, fowling and navigation" was "[l]ong and firmly established," 557 A.2d at 169, is simply wrong.

the premier treatise on Maine coastal law (2 Henry & Halperin, *Maine Law Affecting Marine Resources*, 239 (1970)), the views of the Justices who wrote the *1981 Opinion,* the Justices who dissented in *Bell II,* the Justice concurring in *Eaton* and the Superior Court Justices in *Flaherty* and *McGarvey*. These are not *personal* preferences, but rather the clear direction of the law both *before* and *after* the *Bell* decisions.

The courts are not bound by the doctrine of *stare decisis* when the underpinnings of the previous decisions are disproved and the conditions of society have changed. *Maddocks v. Giles*, 1999 ME 63, ¶ 11, 728 A.2d 150; *Myrick v. James*, 444 A.2d 987, 997-98 (Me. 1982); Cheung, *supra,* 42 Me. L. Rev. at 155-56 (explaining why *stare decisis* does not prevent reexamination of *Bell II*). The *Bell II* majority did not even try to comport its decision with the reality that Mainers walk and sit in the intertidal zone unrelated to fishing, fowling and navigation, other than suggesting that Maine take the intertidal zone by eminent domain – that, of course, is an impossibility for Maine's 3,500 mile coast, particularly when the State gave away rather than sold its rights to filled in coastal land based upon the Justices' *1981 Opinion*.

The majority's 1989 opinion is not one long adhered to, since prior thereto the Law Court had never held or even hinted that the public was excluded from the intertidal zones for common recreational activities. 557 A.2d at 187 (dissent). The majority's rule leads to unworkable distinctions – for example, is walking in the intertidal area to ascertain the location of a future

kayak landing or fishing site permissible? *Stare decisis* does not enshrine such illogical and problematic results.

And finally, and as simply put as possible, under all of the cases such as *Illinois Central* prior to *Bell,* the *jus publicum* is not lost if not conveyed for a public purpose. There is *no* public purpose in preventing the public from engaging in transitory public recreational activity such as walking, boogie-boarding, rafting, swimming and wading on and over the intertidal zone.

C. "[T]he 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." *Eaton,* 2000 ME 176, ¶ 54 n.9.

It is beyond dispute that the balance of the *jus publicum* and *jus privatum* in Maine's intertidal zone is a function of Maine's common law – judge-made law based upon the evolution of *Maine* society. As clearly explained by the Court itself over a century ago: Mainers "adopted only so much of" the common law regarding the Colonial Ordinance "as was suitable to their new conditions and needs, consistent with the new state of society, and conformable to the general course of policy which they intended to pursue" as "so acted upon and acquiesced in as to have become a settled, universal right." *Conant,* 107 Me. at 230, 234. *See also Blaney*, 312 A.2d at 528 n.7.

As of yet, no Maine decision has identified how, why or where the public "acted upon and acquiesced in" a prohibition against public walking, swimming, wading or other similar activities in the intertidal zone along Maine's coast. Prior to *Bell*, no Maine court had ever held or hinted that these

common public uses did not fall within the public trust uses. Prior to *Bell,* the case law in Maine such as *Blaney* and *Moulton* adopted an expansive view of the doctrine and a restrictive reading of the Colonial Ordinance. Based upon this expansive view, the *1981 Opinion* counseled the Governor that it was permissible to give away millions of dollars of State coastal property interests. *Stare decisis* does not prevent this Court from placing Maine back on the path laid out by every pronouncement by the Court before *Bell.*

D. "[T]he 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." *Eaton,* 2000 ME 176, ¶ 54 n.9.

The Legislature has spoken – that the public trust rights do include recreational rights, before *Bell II.* 12 M.R.S. §§ 571, *et seq.* The Legislature has *not* repealed that provision in the 30+ years since, and thereby rejects *Bell.*

E. "[T]he 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." *Eaton,* 2000 ME 176, ¶ 54 n.9.

The *jus publicum* in the intertidal zone should be the same everywhere in Maine. Appellants' argument is this Court has no authority to part ways with the 24 year old *Bell II* majority even if it is wrong, even though the only statements by the Court in that period (in the *Eaton* concurrence and the *McGarvey* opinions) have criticized and/or parted ways with the *Bell II* majority's restrictive application of the public trust doctrine, and even though it has been roundly and justifiably criticized by commentators and Superior

Court Justices. *See* nn. 1 & 9, *supra.* In sum, Appellants' bold view is that once an error is made by this Court, that error must remain as part of Maine law *forever.* Maine's doctrine of *stare decisis* is not so absurd.

Appellants' backstop is to refer to the recent decision of *Stop the Beach v. Florida Dept. of Env. Prot,* 130 S.Ct. 2592 (2010). *Appellants' Br.,* 71; *see also McGarvey,* 2011 ME 97, ¶ 65. However, the judicial takings doctrine did not change this Court's authority regarding the common law, nor did *Stop the Beach* etch into stone *Bell II's* majority decision thereby precluding the Law Court from correcting the errors made therein. First, the extraordinary conclusion that the actions of a state court may constitute a "judicial taking" was not the decision of the Court but only the opinion of four Justices.[26] Therefore, it is not the law of the land. *Sagarin v. City of Bloomington,* 932 N.E.2d 739, 744 n.2 (Ind. App. 2010).

Second, *Stop the Beach* did not deal with public trust rights or the public trust doctrine. The public trust doctrine is not even mentioned. The fountainhead public trust case of *Illinois Central R. Co. v. Illinois,* 146 U.S. 387 (1892), is not questioned. *Illinois Central's* holdings regarding the public trust doctrine remain good law, in particular that *jus publicum* cannot be lost if not supported by a public purpose. *Id.* at 453. No public purpose has been identified to support the loss of public swimming, wading and walking in the intertidal zone.

[26] In this fractured effort, Justice Scalia's opinion on "judicial takings" was concurred in by Chief Justice Roberts and Justices Thomas and Alito. Justices Kennedy, Ginsburg, Breyer, and Sotomayor disagreed on this point, although they agreed that there was no violation of the constitution. Justice Stevens did not participate.

Third, it is doubtful that the *Bell II* majority would form the basis for a "judicial taking" under any of the *Stop the Beach* opinions. The plurality proposes a "clearly established property rights" standard. 130 S.Ct. at 2608. As is plainly evident from the pre-*Bell* precedent, the split in *Bell II,* and the *McGarvey* opinions, it cannot be said with a straight face that it was *clearly established* that the upland owners had a private recreational park in the intertidal zone in Maine. As the *Stop the Beach* plurality further explains, "[I]nsofar as courts merely clarify and elaborate property entitlements that were previously unclear, they cannot be said to have taken an established property right." *Id.* at 2609. The *Bell* decisions represent isolated, and wrong, views of Maine's jurisprudence.

Fourth, the Supreme Court Justices certainly did not agree on the role of the common law. Justice Scalia's plurality opinion seems to state that the common law is entirely irrelevant, while Justice Kennedy makes clear that "incremental modification under state common law [] does not violate due process, as owners may reasonably expect or anticipate courts to make certain changes in property law." *Id.* at 2606, 2615. The common law, according to both the majority and dissent in *Bell II* determines the balance of rights in Maine in the intertidal zone. 557 A.2d at 171-73, 181-85 (dissent); *see also Bell I,* 510 A.2d at 511-512; *1981 Opinion,* 437 A.2d at 605-07; Donahue, *supra*, 64 Me.L.Rev. at 603.[27] For over a hundred years upland property owners have known that the common law alters property rights in Maine's

[27] That role of the common law seems to have been lost in the discussion of the *Levy Opinion* on this point, as did the *Bell II* majority. *McGarvey,* 2011 ME 97, ¶ 65.

intertidal zone. *Conant,* 107 Me. at 241. ("While a long-continued public practice may not of itself create a right, or make a law, yet such a practice, yielded to and acquiesced in by those adversely interested, may be strong evidence of what the right, or the law is.") And, of course, the common law is the *only* reason why the normal rules that *all* rights in the intertidal zone rest with the sovereign state and the public do not apply in Maine.

Fifth, under the public trust doctrine, a "conveyance" of public rights in the intertidal zone can be repossessed if the "conveyance" is founded upon no public interest. In *Illinois Central,* the Supreme Court upheld a legislature's negating a broad conveyance of the *jus publicum.* 146 U.S. at 453. Assuming the Court may recognize a *judicial* taking, likewise the Court should recognize an improper *judicial* conveyance which is exactly what *Bell II* effectuated. If a legislative conveyance of the *jus publicum* can be voided for failure to be founded upon a legitimate public interest without constituting a taking as was the case in *Illinois Central*, so too can a *judicial* conveyance of the *jus publicum* in *Bell II* be voided without constituting a taking for failure to be founded upon a legitimate public interest. The very nature of the *jus publicum*, at least as understood before the *Bell* decisions, mandates that result. Therefore, even assuming "judicial takings" are to be recognized, the public trust doctrine as explicated under cases such as *Illinois Central* would contemplate the state courts negating a "judicial conveyance" of *jus publicum* likewise not supported by a public interest

Where a state court *corrects* a recent mistake, that is not a "judicial

taking;" rather, it is engaging in proper, necessary and lawful justice.

IV. TRANSITORY PUBLIC ACTIVITIES IN THE INTERTIDAL ZONE ARE PROTECTED PUBLIC TRUST USES

The various transitory public activities in the intertidal zone at Goose Rocks Beach, and along Maine's coastline where geographically possible, fall well within the public trust doctrine. While the State has asked the Court to adopt the approach of the *Saufley Opinion* and thereby abandon the *Bell* errors, this brief will also apply the generous approach of the *Levy Opinion* which mandates approval of the various public uses at issue as well.

Public accessways. As a preface, there are several public accessways through the upland to Goose Rocks Beach that are not in the Conservation Trust area, and are various distances from that area.[28] They cannot all be reasonably viewed as accessways to the Conservation Trust area,[29] and were treated as access to the whole beach.[30] These accessways are narrow, no more than 10 feet wide, and have always been called "accessways," not "mini-public beaches."[31] Obviously, there are no visible boundary lines in the sand or water demarcating the accessways,[32] and there are no signs indicating the boundaries lines of the intertidal zone.[33] Members of the public spread out beyond the boundaries of the accessways on the intertidal zone without

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[28] *E.g.,* Chief Bruni (A.621 at 30); Mead (A.1943 at 419).
[29] *E.g.,* Plaintiff O'Connor (A.707 at 84-85, 708 at 90); Schmalz (A.1528-29); MacDonald (A.1557-58, 1589-90).
[30] *E.g.,* Mead (A.1943 at 419-20).
[31] *Id.*
[32] *E.g.,* Plaintiff Forrest (A.814 at 42); Heartz (A.1492-94).
[33] Plaintiff Henriksen (A.826 at 90); Merrill (A.832 at 115); Heartz (A.1495); Hogan (A.1215).

permission to engage in various recreational activities in front of beachfront property owners.[34]

It tests credulity to suggest that these accessways were intended to be used as the only areas in which the public could engage in recreation or as accessways to travel to the Conservation Trust area which is over a mile from one of the accessways.[35] The testimony showed that public trust uses sought to be recognized here were exercised in front of beachfront property owners' homes, including Plaintiffs, without permission, outside of the public accessways and the Conservation Trust area.[36]

Jet-skiing. Jet-skis are small, modern power boats, and use of power boats long have been held a public trust use. *Andrews v. King*, 124 Me. 361, 363-64, 129 A.298, 298-99 (1925). There has been jet-skiing at Goose Rocks Beach; at least one Plaintiff has complained about jet-skiers beaching their craft in the intertidal area.[37] The Superior Court properly concluded that jet-skiing fell within ocean-based, waterborne activities in the intertidal zone. (A.369). Jet-skiing fits easily within public trust activities pursuant to the *Saufley* and *Levy Opinions.*

Water-skiing, -kneeboarding, -waking, and -tubing. These activities have been engaged in by non-beachfront owners at Goose Rocks Beach in front

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[34] MacDonald (A.1557, A.1560, A.1569, A.1589-90, & TMF Ex. 318 (A.2357, A.2358, A.2363, A.2367, A.2376, A.2380)); Case (A.1667, 1670); Gustin (A.1814-15); Matthews-Bull (A.1834 at 5-7, A.1836 at 13); Dwyer (A.1913 at 300-01); Chief Bruni (A.632 at 49-50); Judge Whitehead (A.1623-24, A.1643).
[35] Anderson (A.1766) (not stay within accessway); Nixon (A.1726-27) (not limited to accessway just to go into water); Wostbrock (A.1733).
[36] *E.g.,* Hogan (A.1205, 1214); Driver (A.1481).
[37] Plaintiff Eaton (A.762-64 at 39-40); Chief Bruni (A.635 at 61).

of beachfront owners' houses for over 50 years.[38] The intertidal area is used as a staging area for these activities, including putting in and landing participants, and waiting one's turn.[39] The activity includes walking, standing and sitting.[40] No permission is sought or given for this activity.[41] The activity contemplates the use of a power boat; tow line; water skis, boards, tubes and/or kneeboards; and life-jackets.[42] Each of these activities has no greater impact on the use and enjoyment of the upland owners' of their property than other boating activities.

The Superior Court concluded that this activity was a public trust use. (A.369). This is an easy call under both the *Saufley* and *Levy Opinions*. These activities necessarily involve the use of a boat, and require specially-designed devices (tow lines, life jackets, skis, boards or tubes) to pass over the water.

Additionally, just as one can sit, stand and/or walk as incidental to a beached or moored boat, *Deering v. Proprietors of Long Wharf,* 25 Me. 51, 65 (1845) ("there is reserved for all, the right to pass freely to the lands and houses of others besides the owners of the flats .... They may pass over the ground ... whenever their necessities or their inclinations induce them to go to others' lands or houses, and they have all the privileges of lying upon the flats,

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[38] MacDonald (A.1558-60, 1573-74) (51 years), & TMF Ex. 318 (A.2363, A.2364, A.2367); Judge Whitehead (A.1632); Johnson (A.1844-45 at 45, 48-49) (waterskiing, wakeboarding, tubing); Somers (A.1381-82); Mazeika (A.1446, A.1453-54, & TMF Ex. 330 (A.2397)); Pearce (A.1381-82); Joan Junker (A.1102, A.1107-08); Johnson (A.1844-45 at 48-49).
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Id.*

when they go or return from the lands of others ...."), so too sitting, standing and/or walking in the intertidal zone are incidental to these activities. Waiting to go waterskiing is waiting for a boat.

Modern "navigational" activities. Modern ingenuity and experimentation have resulted in a wide variety of new devices which assist people, particularly children, to "navigate" – that is, to float on and through the water.[43] Navigators can leave navigational contraptions in the intertidal zone.[44] At Goose Rocks Beach, these devices include, *inter alia:* old wooden boxes;[45] kayaks;[46] surfboards;[47] windsurfers;[48] "boogie boards" which appear to be generally two to three feet in length;[49] inflatable rafts and tubes of various sizes some with oars and others without;[50] and styrofoam floats and paddle

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[43] Plaintiff Gerrish (A.798 at 183) ("assumed any boat was navigation.")
[44] *State v. Wilson,* 42 Me. 9, 24 (1856) (public has right to moor vessels and discharge and take on cargo on intertidal land); *e.g.,* Plaintiff Sandifer (A.733 at 189).
[45] Wiewel (A.1275-76, & TMF Ex. 349 (A.2416)).
[46] Jose-Roddy (A.1174; & TMF Ex. 310 (A.2334, A.2345, A.2347)); Plaintiff O'Connor (A.712-13 at 107-08); MacDonald (TMF Ex. 318 (A.2377)); Wiewel (TMF Exhibit 349 (A.2414)); Pearce (A.1422); Mazeika (A.1446; & TMF Ex. 330 (A.2400)).
[47] Plaintiff Gardner (A.668 at 196) (with wetsuit); MacDonald (A.1572-73); Anderson (A.1781). The *Saufley Opinion* noted that surfing would be left to "the next question in the evolution of this area of the common law for future determination." *McGarvey,* 2011 ME 97, ¶ 11.
[48] Hogan (A.1202); Barwise (TMF Ex. 282 (A.2297); Anderson (A.1781).
[49] MacDonald (A.1575) (typical to see boogie boards for decades); & TMF Ex. 318(A.1573, A.1575)); Jose-Roddy (A.1199, & TMF Ex. 310 (A.2326, A.2343, A.2348)); Schmalz (A.1539-40, & TMF Ex. 342 (A.2409) (seen all over the beach)); Somers (A.1401; & TMF Ex. 335 (A.2406)).
[50] MacDonald (TMF Ex. 318 (A.2357)); Judge Whitehead (A.1650, & TMF Ex. 348 (A.2412)); Plaintiff Vandervoorn (A.774 at 87); Anderson (A.1773; & TMF Ex. 279 (A.2288)); Kudaroski (A.1801-02); Junker (Town Ex. 171 (A.2236, A.2238-39)); Heartz (A.1498); Mazeika (A.1455, & TMF Ex. 330 (A.2396, A.2398)); Somers (A.1400, & TMF Ex. 335 (A.2406)).

boards.[51] This activity by necessity also involves touching and wading upon the bottom of the intertidal area and state-owned submerged lands.[52] These have been used in the intertidal area and in the ocean by non-beachfront owners in front of beachfront owners' houses without permission.[53] These activities have been a common sight at Goose Rocks Beach since no later than the early 1950s.[54] Obviously, each of these activities has no greater impact on the use and enjoyment of the upland owners' of their property than navigational activities with more established devices.

There is no doubt that these floating devices assist and make possible for individuals to float on and through the water just as do classic water craft. Use of each of these devices involves touching the bottom of the intertidal area and submerged lands. For example, windsurfers get on and off their sailed windsurf boards in the intertidal area (either intentionally or due to a fall), just as sailboaters get in and out of their sailboats. The users of these devices, often children, utilize them largely for fun and touch the bottom of the intertidal area as integral to the activity of floating over the ocean. Users of classic water craft, like kayaks, do so as well. It is hard to understand how these activities in the intertidal zone are not public trust uses.

The *Saufley Opinion* approach resolves the issue under its first step: the primary activity here falls readily within navigation. *McGarvey,* 2011 ME 97, ¶

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[51] Heartz (A.1498) (paddleboards); Kudaroski (A.1801-02) (Styrofoam float); MacDonald (A.1575, & TMF Ex. 318 a (A.1573, A.1575)); Johnson (A.1840 at 30); Junker (Town Ex. 171 (A.2239)); Jose-Roddy (TMF Ex. 310 (A.2348)).
[52] *See* notes 43-50, *supra.*
[53] *Id.*
[54] *Id.*

49. These activities, and similar ones, contemplate using a device to float on top of the water – that is navigation. Even if that does not suffice, these activities are "consistent with the common law of the *jus publicum* …." *Id.* at ¶ 54. At the very least, the *jus publicum* in the intertidal zone relates to the use of the ocean, and clearly these activities are dependent upon the ocean itself.

The *Levy Opinion* methodology mandates the same result. These activities are navigation as defined by that *Opinion*: each activity uses a man-made device of some type to pass freely over the water. *Id.* at ¶ 75. These are "newly developed methods of travel associated with" passing freely over the water. *Id.* at ¶¶ 76-78. They are more like boating than scuba diving is.

Just as walking across and sitting and standing in the intertidal zone when using a more traditional boat are attendant public trust uses, *Deering*, 25 Me. at 65, so are walking, standing and sitting associated with these activities.

Snorkeling. If scuba diving is a public trust use under both the *Saufley* and *Levy Opinions*, snorkeling must be as well. Snorkeling by non-beachfront owners occurs along Goose Rocks Beach in front of beachfront owners' houses without permission.[55] Snorkeling contemplates the use of goggles, a breathing device or tube, swim fins and at times wet suits.[56] They use these special devices to make possible passing over or through the water. The intertidal area is used without permission as a staging area for snorkeling, with participants

[55] Jose-Roddy (A.1198; & TMF Ex. 310 (A.2332, A.2344, A.2346)); Anderson (A.1765-66, A.1772).
[56] *Id.*

standing, sitting, resting, wading and walking on the intertidal area.[57] Snorkelers, among other things, explore the bottom of the ocean. Also, there is some snorkeling in the intertidal area at high tide. Scuba divers generally have as one of their goals looking for creatures and other things on the bottom.[58] Certainly, snorkeling activity in the intertidal area has no greater impact on the upland owners' enjoyment of their property than scuba diving.

Snorkelers engage in identical activities to scuba divers, except snorkelers cannot go as deep or as long in their exploration of the ocean and its bottom. It is no surprise that the Superior Court found that snorkeling is a public trust use. (A.369). Additionally, just as one can sit, stand and/or walk as incidental to other forms of navigation, *Deering,* 25 Me. at 65, so too sitting, standing and/or walking in the intertidal zone for this activity.

Swimming/Bathing. Swimming as it actually has occurred and is occurring, which involves sitting, walking and standing in the intertidal zone, is a public trust use. There is no doubt under both *McGarvey* opinions that the public at the very least has the public trust right to swim in the ocean *over* and *through* the intertidal zone.[59] 2011 ME 97, ¶¶ 40 n.12, 41, 74-77. Although swimming/bathing is an ocean-based activity, the Superior Court declined to include it as a public trust activity, apparently in view of language in the *Levy Opinion*. (A.369).

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[57] *Id.*
[58] Judge Gordon (A.1518-19); Plaintiff Hastings (A.570 at 126-27) (one of goals); *see also McGarvey,* 2011 ME 97, ¶ 5 n.1.
[59] So too body-surfing would appear to be approved in the intertidal zone as it occurs on and through the water. *E.g.,* Johnson (A.1840 at 30).

Other than walking which occurs year-round, swimming is the most exercised activity at Goose Rocks Beach and has been occurring at least back to the 19th century.[60] This activity occurs all along the beach in the intertidal area both when covered with water and when not, not just in the Conservation Trust area and public accessways, and is generally done without permission.[61]

In addition, there is much use of "tidal pools," which occur after the tide goes out in low lying areas of the intertidal zone. Tidal pools are locations where children frolic in the water, with their parents and others sitting and watching them.[62] The location of the tidal pools changes over time.[63]

Some people swim back and forth to boats moored off of Goose Rocks Beach.[64] There should be no dispute that such swimming falls within even the limited view of the public trust doctrine in the *Bell II* majority opinion.

Obviously, the intertidal area is utilized by swimmers to wade into and out of the water.[65] Children in particular extensively use the intertidal area,

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[60] Churchill (A.1878 at 1879); Town Ex. 136 (A.2172) (1938), (A.2173) (1939), (A.2176); Town Ex. 152 (A.2192) (during 1915), (A.2193) (during 1930), (A.2196), (A.2200) (during 1930s); Wiewel (TMF Ex. 349 (A.2415); Joan Junger (A.1102) (since 1930s); Pearce (A.1408-09) (since at least 1930s).

[61] *E.g.,* Plaintiff O'Connor (A.711-12 at 102-04; & Plaintiff Ex. 116 (A.2108)); Plaintiff Gerrish (A.799 at 184-86); Joan Junker (A.1102, A.1107, A.1109, 1111-12, 1114-16) (since 1930s); Fessenden (A.1892-93 at 240-43); MacDonald (A.1569; & TMF Ex. 318 (A.2357, A.2358, A.2376)); Judge Whitehead (A.1628) (since 1950s); Hogan (A.1209); P.Smith (A.1336-37); Pearce (A.1408-09) (since 1930s).

[62] *Id.*; Pearce (A.1411); Cohen (A.1125).

[63] Joan Junker (A.1107, A.1113-14) (since 1930s); Cohen (A.1136-38); MacDonald (TMF Ex. 318 (A.2381)); Hogan (A.1204-07); Somers (A.1368); Judge Whitehead (A.1636-37); Judge Gordon (A.1514); TMF Ex. 310 (A.2323, A.2327, A.2341); Junker (Town Ex. 171 (A.2238)); TMF Ex. 327 (A.2390). One could make the argument that these areas are temporary submerged lands.

[64] Anderson (A.1773) (swam and walked to moored boats).

[65] *E.g.,* Plaintiff Gallant (A.722 at144-45); Plaintiff Gray (A.652 at 130) (wades into waist level); Judge Whitehead (A.1643-44, & TMF Ex. 348 (A.2411)); Plaintiff Gerrish

wading on and touching the ground as they learn to swim, and to rest and otherwise enjoy the water.[66] If scuba divers can use the intertidal zone for access to the ocean, it is hard to understand how swimmers cannot.

The *Town of Kennebunkport's 1996 Comprehensive Plan* recognized bathing in the intertidal area at Goose Rocks Beach, "*instructing bathers* to gain access to the beach through public rights of way, directing them *to stay below the high water mark* …." (Emphasis added).[67] The Plan set forth the policy of the Town from 1981 to 2011.[68]

Swimming lessons for children have been provided in the intertidal area since at least the early 1950s, in front of beachfront property owners' houses without their permission.[69] Such lessons by their very nature use the intertidal areas.[70] When the children took such lessons, parents often watched and waited, sitting or standing in the intertidal area.[71] The swimming lessons used a raft anchored offshore that children could use in and out of lessons to

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(A.799 at 184-85); Plaintiff Hastings (A.570 at 127); Wiewel-8/29 (TMF Ex. 349 (A.2414); Mazeika (TMF Ex. 330 (A.2395)) and to stand and sit to rest or watch children (Hogan(A.1204); Junker (Town Ex. 171 (A.2238)); Somers (A.1392; & TMF Ex. 335 (A.2403)); Town Ex. 136 (A.2172 (in the year1938)), (A.2173 (in the year 1939)), (A.2176).

[66] *Id.;* Somers (A.1392; & TMF Ex. 335 (A.2403) (80 year old photo of child in water); Barwise (TMF Ex. 282 (A.2289, A.2293-94)).

[67] Plaintiffs' Ex. 2 (A.1977) (emphasis added); Mead (A.1942-45 at 417-19); Bruni (A.631 at 47).

[68] Chief Bruni (A.631 at 48). This *Plan* was approved by a vote of the residents of the Town, and is a public document. *Id.*

[69] Joel (A.1961 at 471, 1963-64 at 481-82, A.1966 at 490-93) (taught swimming in early 1950s); Pearce (A.1426); Mazeika (A.1453, A.1456); Fessenden (A.1892-93 at 240-43) (1960's and 1970's), (A.1897), Town Ex. 263 (A.2275) (raft for lessons with children wading to it in intertidal zone); Barwise (TMF Ex. 282 (A.2293-94)).

[70] *Id.*

[71] *E.g.,* Fessenden (A.1893 at 243).

jump off;[72] in other words, the children were swimming to a watercraft which should be permissible even under *Bell II*.

While fishing and boating, the public stands and moves around in the intertidal area when covered with water. *Deering,* 25 Me. at 65*; e.g.,* TMF Ex. 335 (A.2406); Town Ex. 177 (A.2240). Swimming has no greater impact on the use and enjoyment by the upland owners of the intertidal zone than the classic public trust uses.[73] Indeed, simply "bathing" in the intertidal zone without a fishing pole with hooked lures or beaching a boat has less impact and is safer to others.

The issue is whether the public can touch the intertidal ground itself while engaging in swimming, also known as bathing – which generally is what virtually everyone, and particularly children, do when they "swim" in the ocean. Certainly, swimmers have the right to touch the bottom on the state-owned *submerged lands* beyond the low water mark*;* the great dispute apparently is whether they can also touch the *intertidal lands* above the low water mark.

There is no doubt that at Goose Rocks Beach and elsewhere along Maine's coast, members of the public have been engaging in swimming involving touching the intertidal lands as long as anyone can remember, and longer. No matter how good a swimmer one may be, swimmers have always walked across the intertidal lands to get into and out of the ocean to swim and have stood and sat in the intertidal area to rest when swimming.

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[72] Somers (A.1400); Mazeika (A.1456; & TMF Ex. 330 (A.2397)).
[73] Plaintiff Gallant (A.722 at 145-46) (kayaking causes greater concern than swimming).

Prior to *Bell II* in 1989, no court or commentator suggested that the public could not utilize the intertidal zone for swimming. In 1970, the premier Maine treatise on marine resources stated: "[T]he broad powers given to the public to be on the flats would be sufficient to encompass the public rights of swimming on the seashore." 2 Henry & Halperin, *surpa* at 239; *see Blaney*, 312 A.2d at 528 n.7 (recognizing rights to tidal flats in addition to navigation). In the *1981 Opinion,* the Justices stated that the historic public uses of navigation, fishing and fowling "of intertidal and submerged lands remain important, … others have grown up as well." 437 A.2d at 437. The Justices cited with approval *Borough of Neptune City v. Avon-by-the Sea*, 294 A.2d 47, 54-55 (N.J. 1972), which recognized swimming, bathing and shore activities in addition to the historic uses. The *1981 Opinion* was confirmed in *James,* 437 A.2d at 865, a judicial fact that seems to be overlooked. In the present case, the Town of Kennebunkport Comprehensive plan at least since 1996 noted that "bathers" have been instructed "to stay below the high water mark". Plaintiffs' Ex. 2 (A.1977).

Pursuant to the *Saufley Opinion,* swimming as we know it (which includes touching of the intertidal zone ground) would not fall within the three descriptors (fishing, fowling and navigation) under the first prong but, rather, is an "ocean-based activity" under its second prong. 2011 ME 97, ¶¶ 12, 51. These three Justices noted that the Massachusetts decision in *Butler,* upon which the *Bell II* majority so heavily relied, "excluded the use of the intertidal land for *hygienic, bathing-related purposes*," and under that decision "the

public also may use the intertidal lands to swim, but not to bathe." *Id.* at ¶¶ 40 n.12, 41 (emphasis added). It appears that the *Saufley Opinion* is drawing a distinction between swimming as we know it for recreation and fun, as contrasted with *hygienic bathing,* and would recognize such swimming as a public trust right.

The *Levy Opinion* distinguishes "bathing" from "swimming" differently. In terms used in *Butler,* 80 N.E. at 689 (a decision not cited by the Justices in the *1981 Opinion* nor by the Law Court until *Bell*), the *Levy Opinion* suggests swimming is limited to "passing freely over and through the water *without* any use of the land underneath." *McGarvey,* 2011 ME 97, ¶¶ 73-75 (emphasis added). This fails to conform with the common and historic experience of swimming, particularly by children, along Maine's coastline with its cold waters. People generally touch the bottom to rest and to enjoy the waters. If common sense and common experience are to be honored, which are the engines of the common law and therefore public trust doctrine, swimming as we know it and as commonly practiced is a trust use. Indeed, depending upon the tides, it may be difficult to determine if one is standing on the submerged lands or the intertidal area when covered with water.

The question under the *Levy Opinion*, therefore, is whether the "'sympathetically generous' and broad interpretation" it espouses*, id.* at ¶ 68, allows for swimming as actually practiced along Maine's coast and at Goose Rocks Beach in the same way it allows for scuba diving under the "functional test." As the *Levy Opinion* found with scuba diving, the public has the right *to*

walk across the intertidal zone to get to the water in order to swim over it and the submerged lands.

Also, the "specially-designed devices" consideration of the *Levy Opinion* would support swimming/bathing as a public trust use. People use swimming suits to swim because it is easier and safer than wearing street clothes.[74] Swimming in street clothes would at best be difficult and at worst dangerous[75] (and downright silly). Some use goggles to protect their eyes from the salt water.[76] Some swimmers, in particular children, use floatation devices to assist them, such as life jackets or inflated devices around their waists and/or arms.[77] Swimmers also often use swim fins on their feet. Thus, modern swimming in the ocean is generally only possible if "special devices" are used. It could be said that these "specially-designed devices" make it possible for people to "pass[] freely over and through the water ...." *Id.* at ¶¶ 73-75. While tempting, the express distinction, albeit *dicta*, drawn in the *Levy Opinion* between "swimming" and "bathing" leaves doubt that these Justices would embrace such a conclusion if they remain tied to *Butler*.

On the other hand, the *Levy Opinion* recognized that "over time ... we have construed those terms far beyond their traditional meanings." *Id.* at ¶ 62. How else can the *Levy Opinion* have concluded that scuba diving is *navigation*?

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[74] Plaintiffs Scribner (A.550 at 46-47); Hastings (A.570 at 124-25) (would use wetsuit if had one); Heartz (A.1498); William Junker (A.1035-36).
[75] *Id.*
[76] Plaintiff Forrest (A.814 at 43); Plaintiff Eaton (A.763 at 42); William Junker (A.1036-37).
[77] *Id;* Case (A.1677-78; & TMF Ex. 284 (A.2303) (child with Mickey Mouse swimming tube)); Somers (A.1400, & TMF Ex. 335 (A.2403)).

Touching the intertidal ground is deemed to be incident to all other recognized public trust uses and for that matter uses of the ocean. There is no practical reason that swimming should be any different – indeed, from a safety standpoint, it is more important for swimming than boating, fishing or fowling.

In addition, scuba diving is much more like swimming than it is to navigation. Swimming and scuba diving are "boatless." The swimmer or scuba diver is propelled directly by her own body, not by oars, sails or motors. Snorkeling without the snorkel is swimming,[78] just as scuba-diving without the tank is swimming. By accepting scuba diving as navigation, the line has been blurred so that it is hard to understand how swimming as we know it is not navigation as well. Indeed, *swimming* is the original form of *navigation.*

The *jus publicum* in Maine is not a static concept, but rather is one that takes account of the needs, desires and evolution of society. *McGarvey,* 2011 ME 97, ¶ 71 (Levy, J.); *1981 Opinion*, 437 A.2d at 607; Note, *Coastal Recreation: Legal Methods for Securing Public Rights in the Seashore,* 33 Me. L. Rev. 69, 82 (1981). The *jus publicum* in Maine is a function of the public's use itself. *See Conant*, 107 Me. at 241. The public trust in the intertidal zone is part of Maine's *judge-made common law* and includes recreational uses. *McGarvey,* 2011 ME 87, ¶¶ 59-62 (Levy, J.) The Law Court explained in *Matter of Robinson*, 88 Me. 17, 23 (1895), that "The common law would ill deserve its familiar panegyric as the 'perfection of human reason' if it did not expand with the progress of society and develop with new ideas of right and justice." The

[78] Anderson (A.1772).

fundamental tenet of the common law is experience and reason, supported by recognition of the expectations and policies of a developing and expanding society. *Id.*; *McGarvey,* 2011 ME 97, ¶ 9 (Saufley, C.J.); *MacDonald v. MacDonald*, 412 A.2d 71, 74 (Me. 1980); *Davies v. City of Bath*, 364 A.2d 1269, 1273 (Me. 1976); *Poindexter v. Poindexter*, 363 A.2d 743, 748-49 (Me. 1976) (Defresne, J., concurring). It is a judicial assessment and appraisal of an evolving society. Cheung, *supra,* 42 Me. L. Rev. at 156.

As the waves crash in along the water line, even the strongest swimmer will be tossed about so that the intertidal zone land will be stepped, sat or stood upon in a retreat from the waves. The reality is that most if not all swimmers of all ages, especially those of tender years, require a simple rest or pause as well, thus standing or sitting in the intertidal area. This is no different than a kayaker or rower pulling his craft onto the intertidal area in order to rest or enjoy the view. The act of swimming in the ocean necessarily includes standing on the intertidal zone; defining it otherwise does not comport with the real world. Swimming in the ocean from both practical and historic perspectives includes standing in the intertidal zone, whether covered with water or otherwise. The sort of illogical distinctions and results contemplated by denying swimming are not countenanced by the common law. *E.g., Myrick*, 444 A.2d at 998. The common law must be "informed by both common sense and common experience …." *Fortin v. The Roman Catholic Bishop of Portland*, 2005 ME 57, ¶ 37, 871 A.2d 1208 (Levy, J.).

Although swimming may not fit neatly within the three descriptors, there is no doubt now that the public can engage in swimming in the ocean *over* the intertidal zone. Just as one sits and stands when engaged in previously recognized public trust uses such as boating, so too sitting and standing in the intertidal zone are incidental to swimming in the ocean. A *sympathetically generous and broad interpretation* mandates no less.

Finally, this issue deserves a heavy dose of common sense. *See Gorham v. Androscoggin County,* 2011 ME 63, ¶ 18, 21 A.3d 115 (Levy, J.) (relying upon "common sense and basic fairness"); *Jacob v. Kippax*, 2011 ME 1, ¶ 3, 10 A.3d 1159 (Silver, J.) ("A common sense reading … also supports this interpretation.") Although there are no discernable boundary lines, the notion that one can touch the submerged lands ground when swimming as it is entirely owned by the State but *not* the immediately adjoining intertidal lands makes no sense.

Walking/Strolling. By walking, the State means walking for exercise and fun – actually, "strolling" is a better term. This strolling is *not* incidental to fishing, fowling, navigation or any other ocean-related activity – other than perhaps the joy of enjoying the ocean view, ocean air and perhaps bird watching (rather than shooting). Walking along Goose Rocks Beach in the intertidal area is the most common use of the beach.[79] The Superior Court concluded that walking (*i.e.,* strolling) is not a public trust use in the intertidal zone apparently because it is not ocean-based. (A.369).

[79] *Id.*; *see also* Plaintiff Sandifer (A.724 at154-55, A.726 at 160, A.732 at 187); Joan Junker (A.1112) (since 1930s); Cohen (A.1136); Heartz (A.1494-95).

Travel on Goose Rocks Beach, and other coastal areas has been occurring for centuries. Churchill (A.1877 at 178-80, A.1880 at 189-90). Strolling, jogging or pushing a baby stroller along Goose Rocks Beach is viewed by all sides in this litigation as the most exercised, least disputed use in the intertidal zone. *Appellants' Br.,* 9-10. While it seems to be a use recognized as long-standing by all, unfortunately Appellants claim the right to stop such activity in front of each of their properties and thereby effectively end "walking" as it has been exercised.

Walking upon the intertidal area for the sake of walking should be confirmed as a public trust use without having to resort to the *Saufley* or *Levy Opinions.* Walking in the intertidal zone has been established, confirmed, accepted and never lost – and the public's exercise of this right should not be at the whim of the upland owner.

The only reason there is a dispute over the public's use of the intertidal area is the existence of the Colonial Ordinance which was part of the 17th century Massachusetts Laws and Liberties. Part and parcel of those Laws and Liberties was the "drovers" provision which made clear that one could drive livestock in open areas, including the intertidal area.[80] *Bell,* 1987 Me. Super. LEXIS 256, *9. There is no doubt that cattle were on the beaches and

[80] Barnes, *The Laws and Liberties of Massachusetts* at 18 (1982) ("it shall be lawfull to rest and refresh [cattle] for a competent time in any open place that is not corn, meadow, or inclosed for some particular use."; *see also* Town Ex. 136 (A.2160-63) (cart and horses).

intertidal area.[81] Also, not surprisingly, the beaches were used as a place of travel, including walking, in colonial times.[82]

Somehow, although the public's walking, droving and travelling on the beaches is undisputed before Maine became a state, the *Bell* courts, in direct conflict with the applicable common law, seem to believe that such uses never coalesced into "rights" and therefore do not exist. *Bell v. Town of Wells,* 1987 Me. Super. LEXIS 256, at *8 - *12. Of course, this is backwards – the public's use of the beaches for these activities clearly was founded upon the fundamental acceptance of such uses under the common law long before Maine became a state. The burden is on the upland owners to prove otherwise – to prove that these rights, which cannot be lost by mere nonuse,[83] were given away.

There is no record that Maine courts ever prevented walking in the intertidal zone; in fact, the opposite is true. *Bell II,* 557 A.2d at 170, 174, 189, 192; *Bell,* 1987 Me. Super. LEXIS 256, at *9-12. The English decision upon which the peculiar twists in the public trust doctrine seem to be based in Maine and Massachusetts, presumed recreational walkers. *Blundell v.*

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[81] Churchill (A.1878 at 183-84); *see also, Bell,* 1987 Me. Super. LEXIS 256, *9.

[82] [T]he poor roads in 17th Century Colonial America and the dangers that existed in trying to travel inland, both before and after passage of the Colonial Ordinance, made travel along the intertidal zone a public right on both public and private intertidal zones. [Citations omitted.] The Laws and Liberties expressly discussed the right of drovers to rest cattle in open areas. *Barnes, The Laws and Liberties of Massachusetts* (1982) at p. 18. Other historical documentary evidence makes it clear that the public could use the beaches for their own travel and for driving cattle.

Bell, 1987 Me. Super. LEXIS 256, at *8 - *12; *see also* Churchill (A.1877 at 178-80, A.1880 at 189-90); Plaintiff Gerrish (A.799 at 185; Plaintiffs' Ex. 59 at p. 4).

[83] *See* note 18, *supra.*

Catterall, 106 Eng. Rep. 1190 (K.B. 1821) (Bayley, J.) ("generally used for the recreation of walking ...."). In *Deering,* 25 Me. at 65, the Court explained that "there is reserved for all, the right to pass freely to the lands and houses of others besides the owners of the flats .... They may pass over the ground ... whenever their necessities or their inclinations induce them to go to others' lands or houses, and they have all the privileges of lying upon the flats, when they go or return from the lands of others ...." In *Marshall,* 93 Me. at 536-37, the Court stated that the public "may ride or skate over the[] [intertidal zone] when covered with water bearing ice ...." Not surprisingly, the treatise on maritime law in Maine and Massachusetts in 1932 explained that "In Maine ... the courts have extended the public privileges on the flats ... to include ... walking upon the flats ...." Whittlesey, *Law of the Seashore, Tidewaters and Grat Ponds in Massachusetts and Maine,* at 14 (1932).

The experience at Goose Rocks beach is typical. Members of the public, backlot owners and beachfront owners generally walk in the intertidal area for recreation and fun year-round because it is firmer and easier to walk on than the dry sand, and have done so as long as anyone can remember without any express permission and with no one objecting.[84] Many jog[85] or push strollers.[86]

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[84] *E.g.,* Plaintiff Scribner (A.547 at 32, A.550 at 45, A.555 at 66-67) (public has right to stroll in intertidal zone); Plaintiff Rice (A.694 at 34) (no problem with people walking or running on the wet sand); Plaintiff Sandifer (A.729 at 172); Plaintiff Forrest (A.806 at 9-11, A.812 at 34, A.814 at 42) (since 1970); Plaintiff Fleming (A.849 at 183) (from 1983, walked a lot on wet sand from river to river); Plaintiff Gerrish (A.799 at184) (walked in wet sand almost every day from 1985); Plaintiff Hastings (A.571 at 131); Plaintiff Gray (A.639-40 at 80-81, A.645 at 101) (has no problem with people walking up and down intertidal area); Plaintiff Asplundh (A.662 at 169) ("okay" with walking on wet sand; since 1970s); Plaintiff O'Connor (A.701 at 68, A.707 at 87, A.711-12 at 102-

Children pull wagons in the intertidal zone.[87] While they do these activities, members of the public stop, stand, wade, sunbathe and sit in the intertidal area.[88] They sit in the intertidal zone because it is cooler and to be closer to their children who play in and out of the water.[89] Some members of the public bird watch in the intertidal zone.[90] When walking in the intertidal area, children and others stop to sit, rest and play in the sand, including searching for sand dollars and shells; this has gone on for at least as long as anyone can remember.[91] Babies and children stop to rest more often and to play.[92] The

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04; & Plaintiff Ex. 116 (A.2108)); Plaintiff Gallant (A.716 at 123, A.718 at 129, A.721 at 142); Plaintiff Zagoren (A.748-50 at 250-52) (walking in intertidal zone); Plaintiff Vandervoorn (A.773-74at 83-84) (walked in intertidal zone for fun of it); Plaintiff Rencurrel (A.676 at 228) ("no problems" with jogging or walking); Merrill (A.832 at 114-16, A.834 at 122-23) (Plaintiffs' witness; would walk in intertidal zone even if upland owners "revoked" permission); Cohen (A.1136); Jose-Roddy (A.1173-75); Chief Bruni (A.632 at 50); Johnson (A.2241 at 38-39 (in the 1930s)); Barwise - Town Ex. 152 (A.2192 (years 1912-13 and 1930)), (A.2195 (in the1930's)); MacDonald (A.1560; & TMF Ex. 318 (A.2357, A.2358, A.2367, A.2376, A.2380)); Judge Whitehead (A.1630-31); Dwyer (A.1913 at 299-300); Heartz (A.1494-95); Pearce (A.1411-12); Hogan (A.1202, A.1213); Wiewel (A.1235, A.1250-51); Driver (A.1479 (walking and jogging since 1970)).

[85] Plaintiff Rice (A.694 at 34); Plaintiff Gardner (A.667 at 190); Cohen (A.1136, A.1144); Schmalz (A.1540); Wiewel (A.1250-51); Driver (A.1479 (walking and jogging since 1970); Dwyer (A.1914 at 302).

[86] Plaintiff Forrest (A.814 at 43); Plaintiff Sandifer (A.733-34 at 190-92, & Plaintiff Ex. 121 (A.2114)); Plaintiff Eaton (A.763 at 40-41); Judge Whitehead (A.1643-44, & TMF Ex. 348 (A.2412)).

[87] Jose-Roddy (A.1199, & TMF Ex. 310 (A.2340)).

[88] *E.g.,* Plaintiff Hastings (A.568 at 118, A.569 at 120) (never told anyone walking or standing in the intertidal zone to move on); MacDonald (A.1560;& TMF Ex. 318 (A.2357, A.2361, A.2366-67, A.2369-70, A.2376, A.2380-81, A.2384); Fessenden (A.1894-95 at 248-49) (walked and sat); Jose-Roddy (A.1170-71, A.1175); Hogan (A.1204, 1207); Steiger (A.1282-83) (walked and sat); Pearce (A.1411-12) (80 years); Heartz (A.1494-95); Joan Junker (A.1114, 1107) (sat and sunbathed; since 1930s).

[89] *Id.; see also* Heartz (A.1497); Anderson (TMF Ex. 279 (A.2288)).

[90] Kudaroski (A.1809); Anderson (A.1781).

[91] Joan Junker (A.1102, A.1107, A.1109, A.1114); Jose-Roddy (A.1171, A.1174-76, A.1184, & TMF Ex. 310 (A.2321-24, A.2328-29, A.2335-36, A.2339, A.2341, A.2347)); Plaintiff Sandifer (A.733 at 191); Plaintiff Zagoren (A.748 at 251); Judge Whitehead (A.1630-31); Case (A.1684-85); Wostbrock (A.1735-36); Fessenden (A.1894-95 at 248-

Town's Comprehensive Plans recognize walking in the intertidal area at Goose Rocks Beach.[93]

No beachfront property owner ever stopped these activities or explicitly granted permission for them.[94] Children have not been instructed to stay just in front of their house on the beach, and have walked and did other things on the whole beach without permission.[95] The few signs put up by several of the Appellants were not near the high water mark and could not reasonably be viewed as an effort to stop walking or other activities in the intertidal area.[96]

Walking, sitting or standing in the intertidal area has no greater impact on the use and enjoyment of the upland owners' of their property than the classic public trust uses, such as fowling, fishing and boating.[97] Indeed, walking, sitting or standing in the intertidal zone casting hooked lures,

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49) (walked and sat); Judge Gordon (A.1514); Hogan (A.1207) (sand castles); Pearce (A.1380-82); Somers (TMF Ex. 335 (A.2404-05)).

[92] *Id.*; MacDonald (A.1560; & TMF Ex. 318 (A.2357, A.2358, A.2367, A.2376, A.2380)); Mazeika (TMF Ex. 330 (A.2401)).

[93] *1996 Comprehensive Plan* (Plaintiffs Ex. 2 at 20 (A.1974 ("There are also means to enjoy much of the Kennebunkport seashore on foot. … [A] pedestrian can easily walk the length of Goose Rocks Beach and continue up the Little River beyond it.")); *2009 Comprehensive Plan* (Plaintiffs Ex. 3 at 11 (A.1981 (Vision for Goose Rocks Beach: "The beach will remain … walkable")).

[94] *E.g.,* Plaintiff Hastings (A.560 at 85-86, A.561 at 91, A.565-66 at 107-08, A.567 at 114, A.568 at 118); Cohen (A.1136); Jose-Roddy (A.1177); Judge Gordon (A.1515); Steiger (A.1283).

[95] Plaintiff Forrest (A.809-10 at 24-25 & 27-28); *also* Jose-Roddy (A.1177); Wiewel (A.1238-40).

[96] *E.g.,* Plaintiff Sandifer (A.734 at 194); Plaintiff O'Connor (A.704 at 72) ("no trespassing sign" on stairs from beach to houselot); Plaintiff Henriksen (A.822 at 73) (sign on path to but not on the beach); Plaintiffs' Ex. 85 (A.2080-88); Plaintiffs Ex. 137 (A.2128); Merrill (A.832 at114-15).

[97] *E.g.,* Plaintiff O'Connor (A.712 at 105-07) (gives wider berth to fishermen casting than a person standing); Plaintiff Zagoren (A.749 at 253-54 (fishing "more objectionable and burdensome than walking or sitting or other things in the intertidal zone".

shooting a gun at water fowl or beaching a boat has more impact than just walking, sitting or standing.

Not surprisingly, Appellants testified that they have no problem with or do not plan to stop such walking (*see* note 83, *infra*) but seek the right to stop the walking if they so desire. Obviously, if one or more of them did so, and in the unlikely event the public complied with such requests, strolling on the intertidal beach as we know it would cease. In any event, there is a dispute here whether members of the public have the right under the public trust to stroll. It is a dispute that cannot be avoided by the Appellants professing at this moment in time that they may "continue to permit" strolling in the intertidal zone.

With this background, it is hard to understand how strolling, jogging and pushing a stroller are *not* public trust activities. These activities have been exercised without dispute for hundreds of years, the case law prior to *Bell* certainly supports such activities and never hinted otherwise, and the activities are accepted in practice by upland owners. If the common law is to be properly applied here as "the 'perfection of human reason' [which] expand[s] with the progress of society and develop[s] with new ideas of right and justice," *Matter of Robinson*, 88 Me. at 23, it is unnecessary to even choose between the *Saufley* and *Levy Opinions.* The case law and actions of the public and upland owners established these uses as public trust activities long before *Bell.*

Incidental Wading. It is virtually impossible to engage in any public trust activity in the intertidal zone without wading, be it fishing, fowling,

navigating, scuba diving, water skiing, surfing or boogie boarding, let alone swimming or walking.[98] Wading is an incidental use to any and all recognized public trust rights. There should be no dispute that the public can wade over submerged lands and wade to get to the submerged lands. A boundary line for wading between the submerged and intertidal lands when covered with water is unenforceable. Common sense and common practice mandate recognition of wading as well.

Games. Members of the public, and in particular children, have played games in the intertidal area apparently as long as people have been in the intertidal area in large part because the sand is firmer. The games have included softball and frisbee.[99] Not surprisingly, children who are members of the public play in the intertidal zone, including in particular in tidal pools, at Goose Rocks Beach, in order to engage in the age-old endeavor of building sand castles which has been a common sight for as long as anyone can remember.[100] They do so without permission of the upland owners.[101] Like walking, games-playing, in particular sand-castle building, should fall within

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[98] *E.g.,* Barwise (TMF Ex. 282 (A.2289, A.2293-94); Kudaroski (TMF Ex. 316 (A.2352)); Wiewel (TMF Ex. 349 (A.2415); Jose-Roddy (TMF Ex. 326 (A.2326, A.2335, A.2347)); TMF Ex. 330 (A.2395-96); TMF Ex. 348 (A.2411-12); TMF Ex. 335 (A.2403).

[99] *E.g.*, Plaintiff Forrest (A.806 at11-12 & A.812 at 34-35) (frizbee, volleyball, football); Joan Junker (A.1102, A1107-08) (baseball since 1930s; intertidal area was perfect ballfield); Jose-Roddy (A.1174) (whiffleball, frizbee, football, volleyball); TMF Ex. 310 (A.2338); Cohen (A.1136); Judge Whitehead (A.1644); Mazeika (TMF Ex. 330 (A.2402 (bocce)); Wiewel (A.1235, 1241) (softball, frizbee, lacrosse); P. Smith (A.1335) (softball on wet sand); Judge Gordon (A.1511) (hard sand better for playing ball); Steiger (A.1280) (badmitten, volleyball, whiffleball, football, bocce).

[100] *E.g.,* Plaintiff Forrest (A.806 at 11-12); Case (A.1675; & TMF Ex. 284 (A.2304)); Joan Junker (A.1102) (since 1930s); Jose-Roddy (A.1173-74, A.1184; & TMF Ex. 310 (A.2321-24, A.2328, A.2336, A.2339, A.2341)); Cohen (A.1136); Wiewel (A.1235); Steiger (A.1280); Anderson (TMF Ex. 279 (A.2284)).

[101] *Id.; see also* Plaintiff Gray (A.649-50 at 120-23).

the *jus publicum*. If cattle were allowed to rest and wallow around in the intertidal zone, it is hard to understand how children are not allowed to play in it.

Incidental eating, walking, standing and sitting. Both the *Saufley* and *Levy Opinions* found that the public has the right to *walk* across the intertidal zone in order to reach the ocean for public trust activities. The *Opinions* did not specifically address public *sitting* or *standing* when associated with or incidental to public trust activities such as scuba diving. The law in Maine seems clear that the public can eat, sit, stand and walk as incidental to public trust uses of fishing, fowling and navigation. *Marshall,* 93 Me. at 536-37; *Deering,* 25 Me. at 65. Fishing (by line, net or rake, for fish or shellfish) and fowling (the shooting of waterfowl) obviously contemplate sitting and standing – it could not be otherwise. No court has ever suggested that one cannot munch on a sandwich while fishing, fowling or in or near a beached boat. A requirement that one must be in constant motion when fishing, navigating or fowling and not eat defies common sense. When clamming, by necessity the clammer must move from one spot to another and at each spot stand while leaning over to rake for shellfish. And, being engaged in strenuous work, clammers are known to stand while resting their backs out on the flats. Likewise, when engaged in classic navigation, which includes beaching a boat in the intertidal zone, the view that one cannot eat, stand or sit next to or in the boat until the tide rolls in is wrong as *Andrews, Marshall* and common sense make clear. Because sitting and standing have been confirmed as

incidental public trust activities in the past, it is logical to assume that they fall within the public trust when associated with other public trust activities.

In view of this, and under the logic of both the *Saufley* and *Levy Opinions,* 2011 ME 97, ¶¶ 53, 75, when engaging in, about to engage in or having just engaged in public trust activities in the intertidal zone or in the ocean, the public may also engage in the incidental activities of walking, eating, standing and sitting.

CONCLUSION

This Court should affirm the Superior Court decision insofar as it concluded that "ocean-based," water-borne activities of jet-skiing, water-skiing, knee-boarding, waking or tubing, surfing, windsurfing, boogie boarding, rafting, tubing, paddleboarding, and snorkeling are public trust uses, and reverse that decision to the extent it rejected swimming, bathing or wading, walking, eating or playing games as public trust uses.

DATED: August 5, 2013

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