STATE OF MAINE

MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Court Docket No. Cum-24-82

PETER MASUCCI, et al.,

Plaintiffs - Appellants

v.

JUDY'S MOODY, LLC et al

Defendants – Appellees

APPEAL
FROM THE CUMBERLAND COUNTY SUPERIOR COURT

BRIEF OF APPELLANT ORLANDO E. DELOGU, *pro se*

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STATEMENT OF FACTS

These proceedings began on April 22, 2021 when Peter and Kathy Masucci who reside in Wells, Maine, 20 other residents of Maine, and 2 persons whose residence is out-of-state, but who own property in Maine, brought a 5 Count action challenging the claim of ownership of intertidal land abutting the shoreland property of the named defendants. Further, the 24 named plaintiffs challenged the limitation of public use rights to "fishing, fowling, and navigation" as laid out in a 1647 Colonial Ordinance. The Ordinance is said to be the foundation of defendant's claim of title to intertidal land abutting their property and the limitation of public use rights (noted above) in/on intertidal land.

The named defendants are shoreland property owners widely scattered along the coast of Maine. They stand as surrogates for any/all other shoreland property owners in the state whose claimed title to abutting intertidal land and their asserted right to limit public uses to "fishing, fowling, and navigation" derive from the same 1647 Colonial Ordinance relied upon by the named defendants, thus enabling the final disposition of this case to be given statewide effect.

The Attorney General of the State of Maine (as a Party in Interest) joined these proceedings from the outset for the limited purpose of asserting that the public (any/all Maine citizens and one assumes visitors to Maine) have a use right to walk on intertidal land in Maine, presumably as an extension of the Ordinance's

admitted public right to "navigate" in/on intertidal land.

The defendants (through various groupings of counsel) answered the complaint with motions to dismiss the case predicated either on 14 MRS § 556 (Maine's anti-SLAPP statute) or on the Maine Rules of Civil Procedure, Rule 12(b)(6) asserting that plaintiffs failed "to state a claim upon which relief can be granted."

On April 15, 2022, the trial court (without hearing) "GRANTED IN PART" and "DENIED IN PART" defendant's motions.[1] At the outset of the court's "Discussion" it noted that Count I merely "…notice pleads the form of equitable relief requested by the Plaintiff. Thus, the Court does not address it here."[2] The trial court then dismissed Count's II, III, and V, each dealing with a separate plaintiff argument asserting the state's ownership of its intertidal lands, except for discrete parcels alienated by the Legislature to facilitate "wharfing out," i.e., marine commerce. The trial court's reasoning (underlying its dismissal) essentially accepts the Law Court's holdings in *Bell v. Town of Wells (Bell I),* 510 A2d 509 (Me. 1986) and *Bell v. Town of Wells (Bell II),* 557 A2d 168 (Me. 1989) and the later case *Ross v. Acadian Seaplants, Ltd.,* 2019 ME 45, 206 A3d 283 as settling the question of ownership of intertidal land in Maine—the upland owner holds

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1 See *Peter & Kathy Masucci et al v. Judy's Moody, LLC, et al,* Sup. Ct. Civ. Act. Doc. No. RE-21-0035. The court's April 15th Order was expanded and clarified in an August 1, 2022 Order.

2 See April 15th Order, fn. 6 pg. 20.

title. The trial court declined to examine ownership issues, notwithstanding the Law Court's most recent case on point, *Almeder v. Town of Kennebunkport,* 2019 ME 151, 217 A3d 1111 holding that title to intertidal land in Kennebunkport was (except for one parcel) held by the Town in trust for the public.

The trial court's April 15th Order declined dismissal of plaintiff's Count IV. The court noted *McGarvey v. Whittredge*, 2011 ME 97, 28 A3d 620 and the Law Court's "…flexible approach to determining what public uses are allowed in the intertidal area…"[3] A lengthy discovery process with respect to Count IV ensued.[4] This process culminated in all sides filing motions for summary judgment and supporting briefs in May/June, 2023. Plaintiffs brief urged that a wide range of recreational/commercial uses on intertidal land be recognized by the trial court. The AG's office urged that recreational walking be a permitted public use on intertidal land, arguing that the scope of public rights on intertidal land was not conclusively defined by *Bell II*, citing subsequent Law Court decisions, *McGarvey* and *Almeder* to that effect. Defendants brief argued that *Bell II* barred recreational walking on intertidal land and was binding on the trial court.

On January 26, 2024 a trial court Order (again, without hearing, and contrary to the Law Court's "flexible approach") dismissed plaintiff's Count IV claim "as

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3 See *Peter & Kathy Masucci et al v. Judy's Moody, LLC, et al*, Sup. Ct. Civ. Act. Doc. No. RE-21-0035 at pg. 24.

4 All defendants declined to proceed on the basis of stipulated facts.

barred by the doctrine of *res judicate".* In a separate Order on the same day, the trial court denied the AG's motion for summary judgment, apparently for the AG's failure to comply with (or misuse of) Maine Rules of Civil Procedure, Rule 56, Summary Judgment requirements. Finally, in a separate Order on the same day, the trial court (having accepted defendant's *res judicate* arguments) granted the defendant's summary judgment motion, thereby disposing of all Count IV issues.

At this point, all five Counts of plaintiff's original complaint having been "not address[ed]" or dismissed by the trial court, plaintiffs represented by Archipelago Law filed a notice of appeal on February 20, 2024; plaintiff *pro se* Orlando Delogu, filed a notice of appeal on February 21, 2024. The AG's office filed a notice of appeal (presumably limited to Count IV issues) on February 29, 2024. Finally, in early March, 2024 all of the remaining defendants (through respective counsel) sought and were granted cross-appellant status.

STANDARD OF REVIEW

Except for provisions in the U.S. Constitution, valid federal statutes, and regulations binding on the States (and limiting their jurisdiction), the Law Court has unfettered discretion to examine/reexamine laws and prior case law recognizing property rights in Maine, e.g., the ownership of intertidal land. Though early Colonial legislative enactments, Maine statutes, and case law took the position that local governments held title to intertidal land in Maine in trust for the

public,[5] the 1986 and 1989 *Bell* cases held that a 1647 Massachusetts Bay Colony Ordinance (subsequently "annulled" but judicially sustained as "an usage")[6] ceded title to all intertidal land in what are now the states of Massachusetts and Maine to abutting upland owners. The 2019 *Ross* case accepted this interpretation of the Ordinance without question. A more recent Law Court holding, the 2019 *Almeder* case, did not accept the *Bell* / *Ross* court's interpretation of the Ordinance.

This conflict in Law Court holdings (without more) justifies going forward with these proceedings—resolving the conflict is imperative. An early Maine case *Ex parte Davis*, 41 Me. 38 (1856) noted: "The judiciary … are bound to give construction to acts which are properly submitted to them." Id. at 53. In clarifying ownership of Maine's intertidal land, the Law Court must look not only at the 1647 Colonial Ordinance, but at intervening political realities and the legislation these realities gave rise to. A Revolutionary war was fought; a new Union was fashioned; the new Union adopted English common law respecting ownership of intertidal land, i.e., the King and Parliament held title to such land in trust for the public—

5 See 1 MRS §§ 1-5; 12 MRS §1865; *Inhabitants of North Yarmouth v. Skillings*, 45 Me. 133, 139-140 (1858)(holding that as early as 1743 the selectmen of the town held title to intertidal land in trust for the public); *Opinion of the Justices,* 437 A2d 597 (1981)(sustaining the 1981 amendment to Maine's Submerged Lands Act, (now12 MRS §1865). The *Opinion* (including its attachments) evidences the fact that at this point in time all three branches of Maine government believed that the state held title to its intertidal land in trust for the public, except for discreet parcels legislatively alienated to facilitate marine commerce. See also *James v. Inhabitants of the Town of West Bath,* 437 A2d 863, 866 (Me. 1981)(holding that Maine owns the bed of all tidal waters).

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

now coastal states hold title to such land in trust for the public;[7] a new State of Maine was admitted to the Union.

These realities require the Law Court to examine Maine's Statehood Act (passed by the Congress of the United States), specifically its reference to the "equal footing" doctrine (rooted in the U.S. Constitution, Article IV, §§ 2-3) and U.S. Supreme Court cases construing the doctrine in the context of settling ownership of intertidal land once a territory attains Statehood. In addition, the Law Court must examine a panoply of Maine statutes dealing with ownership of (or otherwise regulating) intertidal lands, and (stating the obvious) the Court must observe the limitations imposed on the Judicial branch by Maine's Constitution.[8]

That said, it should be noted that these proceedings take on added significance given the fact that the economic value of intertidal land, circa 2024, is no longer limited to marine commerce and lateral passage. Rooted in recreational uses, aquaculture, offshore wind, seaweed harvesting and processing, the value of intertidal land has increased dramatically in recent years. There is no sign that

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7 See *Shively v. Bowlby*, 152 U.S. 1 (1894) which held: "By the American Revolution, the people of each state, in their sovereign character, acquired the absolute right [ownership] to all their navigable waters and the soil under them. The shores of navigable waters and the soil under them were not granted by the Constitution to the United States, but were reserved to the states respectively. And new states have the same right of sovereignty and jurisdiction over this subject as the original ones." Id. at 36.

8 See e.g., *Myrick v. James*, 444 A2d 987 (Me. 1982)("That which we [the court] may not do is change … a rule or policy once the Legislature has specifically taken the rule or policy out of the arena of the judicial prerogative…by a positive and definitive statutory pronouncement…." Id. at 992. Whether the *Bell* cases failure to heed the *Myrick* court's warning, their failure to examine 12 MRS §1865, *supra* fn. 5, led to an incorrect determination of intertidal land ownership is now a matter for this court to decide.

these increases in intertidal land value will abate any time soon.

Also worth noting is that what is before this court, i.e., the irreconcilable ownership posture of the Bell / Ross cases on one hand and the Almeder case on the other, poses questions of law only—questions well within the purview of this court to resolve. A threshold question deserves answer—what is the standard of review? A relatively recent case, *Northern Utilities, Inc. v. City of South Portland*, 536 A2d 1116 (Me. 1988) noted: "The construction of language... is a question of law that we [the court] independently review." Id. at 1117. In *Northern Utilities* the interpretation of plaintiff's easement interest was before the court. The court did not impose any extraordinary burdens of proof on the plaintiffs, e.g., a showing "beyond a reasonable doubt" or a showing supported by "a preponderance of the evidence". Instead, the court looked at the facts of the case, the intent of the easement. They noted that defendant's interpretation of the easement (the facts in that case) all but eviscerated the underlying (cost saving) intent/purpose of the easement. The plaintiff, *Northern Utilities*, prevailed.

It is also worth noting that well before these proceedings, a concurring opinion in *Eaton v. Town of Wells,* 760 A2d 232 (Me. 2000) cautioned: "I write separately, however, because I would overrule *Bell v. Town of Wells,* 557A2d 168 (Me. 1989)." In short, problems with the *Bell* cases were seen early on. The concurring argument in *Eaton* approvingly cited *Myrick v. James,* 444 A2d 987 (Me. 1982)

particularly its five-part test for departing from *stare decisis* principles in favor of a more just, a more appropriate rule of law. Id. at 1000.[9] All five prongs of the test are met in the case now before this court. Neither the concurring opinion nor the *Myrick* case, suggested that any burdens of proof should be imposed on plaintiffs in those proceedings. *Pro se* plaintiff would urge that the Law Court not impose any additional burdens of proof on plaintiffs in these proceedings.

Plaintiffs here would set aside *stare decisis,* set aside the *Bell / Ross* holdings because they are rooted in a misinterpretation of a 1647 Ordinance, and a failure to give weight to Congressional, Massachusetts and Maine legislative enactments. Plaintiffs further urge this court to correct mistakes of the past, i.e., that from *Lapish* to *Barrows* to the *Bell* cases to *Ross,* Maine courts have incorrectly adhered to Massachusetts intertidal land law and ignored relevant U.S. Supreme Court cases. Successive Law Courts have failed to recognize that the Revolution, the founding of the Union, the Union's "equal footing" doctrine, the Union's adherence to English common law, gave rise to a new paradigm, i.e., Maine, upon statehood in 1820, held title to its intertidal land.[10]

In sum, whether one sees the Colonial Ordinance as misinterpreted, annulled by

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9 The text of the *Myrick* court's Part IV. *Stare Decisis Considerations*, is found at 444 A2d pgs. 997-1001.

10 See *Shively* fn. 7 *supra.* See also *Phillips Petroleum Co. v. Mississippi,* 484 U.S. 469 (1988)(holding that upon statehood Mississippi took title to its intertidal land); *Phillips* cites a long line of supporting U.S Supreme Court cases; the *Bell II* court brushed aside *Phillips* (without examining its reasoning) characterizing the case as "revisionist history," 557 A2d at 172. Plaintiffs here characterize *Phillips* as the law of the land in 1988, and today.

its own terms in 1690,[11] or rendered a nullity by the founding of the Union and Maine's admission to the Union is largely irrelevant. In Plaintiffs view any/all of these realities lead one to conclude that the Ordinance did not (could not) cede title to all intertidal land in Maine to abutting upland owners.

Given these facts, this reasoning, the approach taken in the previously noted *Northern Utilities* case seems appropriate in these proceedings. This court might well ask—was the Ordinance language interpreted correctly in the *Bell* cases? Arguably not. What was the intent of the 1647 Ordinance? It was said to be incentivizing marine commerce "wharfing out." Can that intent be achieved without relinquishing title to all intertidal land in what is now two states? Arguably it can be. The facts in this case (when fully laid out *infra*), as they were in *Northern Utilities,* will speak for themselves and definitively answer these questions. What has been cited already, see fn. 5 *supra*, suggests plaintiffs have a strong case. The standard of review should require plaintiffs to lay out the facts, case law supporting their contention that Maine holds title to its intertidal lands as fully as possible—nothing more. Separation of powers principles in Maine's Constitution, and *Ex parte Davis*, 41 Me at 53, then requires: "The judiciary [the Law Court]… to give construction to acts which are properly submitted to them."

11 See *supra* fn. 6.

That is precisely what plaintiff *pro se* would ask this court to do.

Finally, though it seems axiomatic, it bears repeating that the Law Court's conclusions in the case at hand are not bound by cases/holdings respecting the ownership/regulation of intertidal land by courts in another state. Nor is this court bound to adhere to errors/oversights made by previous Maine courts. The Law Court's conclusions in this case are subject to further review only by federal courts, including the U.S. Supreme Court, and only with respect to federal questions (issues) that a party to these proceedings views as wrongly decided by the Law Court's final disposition of this case.

ISSUES PRESENTED

Note: [Counts I, II, III, and V present ownership arguments, i.e., that Maine holds title to its intertidal lands, except for discrete parcels legislatively alienated to facilitate marine commerce. They will be addressed in this order. Count IV dealing with public uses of intertidal land will be discussed last.]

Count I: Plaintiff *pro se* asserts that given the scope of Maine's Declaratory Judgement Act, and the Act's grant of power to the Law Court to interpret legislation and resolve disputes involving the ownership of property, it follows that if this court's interpretation of the Colonial Ordinance, or any of Plaintiff's Count II, III, or V arguments invalidate the Ordinance as the foundational basis for defendant's (and all similarly situated shoreland owners) claim of title to Maine intertidal land, then the State of Maine's title to its intertidal land is confirmed, except for discrete parcels legislatively alienated to facilitate marine commerce.

Count II: Plaintiff *pro se* asserts that the "equal footing" doctrine rooted in Article IV, §§ 2-3 of the U.S. Constitution supported by Maine's Statehood Act, and U.S. Supreme Court case law (explicating the doctrine) confirms Maine's claim of ownership of its intertidal land, except for discrete

parcels legislatively alienated to facilitate marine commerce.

Count III: Plaintiff *pro se* asserts that Maine's Constitution precludes the judicial branch (by adhering to a "usage") from ceding title to Maine's intertidal land to upland owners, particularly when Legislative enactments have confirmed the State's ownership of its intertidal land. Moreover, English common law, Maine law, and the law in most states holds that only the Legislature can alienate intertidal land, and then only for a public purpose.

Count V: Plaintiff *pro se* notes that Massachusetts sponsored settlements in Maine (of necessity) retained title to intertidal land to enable lateral passage. The *Almeder v. Town of Kennebunkport* case recognized that fact. *Almeder* (sustaining the town's title to its intertidal land) undercuts the rationale of a line of Maine cases (from *Lapish* to *Barrows* to the *Bell* cases and *Ross). Almeder* leads plaintiff to conclude that defendants in this case, and all similarly situated shoreland owners, do not have title to adjacent intertidal land—title is in the respective towns and (upon statehood) the State, in trust for the public.

Count IV: Plaintiff *pro se* asserts that whether upland owners or the state are ultimately deemed to hold title to Maine intertidal land, the Colonial Ordinance's limitation of public use rights to "fishing, fowling, and navigation" does not supersede legislative exercise of Maine's sovereign powers, e.g., the "police power" to expand or narrow public use rights as it sees fit subject only to extant "takings" law.

SUMMARY OF ARGUMENT

Count I is both jurisdictional and substantive in character, i.e., named plaintiffs (all users of intertidal land) assert, pursuant to the Declaratory Judgment Act, 14 MRS §§ 5951-5959, that the *Bell* cases ceding title to all intertidal land in Maine to adjacent upland owners were wrongly decided. That said, the State of Maine in its sovereign capacity is the true owner of Maine's intertidal land (in trust for the

public) except for discrete parcels legislatively alienated to facilitate marine commerce.

The *Bell* cases followed a line of Maine and Massachusetts cases that go back to *Storer v. Freeman*.[12] The *Storer* court, however, did not accurately quote the 1647 Ordinance. *Storer's* cite to the Ordinance says: "…the proprietor of land adjoining on the sea or salt water shall hold to low water mark…."[13] The actual language of the Ordinance says: "…where the Sea ebbs and flows, the proprietor of the land adjoyning **shall have proprietie** to the low water mark…."[14] The difference is significant. The *Storer* version of the Ordinance suggests a grant of title, and though the Ordinance was annulled in the late 1600's, *Storer* held that "…an usage has prevailed…." ceding title to all intertidal land in what is now two states to upland owners. **But the actual language of the 1647 Ordinance is not a grant of title**.[15] It accords upland owners only a **"proprietie",** a term that in 16/17th century Massachusetts connoted a permission, a right, a license, a riparian/easement type

12 See *supra* note 6 and accompanying text.

13 See *Storer*, 6 Mass at pg. 438.

14 See E. Churchill, R. Yarumian II, *The Great Land Grab*, Tower Publishing 2019 at pg. 25, setting out the full text of the 1647 Colonial Ordinance. Further, the Churchill/Yarumian text at pgs. 118-119 summarizes the *Storer* case; a pertinent excerpt notes: "In thousands of documents examined there was not a single example where **'proprietie'** was used as a synonym of deed."

15 See Delogu, *Intellectual Indifference—Intellectual Dishonesty: The Colonial Ordinance, The Equal footing Doctrine, and the Maine Law Court,* 42 Me. Law Rev. 43 (1990) fns. 39-51 (pgs. 49-52) and accompanying text, laying out the argument that the Colonial Ordinance was not a conveyance (a grant) of intertidal land to upland owners, not by 16/17th century (or modern) property law principles. See also

of interest that if acted upon (to fill intertidal land, build wharves to facilitate marine commerce) would give the upland owner title to that portion of intertidal land. If not acted upon, English common law would remain in place.[16]

It follows that this court, having been called upon by 14 MRS §5954 to "…determine[d] any question of [statutory] construction…" may correct this long-standing error—this court may conclude that the *Storer* interpretation/construction of the Ordinance was not correct. And further, this court, pursuant to 14 MRS §5953, may then "…declare rights, status and other legal relations…" between the parties to these proceedings. Logically, (given the *Bell* cases statewide reach) the overturning of the foundational basis of the *Bell* cases would affirm (statewide) Maine's title to its intertidal lands (except for discrete parcels legislatively alienated to facilitate marine commerce).

Beyond the power of this court to correctly interpret the Ordinance, outlined above, the full Count I argument *infra* will cite other Maine legislation, Maine case law, an Opinion of the Justices, and U.S. Supreme Court case law all pre-dating the *Bell* holdings, and all suggesting that the *Storer* and *Bell* cases interpretation of the

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Cheung, *Rethinking the History of the Seventeenth Century Colonial Ordinance: A Reinterpretation of an Ancient Statute,* 42 Maine L. Rev. 115 (1990); a concluding excerpt notes, "As this article has demonstrated, colonial history does not support the traditional view that the Ordinance acted as a conveyance of property." Id. at 156.

16 English common law held that the King and Parliament held title to intertidal land in trust for the public. Upon the founding of the Union the title to intertidal land (again, in trust for the public) passed to the states; see *Shively*, *supra* fn. 7, and accompanying text.

Ordinance is incorrect.

Count II recognizes the new legal paradigm that arose as a result of the Revolution, the founding of the Union, the Union's fashioning of an "equal footing" doctrine, the Union's adherence to English common law with respect to the ownership of intertidal land, and Maine's 1820 admittance into the Union.[17] Earlier laws addressing intertidal land fashioned by French, Spanish, or English colonial bodies seeking a foothold in territory that became part of the Union became a nullity.[18] The new reality (sustained by state and federal case law) is that upon the founding of the Union and the granting of statehood to individual new states, the original states (with few exceptions) and all new states hold title to their intertidal land. See *PPL Montana, LLC v. Montana*, 565 U.S. 576 (2012) holding that, "Upon statehood, the state gains title within its borders to the beds and waters then navigable, or tidally influenced…." Id. at 591. Maine case law (including the *Bell* cases and *Ross*) failures to accede to these widely shared views respecting the ownership of intertidal land will be critically examined in the full Count II argument *infra*.

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17 See *supra* fn. 10 and accompanying text.

18 A State, of course, after entering the Union may freely adopt an earlier colonial law if it chooses to do so. That said, it should be noted that no Massachusetts legislative body ever extended the Colonial Ordinance to any Maine territory; no pre-statehood colonial settlement in Maine ever adopted the Ordinance, and post-statehood, no Maine Legislature has ever enacted the Ordinance, much less the proposition that a "usage" could cede title to all intertidal land in Maine to upland owners; see Delogu, *Intellectual Indifference—Intellectual Dishonesty: The Colonial Ordinance, The Equal footing Doctrine, and the Maine Law Court,* 42 Me. Law Rev. 43 (1990) fn. 73 at pg. 57.

Count III arguments (quite apart from arguments raised in Counts I and II) assert that Maine's Constitution, Article III, §§ 1 and 2 precludes the judicial branch of Maine government from ceding title to all of Maine's intertidal land to abutting upland owners. The constitutional language is short and unambiguous; §1 says: "The powers of this government shall be divided into 3 **distinct** departments…." (emphasis added). §2 says: "No person or persons, belonging to one of these departments, shall exercise any of the powers properly belonging to either of the others…." Given these constitutional limitations it seems clear that Maine's judicial branch, i.e., the Law Court, may not by simply adhering to a pre-statehood judicial "usage" of a Massachusetts court, alienate all of Maine's intertidal land to abutting upland owners. Moreover, it is universally accepted that the alienation of public property is a legislative function.[19] In sum, the judicial alienation of all Maine intertidal land is facially at odds with Me. Const. Art. III, §2. The full Count III argument *infra*, will augment and support the citations noted above indicating that a judicial alienation of all intertidal land in an entire state is violative of Maine's Constitution and contrary to a large body of case law.

Count V asserts that the Law Court's recent decision in *Almeder v. Town of Kennebunkport,* 2019 ME 151, 217 A3d 1111 is both correct, and represents an

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19 See *Opinion of the Justices,* 437 A2d 597 (Me. 1981)("Only the Parliament, as the public's representative could alienate the jus publicum…. By virtue of the American Revolution, the states succeeded to all the rights of both the Crown and the Parliament in tidelands. Id. at 605.)

historically accurate position with respect to the ownership of intertidal land in Maine. More importantly, *Almeder* implicitly repudiates the line of cases from *Lapish* to *Barrows* to the *Bell* cases and *Ross* predicated as they are on a 1647 Colonial Ordinance said to have ceded title to all intertidal land in what is now two states to abutting upland owners. Plaintiffs in these proceedings respectfully ask the Law Court to make explicit what at this point is a matter of record in the 2019 *Almeder* holding, i.e., that upland owners (settling in Maine) did not have title to intertidal land. The trial court's detailed findings make clear that in the settlement of Cape Porpus (now Kennebunkport)[20] town officials charged with executing the settlement process retained title to all town intertidal land (including Goose Rocks Beach) in trust for the public (except for one parcel at the mouth of the Little River). Kennebunkport holds that title today. Public ownership of intertidal land in 17th century Maine was seen as a matter of necessity—the survival of the Cape Porpus settlement (indeed of any/all settlements along the coast of Maine) required lateral passage along the foreshore. There were no interior roads.[21] Grants of land to individual settlers, by town officials legislatively charged with executing the

20 See 2019 ME ¶10 stating that the settlement of Cape Porpus (now Kennebunkport) began in 1653.

21 See *Almeder* trial court opinion ¶ 69 which notes: "From earliest colonial times and into the 18th century, beaches were used as a way for public travel and passage…. Before inland roads or highways were cleared and secured beaches were the main, often the only road, for travel along Maine's coast." ¶ 70 goes on to note: Beaches were also used for driving cattle, a practice that continued well into the 18th century, and was the subject of oversight and regulation for public order and protection…"

settlement process, ran from mean high (or in the Kennebunkport setting from the "seawall" (a natural barrier above mean high) landward, reserving all intertidal land for continuous public use.

The clear inference from the trial court and Law Court holdings in *Almeder* is that no Massachusetts Colonial legislature (and upon the founding of the Union, no Massachusetts legislature) engaged in fostering/maintaining settlements in the district of Maine believed that the 1647 Colonial Ordinance (much less an after the fact 1810 judicial "usage") had alienated all intertidal land subject to their authority.[22] Colonial legislatures, pursuant to the delegated authority of the King/Parliament held title to intertidal land in trust for the public. Upon statehood Massachusetts legislatures succeeded to those powers. For over 150 years they conveyed that title to those charged with executing the settlement process. These local officials in turn (as noted above) conveyed tracts of land (invariably from mean high or the "seawall" landward) to individual settlers.[23]

In short, whether the Colonial Ordinance was interpreted incorrectly by the *Storer, Barrows, Bell, Ross* line of cases or was nullified by the founding of the

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22 If colonial authorities/legislatures thought about the Colonial Ordinance at all they no doubt saw the Ordinance language 'proprietie' as a mere license, a permission, not a grant. This is how it was commonly seen in the 16th/17th century. See *supra* fns. 14 and 15 and accompanying text.

23 See 20 ME.151 ¶ 58 "Ownership of the Beach passed from the Crown to the colony of Massachusetts; and then from Massachusetts through Danforth [the appointed President of the Province of Maine] to the proprietors [of Cape Porpus] Barret, Burrington, and Baden, where it was retained in trust by them for the benefit of the inhabitants of Cape Porpus [now Kennebunkport]."

Union is a matter of indifference. What is clear is that the settlement of Kennebunkport (and of other coastal areas within the district of Maine) would not have been possible without public control/ownership of intertidal land. And Massachusetts legislatures held title to intertidal land and conveyed that title to those charged with carrying out the settlement process in Maine. The full Count V argument *infra*, will augment and support the research and conclusions laid out to this point, i.e., that coastal colonial settlements in Maine, (and Maine upon statehood) held title to Maine's intertidal land; they hold that title today, except for discrete parcels legislatively alienated.

Count IV arguments shift the focus from the ownership of intertidal land to permitted public uses in/on intertidal land. The 1647 Ordinance acknowledges that "fishing, fowling, and navigation" are permitted common law public trust use rights in/on intertidal land. *Ergo,* even if upland owners are deemed to own abutting intertidal land, their title is not "absolute." They do not have exclusive use of intertidal land. The terms "fishing, fowling, and navigation are subject to interpretation. Moreover, traditionally, common law public trust use rights have always been amenable to expansion (or narrowing) to meet changed conditions, new realities, technologies, etc.—that was the beauty of the common law—its ability to evolve over time.

Beyond (or in addition to) these common law public trust use rights, all land

within Maine's jurisdiction whether publicly or privately owned is subject (in furtherance of a legitimate governmental purpose) to reasonable exercise of the state's police power. A leading Maine case on point, *Boston & Me. R.R. v. County Comm'rs*, 79 Me. 386, 10 A. 113 (1887) noted:

> "This power of the legislature to impose uncompensated duties and even burdens, upon individuals and corporations … [to protect health, safety, morals and general welfare] is the police power…. This important power must be extensive enough to protect the most retiring citizen in the most obscure walks, and to control the greatest and wealthiest corporations. [24]

See also *French Investment Co. v. City of New York*, 385 NYS 2d 5 (1976) which noted: "A legitimate governmental purpose is, of course, one which furthers the public health, safety, morals or general welfare." Id. at 10. The expansion of 1647 public uses in/on intertidal to include modern uses and activities that could not even be imagined in that era is clearly a "legitimate governmental purpose."

With these points in mind, plaintiff *pro se* in these proceedings argues that the 1989 *Bell II* court erred in holding that the Legislature's 1986 enactment of The Public Trust in Intertidal Land Act, 12 MRS §§ 571- 573 is an unconstitutional "taking" of upland owner's property. Whether this legislation is characterized as an expansion of the public's common law public trust rights, or an exercise of the state's police powers is irrelevant. In either case, the *Bell II* court's holding that it

24 79 Me at 393, 10 A. at 114.

is a "taking" (of upland owner's property rights) cannot be squared with existing Maine "taking" case law, or with U.S. Supreme Court case law elucidating "taking" principles. The leading Supreme Court case *Pennsylvania Coal v. Mahon*[25] makes clear that regulation is often necessary/appropriate, but when regulation goes "too far" it is not sustainable. Plaintiffs argue that the 1986 legislation stops well-short of having gone "too far."

For example, the 1986 legislation does not define a specific intertidal land area in/on which a specific activity (or piece of equipment) may be utilized, thus avoiding the type of problem that arose in *Lorretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419 (1982). Further, the Supreme Court in *Penn Central Transportation Co. v. New York City* and in *Agins v. City of Tiburon* [26] held that a taking occurs when regulations significantly diminish "reasonable investment backed expectations" and/or when the economic value of land is all but destroyed. Plaintiffs argue that the 1986 legislation stops well short of these criteria for finding that a "taking" has occurred.

Moreover, given that the 1986 legislation permits recreational uses that can only occur in limited areas along the entire coast of Maine, and then only in seasons of the year conducive to recreational use, the legislation affects only a very small

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25 260, U.S. 393, 415 (1922).

26 438 U.S. 104 (1978) and 447 U.S. 255 (1980) respectively. See Generally, Delogu, *The Law of Taking Elsewhere, and One Suspects in Maine,* 52 Maine Law Rev. 324 (2000).

percentage of total intertidal land in Maine. Lastly, given the huge appreciation in value of upland owner property abutting intertidal land, the assertion that 1986 Act will diminish upland owner property values (often the key factor in determining whether an unconstitutional "taking" has occurred) seems negligible to the point of non-existence.

The full Count IV argument *infra*, will examine Maine "taking" cases, and elaborate further on U.S. Supreme Court cases. In plaintiff's view this case law leads one to conclude that the *Bell II* court's finding that the 1986 Act is an unconstitutional "taking" is not factually supported.

DETAILED ARGUMENT *in re* ISSUES PRESENTED

Count I: Plaintiff *pro se* asserts that given the scope of Maine's Declaratory Judgement Act, and the Act's grant of power to the Law Court to interpret legislation and resolve disputes involving the ownership of property, it follows that if this court's interpretation of the Colonial Ordinance, or any of Plaintiff's Count II, III, or V arguments invalidate the Ordinance as the foundational basis for defendant's (and all similarly situated shoreland owner's) claim of title to Maine intertidal land, then the State of Maine's title to its intertidal land is confirmed, except for discrete parcels legislatively alienated to facilitate marine commerce.

The point (made in the Count I Summary of Argument) that the *Storer* court misquoted and misinterpreted the 1647 Ordinance as a grant is briefly repeated here. Its importance cannot be over-stated. This argument negates the foundational basis of the line of Maine cases beginning with *Lapish v. Bangor Bank*,[27] and

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27 8 Me. 85 (1831).

culminating in the *Bell* cases and *Ross* case. The *Lapish* court erred in two respects. First, notwithstanding the fact that Maine, then a new state separate and apart from Massachusetts and free to fashion its own intertidal land law, *Lapish* did not independently examine the Colonial Ordinance—it simply accepted *Storer's* erroneous interpretation of the Ordinance, i.e., that the Ordinance was a grant. Second, *Lapish* accepted the proposition that a judicial "usage," interpreting the Ordinance as a grant had ceded title to all intertidal land in Massachusetts to abutting upland owners. The *Lapish* court referencing *Storer* noted:

> "Ever since that decision, as well as long before, the law on this point has been considered as perfectly at rest; and we do not feel ourselves at liberty to discuss it as an open question."[28]

Adherence to these errors had the effect of extending Massachusetts intertidal land law to Maine. But the Ordinance is not a grant. The actual language of the Ordinance **"shall have proprietie"** is not a deed—it conveys only a permission, a right, a license, which if acted upon to facilitate marine commerce (by filling or building wharves in/on intertidal land) would convey title to only a discrete parcel of intertidal land. Title to all remaining intertidal land would remain with the State in trust for the public.[29] In short, Maine intertidal land law from *Lapish* to the *Bell / Ross* cases is founded on error. This court has the power to correct error.

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28 Id. at 93.

29 See *supra* fns. 14, 15.

Perhaps the best evidence that the 1810 *Storer* court erred (in characterizing the 1647 Ordinance as a grant) is found in the fact that for more than 150 years after the Ordinance was adopted no colonial Massachusetts legislative body and (after the founding of the Union) no Massachusetts legislature engaged in the process of establishing/maintaining settlements in Maine believed that the Ordinance had granted away title to all intertidal land in what would eventually become two separate states.[30] On the contrary, these legislative bodies (pursuant to English common law) firmly and consistently believed that they had title to intertidal land in the district of Maine (in trust for the public). They conveyed this title to those founding proprietors charged with carrying out the settlement process. Further, they knew/understood that public use, control, and ownership of intertidal land was essential for settlement to occur. [31]

Further evidence that the *Storer* court erred in characterizing the Ordinance as a grant is found in the U.S. Supreme Court's holding in *Illinois Central Railroad v.*

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30 See O. Delogu, *Maine's Beaches Are Public Property: The Bell Cases Must be Reexamined,* Tower Publishing, 2017; Chapter 9 examines early settlements in Maine many of which began well before the 1810 *Storer* case was decided—in all of the settlements examined public ownership of intertidal land was assumed by the delegating Massachusetts authorities; this ownership was retained by the towns being settled except for discrete parcels alienated to facilitate marine commerce. See A. Wagner, *Cumberland Original Proprietors Shoreline Reservation Study* 1978. See also E. Churchill, R. Yarumian II, *The Great Land Grab,* Tower Publishing 2019 (examining the settlement of Kennebunkport); see also *Inhabitants of North Yarmouth v. Skillings*, 45 Me. 133, 139-140 (1858)(holding that from 1743 the selectmen of the town held title to intertidal land in trust for the public).

31 See *supra* fns. 22, 23 laying out the *Almeder* trial court's findings *in re* public ownership of intertidal land, findings sustained by the Law Court's subsequent affirmance of the lower court's determination, i.e., that Kennebunkport today holds title to its intertidal lands.

Illinois.[32] The fact that this clarifying case arose well after the *Storer* and *Lapish* cases does not absolve the *Bell* and *Ross* courts of their duty to correct error. This is particularly true when (pre-*Bell)* an *Opinion of the Justices,*[33] citing *Illinois Central,* made clear that the alienation of all intertidal land in Maine would not "meet the reasonableness test" of Maine's Legislative Powers Clause, i.e., Maine's Constitution, Article. IV, Part Third, §1.[34] Beyond this *Opinion,* the Law Court, (also pre-*Bell)* held in *James v. Inhabitants of the Town of West Bath,* that: "This state, unless it has parted with title, owns the bed of all tidal waters within its jurisdiction."[35] No Maine legislature post-statehood has alienated all intertidal land in the state to abutting upland owners.

Getting back to *Illinois Central*—the case arose from a legislative grant of the entire bed (intertidal and submerged land) of Chicago Harbor to the Illinois Central Railroad. This legislation was later rescinded; a more modest grant allowing the Illinois Central Railroad to engage in waterfront development was enacted, thus provoking this suit to restore the original enactment. The U.S. Supreme Court in

32 146 U.S. 387 (1892).

33 437 A2d 597 (Me. 1981).

34. Id. at 607. The full text of the Clause follows: "The Legislature, with the exceptions hereinafter stated, shall have full power to make and establish **all reasonable laws and regulations** for the defense and benefit of the people of this State, not repugnant to this Constitution, nor to that of the United States." (emphasis added).

35 437 A2d 863, 866 (Me. 1981).

sustaining the rescinding legislation made three points that the *Bell / Ross* cases mistakenly ignored. First, *Illinois Central* held that:

> "A grant of all the lands under the navigable waters of a state has never been adjudged to be within the legislative power; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation."[36]

Second, the court made clear:

> "That the State holds the title to the lands under the navigable waters of Lake Michigan, within its limits…**in trust for the people of the State**…"[37] (emphasis added)
>
> "The control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein…."[38]

Third, the *Illinois Central* court then approvingly noted:

> **"The legislation** of the State in the Lake Front Act, purporting to grant the fee of the submerged lands mentioned to the railroad company, **was considered by the court below**, in view of the preceding measures taken for the improvement of the harbor, and because further improvement in the same direction was contemplated, **as a mere license to the company**…." [39] (emphasis added)

In short, *Illinois Central* points out *Storer* court errors—errors embraced by *Lapish* and later Maine cases: The 1647 Ordinance (like the Illinois Lake Front

36 146 U.S. at 453.

37 Id. at 452.

38 Id. at 453.

39 Id. at 460.

Act) was a license; it did not grant a fee. The whole of a state's intertidal land may not be alienated. Intertidal land of a state is trust property—trust duties may be abrogated only for discrete parcels. Given *Illinois Central,* the *Bell / Ross* cases should have corrected prior Law Court errors—they did not.[40]

Further evidence that the *Storer* to *Ross* line of cases erred with respect to ownership of intertidal land is found in the fact that (pre-*Bell*) Maine legislative enactments have been ignored by successive Law Courts. These enactments directly or indirectly assert Maine's ownership of its intertidal lands. See, e.g., 1 MRS §1 laying out the scope of Maine's sovereign territory; 1 MRS §3 "The ownership of the waters and submerged lands enumerated or described in [1 MRS] §2 shall be in this State…." 1 MRS §5 notes: "Nothing in … [1 MRS] §§ 2-5 shall be construed as a waiver or relinquishment of jurisdiction or ownership by this State over or in any area to which such jurisdiction or ownership extends…."

In the same vein, Maine's 1975 Submerged Lands Act, more precisely the 1981 amendment thereto (clarifying title to filled parcels of intertidal and/or submerged land used for marine commerce) frequently references the fact that these lands are "owned by the state". See, e.g., 12 MRS §1862 titled: "Submerged and intertidal lands owned by State", also 12 MRS §1865 (the 1981 amendment to the 1975 Act

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40 Parenthetically, one should note that if alienating all intertidal land in a state is not within the power of the Legislature, it surely is not within the power of the judicial branch of government. This point will be addressed more fully in plaintiff's Count III argument *infra.*

relinquishing the state's title to discrete filled parcels) notes:

> "Titles to properties and lands that once were or may have been **submerged or intertidal lands subject to the State's ownership in public trust** that were filled by October 1, 1975 are declared and released to the owners of any such filled lands by the State free of any claimed ownership in public trust…." (emphasis added) [41]

These (pre-*Bell)* enactments (the 1975 Act, and the 1981 amendment thereto) make clear that two separate Maine Legislatures, the Governor's office, and the Law Court, that sustained the validity of the amendment (see 1981 *Opinion of the Justices* [42]) all believed that Maine held title to its intertidal lands except for discrete parcels legislatively alienated to facilitate marine commerce. But these views held by all three of the coordinate branches of Maine government were inexplicably ignored by the *Bell / Ross* cases. Finally on this point, the 1981 amendment (clarifying titles to discrete parcels of intertidal land) would not have been necessary, indeed the amendment would have been ridiculous, if a 1647 Colonial Ordinance had in fact alienated all intertidal land in Maine. But few, prior to the *Bell* holdings, believed that to be the case.

In sum, the argument that the *Storer* court erred is borne out by the fact that for 150 years (post the 1647 Ordinance) Massachusetts colonial and state legislatures acted in the belief that they held title to (ownership of) intertidal lands. The

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41 12 MRS §1865, 3.

42 See *supra* fns. 33, 34 and accompanying text.

Almeder case confirms that view. That title was conveyed to those charged with the settlement of Goose Rocks beach. It is held by Town of Kennebunkport today.[43] *Almeder* also makes clear that coastal settlements anywhere in Maine were not possible without public ownership of intertidal land.

Further, plaintiffs have shown, that the *Storer* court misquoted and misinterpreted the 1647 Ordinance; it was not a grant—the Ordinance language **"shall have proprietie"** connotes a "license"—historical studies and *Illinois Central* bear this out.[44] And given separation of powers principles, it seems clear that the *Storer* court erred in holding that a judicial "usage" alienated all intertidal land to abutting upland owners.

These errors were compounded by the *Lapish* court's failure (post Maine's statehood) to recognize the fact that Maine was now an independent state clothed with the power to fashion its own intertidal land law. The *Lapish* court (without itself examining the Ordinance) adhered to the *Storer* court's errors that characterized the annulled Ordinance as a grant, and that a judicial "usage," had alienated all of Maine's intertidal land. *Lapish* accepted the latter proposition notwithstanding Maine's very strict Constitutional separation of powers principles.[45]

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43 See *infra* Count V: argument, *also supra* fns. 20-23 and accompanying text.

44 See *supra* fns. 14, 15, and 39 and accompanying texts.

45 See Maine Constitution, Article III, §§1 and 2, also fn. 19 *supra* and accompanying text.

But two wrongs do not make a right. In a sparsely settled Maine public ownership of intertidal land (essential for survival) was widely seen as necessary and appropriate. Moreover, public ownership was affirmed by case law, e.g., *Inhabitants of North Yarmouth v. Skillings* and *James v. Inhabitants of the Town of West Bath,*[46] and by the powerfully written 1981 *Opinion of the* Justices cited above.[47] Further, public ownership was asserted (directly and indirectly) by legislative enactments, see Title I and Title 12 statutory provisions previously noted.

The incongruity of Maine intertidal land law shortly before the *Bell* cases arose cried out for resolution. On one hand *Lapish* and *Barrows v. McDermott* [48]embraced the errors of *Storer* (a Massachusetts case ceding title to intertidal land to upland owners). On the other hand, this plaintiff has presented far more weighty arguments asserting Maine's ownership of its intertidal land. They begin with Maine Settlement acts (fashioned by Massachusetts legislatures) and proceed to the 1981 *Opinion of the Justices,* Maine Law Court cases, and a clarifying U.S. Supreme Court case *Illinois Central*, then to Maine 12 MRS §1865. These arguments and supporting materials were all available to the *Bell* courts but were either ignored altogether or summarily brushed aside in the *Bell* court's

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46 See *supra* fn. 5.

47 See *supra* fn. 33 and accompanying text.

48 73 Me. 441 (1882); *Barrows* affirmed the *Lapish* holding acknowledging "…that the Ordinance has no force by virtue of positive enactment by any legislative body having jurisdiction…over what is now the county of Piscataquis…." but then noted that it has so often been recognized "that we could not but regard it as **a piece of judicial legislation…."** Id. at 447-448 (emphasis added). But the concept of "judicial legislation" is barred by separation of powers principles embodied in Maine's Constitution,

zeal to attach Maine intertidal land law to Massachusetts law. In plaintiffs view this was error that violates public trust duties of the State and impairs vital public interests—error that violates Maine's Constitution—error that this court has the power to correct. This plaintiff would urge the court to overturn the *Bell* cases.

Count II: Plaintiff *pro se* asserts that the "equal footing" doctrine rooted in Article IV, §§ 2-3 of the U.S. Constitution supported by Maine's Statehood Act and U.S. Supreme Court case law (explicating the doctrine) confirms Maine's claim of ownership of its intertidal land, except for discrete parcels legislatively alienated to facilitate marine commerce.

Maine, by an Act of Congress, became a state in 1820; the last lines of the Statehood Act read: "…the state of Maine is hereby declared to be one of the United States of America, **and admitted into the Union on an equal footing with the original states in all respects whatever.**"[49] (emphasis added). The "equal footing" doctrine has it roots in Article IV, §§ 2-3 of the U.S. Constitution. It reflects the view that there was to be no second-class statehood. This point was made clear by the U.S. Supreme Court in *Coyle v. Smith*[50] which noted:

> "This Union was and is a union of states, equal in power, dignity, and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself. To maintain otherwise would be to say that the Union, through the power of Congress to admit new states, might come to be a union

49 See 16th U.S. Congress, Session 1, Chapter 19, *An Act for the Admission of the State of Maine into the Union* [statutes at pg. 544) effective March 15, 1820.

50 221 U.S. 559 (1911).

> of states unequal in power…." [51]

With respect to the ownership of intertidal land, the U.S. Supreme Court had occasion to apply this principle of equality between the original states and between original states and new states in the case of *Shively v. Bowlby*.[52] It noted:

> "At common law, the title and the dominion in lands flowed by the tide were in the king for the benefit of the nation. Upon the settlement of the colonies, like rights passed to the grantees in the royal charters, in trust for the communities to be established. **Upon the American Revolution, these rights, charged with a like trust, were vested in the original states** within their respective borders…." (emphasis added)

The *Shively* court went on:

> "The new states admitted into the Union since the adoption of the Constitution have the same rights as the original states in the tidewaters and the lands under them, within their respective jurisdictions." [53]

Maine then, upon statehood, holds title (in trust for the public) to its intertidal land—period. Prior Massachusetts Colonial or State legislative enactments and case law *in re* intertidal land cannot bind Maine. "Equal footing" principles allow Maine and every other (original or new) state to fashion its own intertidal land law. *Shively* again provides clarity and support for this conclusion:

> "The title and rights of riparian or littoral [upland] proprietors in the soil below high water mark, therefore, are governed by the laws

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51 <u>Id</u>. at 567. All of the Acts of Congress admitting new states into the Union from Vermont (the 14th state in 1791) to Hawaii (the 50th state in 1959) have contained similar "equal footing" language.

52 152 U.S. 1 (1894).

53 <u>Id</u>. at pg. 57.

[statutes] of the several states…."[54]

An earlier Supreme Court holding, *Martin v. Lessee of Waddell*,[55] took a similar view. The plaintiffs in *Martin* (like those in the *Bell* cases) based their claim on a mid-1600's British Colonial grant—defendant's claim was based on an original state, New Jersey, statute. The court held:

> "…when the Revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters **and the soils under them**…"[56] (emphasis added)

The court went on to note that when the Union was created the powers and prerogatives "…which before belonged either to the crown or parliament became immediately and rightly vested in the state."[57]

Three years after *Martin* the Supreme Court decided *Pollard v. Hagan*,[58] a case similar to the present case in that Alabama was created out of territory formerly a part of Georgia. The *Pollard* court held that neither Georgia law nor early Spanish grants took precedence over Alabama's title to its intertidal lands and its right

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54 Id. at pgs. 57-58.

55 41 U.S. 367 (1842).

56 Id. at pg. 410.

57 Id. at pg. 416.

58 44 U.S. 212 (1845).

(post-statehood) to fashion its own intertidal land law.[59] It stated: "Then to Alabama belong the navigable waters, and the soils under them, in controversy in this case, "[60] The court had earlier noted:

> "The right of Alabama and every other new state to exercise all the powers of government, which belong to and may be exercised by the original states of the union, must be admitted, and remain unquestioned…. **and they, and the original states, will be upon an equal footing, in all respects whatever.**" [61] (emphasis added).

In the late 1800's (well before the *Bell cases)* the U.S. Supreme Court decided *Knight v. United States Land Association*,[62] Fully embracing the "equal footing" principles laid out in the *Martin* and *Pollard* cases, the *Knight* court noted:

> "It is the settled rule of law in this court that absolute property in, and dominion and sovereignty over, the soils under the tide waters in the original States were reserved to the several states, and that the new States since admitted [i.e., Maine] have the same rights, sovereignty, and jurisdiction in that behalf as the original States possess within their respective borders."[63]

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59 A1795 boundary agreement between Spain and the United States, left all (or most) of Alabama intertidal land "…on the American side of the line…." Any Spanish grants that may have previously existed were presumably treated as nullified by the agreement; see 44 U.S. at pg. 212.

60 44 U.S. at pg. 229.

61 44 U.S. at pg. 224.

62 142 U.S. 161 (1891).

63 Id. at pg. 183.

In the mid-1900's the U.S. Supreme Court (again pre-*Bell)* decided *United States v. California.*[64] The court adhered to long-standing rulings that states own their intertidal land. They noted:

> "…under the *Pollard* rule, as explained in later cases, California has a qualified ownership [it holds the land in trust] of lands under inland navigable waters such as rivers, harbors, and even tidelands down to the low water mark." [65]

In 1988, during the pendency of the *Bell II* case the Supreme Court decided *Phillips Petroleum Co. v Mississippi*.[66] Once again title to intertidal land was at issue. And, once again, the Supreme Court adhered to its prior holdings:

> "…we reaffirm our longstanding precedents which hold that the States upon entering the Union received ownership of all land under waters subject to the ebb and flow of the tide."[67]

Reemphasizing this point, the *Phillips* court concluded by noting:

> "Because we believe that our cases firmly establish that the States, upon entering the Union, were given ownership over all lands beneath waters subject to the tide's influence, … the lands at issue here became property of the State upon its admission to the Union in 1817." [68]

The *Bell II* court, however, ignored *Phillips* and ignored (curtly dismissing) the

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64 332 U.S 19 (1947).

65 Id. at pg. 30.

66 484 U.S. 469 (1988).

67 Id. at pg. 476

68 Id. at pg. 484.

entire line of cases cited by the *Phillips* court and laid out above.[69] More importantly, *Phillips* made clear that pre-Revolution, pre-founding of the Union, Spanish grants—grants undifferentiated from British grants, do not take precedence over the "equal footing" doctrine and the vesting of title to intertidal lands in the original states and in all states subsequently admitted to the Union.

The last, most recent U.S. Supreme Court case in this unbroken 180-year line of cases addressing the "equal footing" doctrine and ownership of intertidal lands is *PPL Montana, LLC v. Montana*.[70] Again, the question before the court is one of ownership of beds underlying navigable waters. As noted in the Summary of Argument, a unanimous court, citing many of the cases noted above held:

> "The title consequences of the equal footing doctrine can be stated in summary form: Upon statehood, the state gains title within its borders to the beds of waters then navigable, or tidally influenced."[71]

The last, most recent case to address these issues, however, is a state case, *Gunderson v. State of Indiana*.[72] Like Maine, Indiana's highest court faced competing claims of ownership (by adjacent upland owners and the State) of

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69 See, *supra* fn. 10.

70 565 U.S. 576 (2012).

71 Id. at pg. 591.

72 90 NE3d 1171 (2018).

intertidal land; these stretched back more than 100 years. Also, like Maine, the Congressional Act admitting Indiana into the Union contained language stating that their entry was "on an equal footing with the original states."[73] Unlike Maine, however, Indiana's highest court did not ignore the line of U.S. Supreme Court cases noted above. Citing *Martin, Pollard, Shively, Phillips, Illinois Central* and its own intermediate appellate court the *Gunderson* court approvingly noted that:

> "…among those rights acquired upon admission to the Union, the State owns and holds 'in trust' the lands under navigable waters within its borders, 'including the shores or space between ordinary high and low water marks, for the benefit of the people of the state.'" [74]

Gunderson went on:

> "Those states subsequently admitted to the Union on an 'equal footing' with the original thirteen, likewise acquired title to the lands underlying the waters within their boundaries that were navigable at the time of statehood." [75]

The court's comments after the above citations make two things clear. First, that the alienation of all Indiana intertidal land (trust property) is not possible— "…the legislature…lacked the authority to fully abdicate it fiduciary responsibility over these lands." [76] The court further noted:

> "The control of the State for the purposes of the trust can never be

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73 See *The Indiana Historian,* Indiana Statehood at pg. 4.

74 90 NE3d at pg. 1173.

75 Id. at pg. 1176.

76 Id. at pg. 1183.

> lost, **except as to such parcels as are used in promoting the interests of the public therein [marine commerce]** or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining."[77] (emphasis added)

Second, that the exceptions noted by the *Gunderson* court in the above citation are made possible pursuant to legislative action—Indiana Code provisions requiring approval by the Governor, allowing title to discrete portions of intertidal land to be alienated for marine commerce purposes.[78]

Gunderson finally noted:

> "We conclude that, with the exception of select parcels of land not in dispute here, Indiana has not relinquished it title to the shores and submerged lands of Lake Michigan."[79]

The Plaintiffs in *Gunderson* appealed the Indiana Supreme Court's holding to the U.S. Supreme Court, but the U.S. Supreme Court, no doubt concluding that the law on these points is settled, denied *certiorari*. [80]

Summarizing Count II arguments: What more can be said? Can it be put more

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77 Id.

78 Id. Indiana's Code provisions allowing discrete parcels of intertidal land to be alienated are similar to Maine laws found in 12 MRS §1865; they recognize the state's ownership of its intertidal land; avoid the alienation all intertidal lands (prohibited by Maine's constitution and by Indiana law); but at the same time allow title to discrete parcels to be alienated to facilitate marine commerce and other public interests. See *supra* fns. 33-34 and accompanying text; *also* fns. 41-42 and accompanying text.

79 90 NE3d at pg. 1182.

80 See 139 S. Ct. 1167 (2019).

clearly? Maine's Statehood Act is federal legislation. The "equal footing" doctrine is rooted in the Constitution of the United States. U.S. Supreme Court decisions explicating Statehood Acts, and the doctrine as applied to intertidal lands have stated over and over that upon admission to the Union new states gain title to their intertidal land, with the caveat that discrete parcels may be alienated to facilitate marine commerce. This unbroken line of cases was recently acceded to by the *Gunderson* court. In plaintiff's view Maine courts are not at liberty to ignore U.S. Supreme Court case law. That said, this plaintiff would respectfully urge this court to overturn the *Bell* cases, thereby returning title to the vast body of Maine's intertidal land to the State—to the people of Maine.

Count III: Plaintiff *pro se* asserts that Maine's Constitution precludes the judicial branch (by adhering to a "usage") from ceding title to Maine's intertidal land to upland owners, particularly when Legislative enactments have confirmed the State's ownership of its intertidal land. Moreover, English common law, Maine law, and the law in most states holds that only the Legislature can alienate intertidal land, and then only for a public purpose.

The magnitude (acreage) of what is said to have been irretrievably alienated by a judicial "usage" (all intertidal land in what is now two states) should give us pause.[81] More important, however, is the terse language in Maine's Constitution,

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81 Focusing only on Maine, the area of intertidal land said to have been alienated is roughly estimated to be **350,000 acres.** Maine's coastline is 3500 miles or 18,480,000 feet. The seaward distance of intertidal land from mean high to mean low must be estimated—it depends on the seaward slope of the land. Accurate slope data for the whole coastline is not available. Several facts are clear—the steeper the slope the less distance between MH and ML—the shallower the slope the greater the distance between MH and

Article III, §§1-2 setting out Maine's separation of powers principles. It is short and unambiguous. An early Maine case, *State v. Hunter* noted:

> "Because of article III, section 2, the separation of governmental powers mandated by the Maine Constitution is much more rigorous than the same principle as applied to the federal government."[82]

[The full Constitutional text was presented in the Summary of Argument, *supra* pg. 15.] Another Maine case *Ex parte Davis* noted:

> "There is no liberty, if the judiciary power be not separated from the legislative and executive powers, is a principle stated by Montesquieu's Spirit of Laws, book 11, chap. 6" [83]

The *Davis* court continued,

> "…the framers of the constitution of this State provided therein that the powers of the government shall be divided into three distinct departments: the legislative, executive, and judicial. And it is provided, that no person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others." [84]

Davis further noted:

> "Each of the three departments being independent, as a consequence, are severally supreme within their legitimate and appropriate sphere of action. All are limited by the constitution. **The judiciary cannot restrict**

ML. The Colonial Ordinance said intertidal land should not extend seaward from MH more than 100 rods or 1,650 feet. The above estimate uses 825 feet (the average) between zero and 1650 feet (the outer limit of the Ordinance). 18,480,000 feet of shoreline multiplied by 825 feet of seaward distance equals 350,000 acres of intertidal land area. If Maine offshore island intertidal land is included, the above estimate almost doubles.

82 447 A2d 797, at pg. 799 (Me. 1982).

83 41 Me. 38, at pg. 51 (1856).

84 Id. at 53.

> **or enlarge the obvious meaning of any legislative act**, although they are bound to give construction to acts which are properly submitted to them, **and to apply them**, provided they do not transcend the bounds fixed by the constitution." [85] (emphasis added)

The *Hunter* and *Davis* court's interpretation of Maine's Separation of powers principles is clear. But the *Bell* cases, rather than apply legislative enactments 1 MRS §§ 2-5 and more on point, 12 MRS §1865, ignored these statutes altogether. The latter statute is clearly predicated on the view that Maine owned its intertidal land and could alienate discrete parcels to facilitate marine commerce. In ignoring 12 MRS §1865 the *Bell* courts restricted the obvious meaning of a legislative enactment, but in so doing they also ignored fundamental separation of powers principles laid out in Article III, §§1-2. In plaintiff's view, the *Bell* courts erred.

Both *Bell* cases cited *Barrows v. McDermott*[86] a case that noted the long adherence to the *Storer* court's view that a "usage" (said to cede title to all Maine intertidal land to abutting upland owners) now existed— *Barrows* characterized the "usage" as a piece of "judicial legislation."[87] The phrase itself is an oxymoron inconsistent with "3 distinct departments"—the latter being the express language of Maine's Constitution. But interestingly, in the same sentence the *Barrows* court acknowledged that this glib phrase remains in place only "…until it shall have

85 Id.

86 See *supra* fn. 48 and accompanying text.

87 73 Me at pg. 448.

been changed by the proper law-making power."[88] In short, *Barrows* acknowledges that the Maine legislature is free to correct/modify/change this judicial holding. This is implicitly what it did with the passage of the 1981 amendment to the Submerged Land Act, 12 MRS §1865.

This separation of powers argument is reinforced by the same *Opinion of the Justices* that validated the 1981 amendment to the Submerged Land Act; the *Opinion* noted that: "Only the Parliament, as the public's representative could alienate the jus publicum,"[89] i.e. intertidal land. In the same vein, in a case where the jus publicum involved public lots not intertidal land, the court in *Cushing v. State of Maine* noted: "The sovereign will be presumed to have conveyed away no more than is necessary to achieve its purpose."[90] "The sovereign" clearly references the legislature. None of the parties in the *Cushing* case believed that a "usage" could resolve ownership issues.

Further, the *Myrick v. James* case,[91] beyond stating what the judicial branch may not do, i.e., change [or ignore] a legislative enactment, went on to examine when courts should not be bound by precedents, i.e. *stare decisis* principles. It noted:

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88 Id.

89 437 A2d 597, 605 (Me. 1981).

90 434 A2d 486, 500 (Me. 1981). Parenthetically, it was never necessary to alienate all intertidal land in what are now two states to achieve the stated Colonial Ordinance goal of facilitating marine commerce.

"Precedents, once so established, however, do not become totally immune from change for all time."[92] Approvingly citing an Illinois case, *Molitor v. Kaneland Community Unit District No. 302,* which concluded "… that the rule of school district tort immunity is unjust, unsupported by any valid reason, and has no rightful place in modern day society." (see 163 NE2d 89 (1959) at pg. 96)

Myrick noted:

> "We have repeatedly held that the doctrine of stare decisis is not an inflexible rule requiring this court to blindly follow precedents and adhere to prior decisions, and that when it appears that public policy and social needs require a departure from prior decisions, **it is our duty as a court of last resort to overrule those decisions** and establish a rule consonant with our present day concepts of right and justice." [93]

Myrick went on to note that when precedents are overruled:

> "… we do not undermine the principle of *stare decisis.* Rather, we prevent it from defeating itself; we do not permit it to mandate the mockery of reality and the cultural lag of unfairness and injustice…."[94]

Finally, *Myrick* notes a series of "…circumstances in which it is appropriate to overrule prior precedent…." One such is:

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91 See *supra* fn. 8. The *Myrick* opinion, part IV, *Stare Decisis Considerations,* confirms plaintiff's argument. Though (*stare decisis*) following precedent, is a useful general rule, there are "…circumstances in which it is appropriate to overrule prior precedent;" (444 A2d at pg. 998) these circumstances exist here.

92 444 A2d at pg. 998.

93 Id.

94 Id.

> "…where the authorities supporting the prior rule [here the *Lapish* to *Ross* line of cases] have been drastically eroded [and] … the suppositions on which it rested are disapproved in the better-considered recent cases and in authoritative scholarly writings…."[95]

In plaintiffs view, these *Myrick* circumstances exist here. State and federal case law has rejected the idea that all intertidal land in a state can be alienated. It is increasingly apparent that the stated purpose of the 1647 Ordinance can be met without alienating all intertidal land in a state. The reserved public uses of intertidal land in the Ordinance were inadequate to meet then contemporary needs, e.g. lateral passage along the shoreline; they are even more inadequate to meet necessary and desired 2024 public uses of intertidal land, e.g., for recreation, the transmission of power from offshore wind to onshore markets, the growth of aquaculture, etc. And recent scholarly research is uniformly of the view that the *Storer* case (the case that underpins the *Lapish* to *Ross* line of cases) was wrongly decided.[96]

Summarizing Count III arguments: One should begin by putting aside Count I and Count II arguments. This Count III argument is rooted in Maine's Constitution alone. Count III (without more) asserts that Maine case law (from *Lapish* to *Barrows,* to the *Bell* cases and *Ross*) has ignored and is facially at odds with

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95 Id.

96 See *supra* fns. 14, 15, and 30.

Maine's constitutionally mandated separation of powers principles. Various courts in the above line of cases have ignored the *Hunter, Davis,* and *Myrick* cases that have delineated Maine's separation of powers principles. They have ignored the fact that from English common law to recent Law Court holdings the alienation of trust property (whether public lots or intertidal land) is a sovereign, a legislative duty. It is not within the judicial prerogative. More recent courts in this line of cases have ignored legislative enactments that clearly assert Maine's ownership of its intertidal lands, e.g., 12 MRS §1865. But all of the courts in the above line of cases have accepted the proposition that a "usage" "a piece of judicial legislation" has alienated all of Maine's intertidal land to abutting upland owners.

In reality, however, there is no such thing as "judicial legislation." It cannot be found in Article III, §§1-2 of the Maine constitution. It follows that the line of cases from *Lapish* to *Barrows,* to the *Bell* cases and *Ross* violate separation of powers principles laid out in Maine's Constitution. This plaintiff respectfully asks this court to so hold,[97] and thereby return title to Maine intertidal lands to the State in trust for the public, except, of course, for discrete parcels legislatively alienated.

97 Whether this court has a "duty to so hold, see *Myrick*, *supra* fn. 93, is problematic; this plaintiff merely asserts that the argument that Maine's Constitution and separation of powers principles are violated by holdings that rest on a "usage" "a piece of judicial legislation" is compelling (if not conclusive) and fully justifies overruling the *Lapish* to *Ross* line of cases.

Count V: Plaintiff *pro se* notes that Massachusetts sponsored settlements in Maine (of necessity) retained title to intertidal land to enable lateral passage. The *Almeder v. Town of Kennebunkport* case recognized that fact. *Almeder* (sustaining the town's title to its intertidal land) undercuts the rationale of a line of Maine cases (from *Lapish* to *Barrows* to the *Bell* cases and *Ross). Almeder* leads plaintiff to conclude that defendants in this case, and all similarly situated shoreland owners, do not have title to adjacent intertidal land—title is in the respective towns, and (upon statehood) the State, in trust for the public.

The *Almeder* case, 2019 ME 151¶¶ 10-13, recounting the history of settlement in Maine noted that Cape Porpus [now Kennebunkport] was first settled in 1653. *Almeder* further noted that: "In the 1670's and 1680's, towns throughout the Colony—including Cape Porpus—were abandoned and resettled following King Phillips War [a series of struggles between settlers and indigenous tribal groups]." The court goes on to note that the Massachusetts Bay Colony in 1678 had consolidated title to all lands in the Province of Maine including intertidal lands. The Colonial legislature in 1681 "…appointed Deputy Governor Thomas Danforth, Esq., as President of the Province of Maine and … authorized him to issue 'indentures' to confirm title to lands."[98] In 1684 "Danforth issued 'indentures' pertaining to land in five towns in the province of Maine—Cape Porpus, North Yarmouth, Scarborough, Falmouth, and York."[99] These indentures commonly

98 2019 ME 151 ¶12.

99 Id. ¶13. Geographically these five towns encompass an area that today stretches from York village to Georgetown. Historic North Yarmouth today encompasses Cumberland, Yarmouth, Freeport, Brunswick, Harpswell, and Georgetown. See O. Delogu, *An Examination and Updating of Research Relative to Town of Cumberland Claims to Upland Along the Foreshore and to Intertidal Lands* (1991) at pgs. 6-7.

referred to as a "Danforth Deed" passed title to Bay Colony lands (upland and intertidal land) to named grantees often referred to as Town proprietors. In Cape Porpus, the named proprietors [Messrs. Barrett, Burrington, and Badson] were charged with the duty of confirming early settler's claims of private property rights, issuing new settlers private property rights, and retaining title to "undivided and common lands in each Town"[100] which included intertidal lands. The *Almeder* case makes clear that the work of the Cape Porpus Town proprietors continued through 1719, 1726, 1785, and 1796.[101]

Critical to these proceedings is the finding of the *Almeder* court that in all three sections of Goose Rocks beach the town had retained title to its intertidal land. Grants of land to new settlers ran from the seawall (a natural barrier above the mean high tide line) landward. Intertidal land remained the property of the town in trust for the public.[102] Neither the trial court or the Law Court in *Almeder* were moved by the *Bell* holdings or the *Almeder* plaintiff's assertion that the Colonial Ordinance had ceded title to Maine intertidal lands to abutting upland owners.

Recent historical studies of settlement in the Town of Cumberland, a portion of historic North Yarmouth (one of the five towns included in Danforth's early indentures) reached the same conclusion. In 1978 (pre-*Bell*), Ann Wagner's

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100 Id. ¶14.

101 Id. ¶¶ 15-16.

102 Id. ¶¶ 18-22.

Cumberland Original Proprietors Shoreline Reservation Study noted: “There is ample and persuasive evidence that the front of the home lots was high water mark.”[103] Title to intertidal land remained with the town. Ms. Wagner also noted:

> “To the extent that Maine courts have created the impression that the [Colonial] Ordinance conveyed title to the flats to the upland owners and have thereby discouraged people from researching titles to beaches, the courts have done the public a disservice.”

A later study (1991) also commissioned by the Town of Cumberland, O. Delogu, *An Examination and Updating of Research Relative to Town Cumberland Claims to Upland Along the Foreshore and to Intertidal Lands,* confirmed Ms. Wagner’s research. It noted:

> “The flats became part of the common and undivided property of the town held by the Proprietors. This was understood; there was no dispute—the flats were the common property of all.”[104]

Early Maine case law, *Inhabitants of North Yarmouth v. Skillings,* and the *James* case[105] also supports this view. The *Skillings* court noted:

> “Here, in 1849, was the town of North Yarmouth owning certain flats and sedge banks, which had been conveyed to the town by the proprietors in 1745, for the use of the inhabitants.”[106]

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103 See A. Wagner study at pgs. 22-27. 103 home lots were laid out. The large majority (if not all) described the coastal boundary of the lots as “highwater mark.” Id. at pg. 25-26.

104 See O. Delogu, Town of Cumberland Study at pg. 18.

105 45 Me. 133 (1858); see *supra* fn. 5, which references the 1981 *James v. Inhabitants of the Town of West Bath* case that also affirms public ownership of intertidal lands, see 437 A2d at pgs. 865-866.

106 45 Me. at pg. 136.

In sum, scholarly research and early as well as more recent case law, including *Almeder,* hold that Maine towns (and upon statehood) the State of Maine hold[s] title to intertidal land in trust for the public. The *Almeder* trial court gives us the pragmatic motive for this well-founded view—it was essential for the survival of settlements.[107] There was no inland network of roads; hostile tribal groups and disease was a constant threat; settlers needed to protect one another, their homes and livestock—movement back and forth on intertidal land was the only option.

Massachusetts Bay Colony legislators understood this reality. Moreover, these legislative bodies did not believe that a 1647 Ordinance (much less a "judicial usage") had deprived them of the power to govern and exercise control over upland and intertidal land in the Provence of Maine. For over 150 years (the mid-1600's to the early 1800's) as the settlement of Maine progressed, successive Colonial Legislatures enabled Town proprietors to retain intertidal land as "… common and undivided lands."[108] The *Almeder* case underscores the point that the Massachusetts Bay Colony's General Court [the Legislature] in 1678-1681 went out of its way "… to resolve any remaining uncertainty regarding ownership of those lands…." This (as noted above) culminated in the appointment Thomas Danforth with power to "…confirm title to lands…." In the Cape Porpus setting,

107 See *supra* fns. 20 and 21 and accompanying text.

108 2019 ME 151 ¶¶ 52-60.

the *Almeder* case confirmed/concluded that the Town proprietors never relinquished title to intertidal land.[109]

Finally, this plaintiff would note that it defies logic to believe that other coastal settlements in Maine (beyond the original 5 towns Danforth addressed in 1684) could have succeeded/survived absent public ownership of intertidal land. The *Almeder* case lays bare the errors of the *Bell* cases—public ownership of Maine's intertidal land was essential to the survival of any/all coastal settlements in Maine from Kittery to Lubec. The *Lapish* to *Bell/Ross* line of cases ignored this fact and ignored 150 years of Massachusetts Bay Colony legislation that understood that public ownership of intertidal land was essential for Maine settlements to survive.

The *Lapish* to *Bell/Ross* line of cases also ignored the fact that alienation of all intertidal land in Maine was never essential to achieve the stated goal of the 1647 Ordinance. They ignored Maine case law and historic studies that are contrary to their view. This litany of error was unmasked by the *Almeder* holding. It follows, that the *Lapish* to *Bell/Ross* line of cases should be overruled. The *Almeder* case is the better reasoned opinion of the Law Court; it should be given statewide effect. Plaintiff would urge this court to so hold thereby returning title to intertidal land to the State in trust for the public.

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109 See *supra* fn. 102 and accompanying text.

Count IV: Plaintiff *pro se* asserts that whether upland owners or the state are ultimately deemed to hold title to Maine intertidal land, the Colonial Ordinance's limitation of public use rights to "fishing, fowling, and navigation" does not supersede legislative exercise of Maine's sovereign powers, e.g., the "police power" to expand or narrow public use rights as it sees fit subject only to extant "takings" law.

Quite apart from the foregoing Count I, II, III, and V arguments that assert independent reasons leading one to conclude that the State (not upland owners) holds title to Maine intertidal lands, this Count IV argument assumes that the foregoing arguments have not persuaded this court—that the *Lapish* to *Bell/Ross* line of cases remain in place. That said, this Count IV argument challenges Part II of the 1989 *Bell v. Town of Wells* case which holds that the Maine Legislature's 1986 Public Trust in Intertidal Land Act, 12 MRS §§ 571-573, a largely regulatory measure that also expanded public uses in/on intertidal land, is an unconstitutional "taking" of adjoining upland owner property rights.

At the outset one should note that "taking" law grows out of the Fifth Amendment of the U.S. Constitution.[110] Accordingly, though each state has developed a body of "taking" case law, state case law has been largely shaped by federal cases, and in the final analysis by U.S. Supreme Court cases.[111] Further, plaintiff would note that Maine's 1986 legislation both regulates intertidal land

110 Maine's Constitution, Article 1, §21 has an almost identical provision.

111 See *supra* fn. 26. See *also* O. Delogu, *Maine's Beaches are Public Property: The Bell Cases Must be Reexamined,* Chapter 11 which critically examines the *Bell II* court's "taking" conclusion.

use and expands already shared ("fishing, fowling, and navigation") public and upland owner use rights on/in intertidal land to now include "recreational" uses. The latter uses could not have been imagined when the 1647 Colonial Ordinance was fashioned. Such uses were appropriate in 1986 when permitted (and today).

The *Boston & Me R.R. case*, cited in the Summary of this argument *supra* fn. 24, presciently noted that the exercise of police powers to regulate activities on private and/or public land "… must become wider, more varied and frequent, with the progress of society."[112] Another early Maine case *State v. Mayo* noted:

> "But the right to use … all personal and property rights, is not an absolute and unqualified right. It is subject to be limited and controlled by the sovereign authority, the state, whenever necessary to provide for and promote the safety, peace, health, morals and general welfare of the people. To secure these and kindred benefits is the purpose of organized government, and to that end may the power of the state called its police power, be used."[113]

This is precisely what the 1986 legislation reflects.

The leading U.S. Supreme Court case addressing "taking" issues, *Pennsylvania Coal Co. v. Mahon* [114] while warning that regulatory legislation must not go "too far," expresses a similar sentiment.

> "Government hardly could go on if to some extent values incident to

112 79 Me. At 393, 10 A. at 114.

113 106 Me. 62, 75 A. 295, 297 (Me. 1909)

114 See *supra* fn. 25.

115 260 U.S. at pg. 413.

> property could not be diminished without paying for every such change in the general law. As long recognized some values are enjoyed under an implied limitation and must yield to the police power."[115]

Given this background, it must be noted that Maine case law has sustained (in the face of "taking" challenges) state regulations that are far more intrusive than the 1986 legislation found unconstitutional by the *Bell II* court. For example, *Hall v. Bd. of Env. Prot.*[116] the State's Sand Dune Law,[117] which barred reconstruction of a permanent dwelling destroyed by beach erosion, was sustained—it did not go "too far"—it was not a "taking." The *Hall* court reasoned:

> "We have previously stated that "the principal focus of the courts in 'taking' cases has become a factual inquiry into the substantiality of the diminution in value of the property involved. Associated with this diminution in value inquiry is whether beneficial uses of the property remain available to the landowner despite the restrictive regulation or ordinance. The burden is on the Halls to prove that the denial of the permit by the BEP renders their property substantially useless." [118] (citations omitted)

The *Hall* court concluded: "We hold that no taking has occurred because substantial beneficial uses of their property remain available to the Halls."[119] These uses consisted of seasonal rental income from, and personal use of, a trailer brought onto the property, road access, water and gas hookups that remained in

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116 528 A2d 453 (Me. 1987)

117 See 38 MRS §§ 480-A et. seq.

118 528 A2d at pg. 455.

119 Id. at pg. 454. The "substantial beneficial uses" were found adequate to refute the "taking" claim.

place.

Worth noting too is the fact that the *Hall* court places the burden of showing that a regulation "renders the property substantially useless" on the Hall plaintiffs. The *Bell II* court places no burden on Bell plaintiffs to show any diminution in the value of their property, much less diminution that rises to the level required by the *Hall* court. This is blatant error. Further, given the fact that the 1986 legislation, though enacted, was never (in the wake of the *Bell II* holding) enforced on the ground, there was never any diminution in value of the Bell plaintiff's property. The *Bell II* court's finding of an unconstitutional "taking" presupposed an economic injury (arising from an expanded use) that never occurred—an economic injury that was hypothetical (at best) and certainly fell far short of what the *Hall* court required. Again, this is blatant error. In sum, there was no actual diminution of value—thus there was no unconstitutional "taking" of property.

Further, the property rights protections afforded upland owners (and the public) by the regulatory provisions in the 1986 legislation also negates the claim that the legislation is an unconstitutional "taking." First, the legislation expressly limits historic and expanded public uses to intertidal land; no trespass on abutting upland owner property is permitted. Second, the legislation protects existing (legally installed) upland owner structures (piers, moorings, etc.) on intertidal land. Third, it protects the peaceable enjoyment by upland owners and public users of intertidal

land by barring motorized vehicles on intertidal land, and by barring the removal of naturally found sand, soil, rocks, or other minerals. Fourth, it prohibits the depositing of any refuse or waste on intertidal land. These provisions can hardly be characterized as a "taking"—they are reasonable police power protections that benefit, abutting upland owners and public users of intertidal land. They clearly do not go "too far."

Another Maine case worth noting is *Seven Islands Land Co. v. Maine Land Use Regulation Comm'n*.[120] In this case LURC imposed timber cutting limitations put in place to protect winter cover for deer were challenged by plaintiffs as an unconstitutional "taking" of Plaintiff's property in violation of the 5th Amendment of the U.S. Constitution and Maine's Constitution. Citing, *Pennsylvania Coal, Penn Central,* and *Agins v. City of Tiburon,* the *Seven Islands* court noted:

> "The proper procedure for analyzing taking questions is to determine the value of the property at the time of the governmental restriction and compare that with its value afterwards, to determine whether the diminution, if any, is so substantial as to strip the property of all practical value. In determining the amount of diminution, the focus is on the interference with the rights in the parcel as a whole, not merely the portion immediately affected." [121]

The *Seven Islands* court then determined that the "parcel as a whole" was the 25,000 acre Township (all of which was owned by plaintiff) of which 2,700 acres

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120 450 A2d 475 (Me. 1982).

121 Id. at pg. 482.

were subject to LURC regulation. At this point the *Seven Islands* court (citing a 1908 *Opinion of the Justices,* 69 A2d 627 at pgs. 628-629) had no difficulty holding that plaintiff had not demonstrated that the legislation/regulation "…renders it (the whole parcel of land) substantially useless". [122] In short, there was no "taking".

In *Wyer v. Board of Environmental Protection,*[123]a more recent case, the Law Court (citing both *Hall* and *Seven Islands*) held that a 50% diminution in the value of Wyer's property did not give rise to a "taking" of his property. In contrast, there is no indication in the *Bell II* holding that the court even thought about "diminution of value," the "parcel as a whole" (which given *Seven Islands* must include both the upland and intertidal portions of plaintiff's property). Nor did the Court have any tangible data (akin to the known value of timber) or even a wild estimate of property value loss that the 1986 legislation would give rise to. Without this information the *Bell II* court's finding that the 1986 legislation was a "taking" of plaintiff's property was baseless. It falls wildly short of *Hall, Seven Islands, Wyer, Pennsylvania Coal, Penn Central,* and *Agins* all of which required factual findings to support a successful "taking' challenge. In short, the *Bell II* court again erred—the 1986 legislation is not unconstitutional—nothing was taken. Already

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122 Id. The court parenthetically noted that even if it had focused only on the 2700 acres, the LURC regulations allowed sufficient full and partial cutting rights to withstand a "taking" challenge.

123 2000 ME 45, 747 A2d 192.

shared public use rights in/on intertidal land were expanded—the rights of upland owners and the public were made more secure by an exercise of the state's police powers.

Examining *Bell II's* "taking" argument further one must note that in *Pennsylvania Coal* the Supreme Court in determining whether a "taking" has occurred noted that: "…the question depends upon the particular facts. **The greatest weight is given to the judgment of the legislature…**" (emphasis added).[124] A previously noted Maine case, *Myrick v. James,*[125] makes a similar point: "**That which we [the court] may not do is change a rule or policy** once the Legislature has specifically taken the rule or policy out of the judicial prerogative…." (emphasis added). Another previously noted Maine case *Ex parte Davis*[126] noted: "**The judiciary cannot restrict or enlarge the obvious meaning of any legislative act**…." (emphasis added)

But the *Bell II* court's finding of an unconstitutional "taking" barely acknow-ledges §571 the Legislative findings and purpose of the 1986 enactment. It ignores §571's lengthy statement of policy and purpose laying out English Common Law, evolving public trust principles, the relationship of trust principles with the health

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124 260 U.S. 393, 413.

125 See *supra* fn. 8.

126 See *supra* fn. 84.

and welfare of Maine people thus justifying an expansion of permitted uses and regulatory safeguards the 1986 enactment put in place. In sum, in a setting where there is no actual harm to upland owners; where U.S. Supreme Court and Law Court case law requires judicial deference to legislative enactments; where the policy and meaning of the enactment could not be more clear; *Bell II,* Part II does not merely restrict the 1986 enactment, it nullifies it completely by finding the enactment to be a "taking". This holding brushes aside *Pennsylvania Coal, Myrick, and Ex parte Davis,* along with Maine's separation of powers principles in its zeal to embrace Massachusetts intertidal land law. This again is *Bell II* error.

On the merits of *Bell II's* "taking" conclusion, the court begins by stating that the 1986 Act creates an "easement for recreation." It does not. First, one should note the term "easement" does not appear in the 1986 Act. §573 of the Act refers to a "**right** to use." Second, an easement grants a specific person or persons a specific right that may be engaged in/on a specific, a defined, land area. There is no such specificity in the 1986 Enactment. The Act uses the general term "recreation," akin to the general terms "fishing, fowling, and navigation" in the Colonial Ordinance. It permits this new activity throughout an entire category of land, i.e., intertidal land—it is not limited to any defined area. The Colonial Ordinance took the same approach in permitting more ancient categories of use.

If one looks at case law—*Storer* after finding a grant of intertidal land speaks of "**rights** of others;"[127] *Commonwealth v Alger* said to be the leading Massachusetts case laying out the meaning of the Colonial Ordinance noted that the Ordinance:

> "… vested the property of the flats in the owner of the upland in fee, in the nature of a grant; but that it was to be held subject to **a general right of the public for navigation**…."[128] (emphasis added)

Barrows, a Maine case, after noting acceptance of the Ordinance states that: "It must be regarded as settled that the public have such **rights** to fish in the waters…."[129] In its next sentence *Barrows* equates the **right** of "…free fishing and fowling…." More recently in *Ross* the Law Court noted that: "State-owned waters are 'of common **right,** a public highway, [available] for the use of all the citizens.'"[130] Even the Massachusetts *Opinion of the Justices* cited by the *Bell II* court in support of its "taking" conclusion noted that:

> "The language of the ordinance well illustrates the notion, previously alluded to, of reserved public **right**. It expressly specifies that **the public is to retain the rights of fishing, fowling and navigation."** [131]

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127 6 Mass. at pg. 438.

128 61 Mass 53 (1851) at pg. 79.

129 73 Me. at pg. 449.

130 2019 ME ¶ 22.

131 313 NE2d 561 (Mass. 1974) at pg. 566.

Summarizing this point: None of these cases use the term "easement" to describe the broad, the general right[s] conferred by the respective legislative bodies.

More importantly, upland owners may be deemed to have fee title to intertidal land, but as previously noted they do not have "fee simple absolute." They do not have (have never had) exclusive use of intertidal land—historically they shared (with the public) the right to engage in the general uses of "fishing, fowling, and navigation."[132] The 1986 Act does not alter this shared use of intertidal land—it merely broadens the range of shared uses permitted on intertidal land. This is not a "taking." The *Bell II* court's assertion that the general use "recreation" is somehow different, is disingenuous.[133]

Further, the *Bell II* court's assertion that *Cushman v. Smith*[134] sustains its "taking" argument is error. In *Cushman* a landowner's property was used by a

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132 This listing of uses was never seen as "exhaustive"—it omitted "lateral passage" one of the most common uses of intertidal land in both Massachusetts and Maine for literally hundreds of years.

133 The *Bell II* court acknowledges the general (undefined) character of the terms "fishing, fowling, and navigation" earlier in its opinion, *see* 557 A2d at 173, where its notes: "We have held that the public may fish, fowl, or navigate on the privately owned land for pleasure as well as for business or sustenance, and we have in other ways given a sympathetically generous interpretation to what is encompassed within the terms "fishing," "fowling," and "navigation," or reasonably incidental or related thereto." The court then cites any number of judicial decisions expanding these terms, even going so far as to declare (contrary to scientific data) that worms, clams and shellfish are "fish" thus allowing these marine organisms to be harvested by members of the public and regulated by DMR. The 1986 legislation allowing "recreational" use of intertidal land is no different. The term may be broadened or narrowed by amending the 1986 Act or by court decisions. It is clearly not a "… **permanent** physical intrusion into the property of private persons," *see* 557 A2d at 177. It merely allows a transient recreational use. And it is not "… a wholesale denial of an owner's right to exclude the public." Id. at 178. Upland owners from 1647 to the present have never had a right to exclude the public. The Act (as noted above) merely broadens the shared uses that may be engaged in/on intertidal land.

134 34 Me 247 (1852).

quasi-governmental entity to expand a rail line. A suit for compensation was sustained. *Cushman* is an early example of what is now referred to as a *"Lorretto"* type of case—a situation where compensation must be paid because a specific piece of land, owned by a specific person/corporation, is used for a specific public purpose.[135] That is not the case here. The 1986 Act does not set aside any specific land area, owned by a specific individual for a specific recreational use.

Further still, *Bell II's* argument that the *Hall*, *Seven Islands*, *Wyer, Pennsylvania Coal, Penn Central,* and *Agins* cases need not be considered in deciding whether the 1986 Act is a "taking" because they do not involve "… a physical invasion of private property," said to be the case here, seems ludicrous on its face. To begin with, there is no "physical invasion of private property" in any of the above cases. A public "use right" on intertidal land has never been characterized as a "physical invasion of private property". The public (and adjoining upland owners) have long had a shared right to be on intertidal land to engage in any of the uses historically delineated by the Ordinance. The 1986 Act's expansion of historic use rights to include recreational use in/on intertidal land simply expands the shared use rights that have long existed. The Act's added safeguards are little different from the safeguards put in place by the State's Sand Dune Law, and LURC regulations.[136]

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135 See *supra* page 20 text.

136 See *supra* fns. 117-123 and accompanying text.

The Act is similar to local zoning laws that, when faced with changed conditions, e.g., a new highway interchange, are fully justified in expanding permitted uses and putting in place added safeguards on nearby land areas. Such laws are only deemed a "taking" when/if there is significant "diminution in value" and/or when surrounding land areas are rendered "substantially useless." The Act clearly does not give rise to such dire consequences.

Summarizing the Count IV argument: Whether the Maine legislature's 1986 Public Trust in Intertidal Land Act is seen as a protection and extension of Common Law public trust principles or as an exercise of the State's police powers is irrelevant. They arrive at the same conclusion. Plaintiff *pro se* has used the language of "police power" to examine the 1986 enactment because it is more widely used today, is referred to by early Maine Law Courts,[137] and is nationally recognized as an essential power of ordered government. However framed, the *Bell II* court's reasoning concluding that the 1986 enactment is an unconstitutional "taking" of adjacent upland owner property rights is fatally flawed.

First, the fundamental error of the *Bell II* court is seeing the 1986 Act as "…a wholesale denial of an owner's right to exclude the public."[138] Upland owners from 1647 to the present have never had the right to exclude the public from

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137 See the *Boston and Me. R.R.* and *State v. Mayo* cases *supra* fns. 24 and 113 laying out the significance of police power enactments to protect and benefit Maine people.

138 557 A2d at 178.

intertidal lands. The Colonial Ordinance said to grant upland owners title to intertidal land confirmed the public's right to engage in "fishing, fowling, and navigation." The public (engaged in these pursuits) cannot be excluded by upland owners. The 1986 Act expands these historic public use rights to include "recreational" uses—nothing more.

Second, the *Bell II* court's assertion that the 1986 Act constitutes "a physical takeover," a "permanent physical occupation"[139] is error. The court would paint the Act as a *Lorretto* type of property seizure. But the facts, the area encompassed, are dramatically different. In *Loretto* there was a permanent installation of cable equipment in/on a single five story building. The 1986 Act would permit the transient (random) and seasonal recreational use of 360,000 acres of intertidal land stretching over 3500 miles of Maine coastline.[140] This latter reality is clearly not the reality of *Lorretto.* Only "fishing, fowling, and navigation" and now "recreational" uses reach an area this extensive. And it has never been suggested that these historic uses constitute an unconstitutional "taking" of upland owner's property. *Ergo* recreational use of intertidal land is not a "taking". All four uses "fishing, fowling, navigation and recreation" do not admit or require a "permanent occupation"; they do not constitute a "physical takeover" of intertidal land. There

139 Id.

140 See *supra* fn. 81.

is no language in the 1986 Act that speaks of "takeover" or "permanent occupation"— public use rights are expanded—nothing more. In short, the *Bell II* court has erroneously read into the 1986 Act language of permanent and physical occupation that is simply not there.

Third, given the two errors noted above, the *Bell II* court peremptorily cut itself off from considering Maine "taking" cases *Hall*, *Seven Islands*, *Wyer* and from examining frequently cited federal "taking" cases, *Pennsylvania Coal, Penn Central, Agins v. City of Tiburon.* In plaintiff's view this narrowing of the *Bell II* court's "taking" analysis is itself an egregious error. It allowed the *Hall* case burden (that plaintiffs must show that a restrictive regulation renders their property substantially useless) to be ignored. Similarly, the *Seven Islands* and *Wyer* requirements (that the whole parcel be considered and that a significant diminution in value arising from the 1986 Act be shown) were ignored. The *Bell II* court declined to reach any of these issues. No burdens were placed on the Moody Beach plaintiffs to show that the 1986 enactment caused any actual injury to their whole (intertidal and upland) parcels, much less the level of injury that state and federal case law requires to sustain a "taking" claim.

A collateral error of the *Bell II* court's "taking" analysis is the fact that in ignoring Maine and Federal "taking" case law, they ignore fundamental separation of powers principles that requires judicial deference to legislative enactments. The

1986 enactment speaks for itself. It more fully protects intertidal lands; it allows no intrusion (trespass) on abutting uplands; it expands public use rights.

Finally, this court should note that if the 1986 Act (and any future effort to expand public use rights on intertidal land) can be mischaracterized as a *Lorretto* type of "taking," we have eviscerated the police power as a tool to serve Maine people. This seems untenable, but it is a consequence that Part II of the *Bell II* case has fashioned. In short, the "taking" analysis of the *Bell II* court is fraught with error. It falls to this court to remedy these errors. By any measure the 1986 Act is not an unconstitutional taking of upland owner's property rights. This plaintiff urges the court to so hold.

CONCLUSION

It serves no useful purpose to attempt to reiterate at length points made in the Summary of Argument and in the more Detailed Argument laid out in the preceding pages. Suffice it to say that each of the four Counts speaking to the ownership of Maine's intertidal land (without more) overturns the *Bell* holdings. Taken together they allow one to conclude that the *Bell* holdings are incorrect.

Count I makes clear that the Ordinance's term "shall have proprietie" is not a grant of title—it is a permission, a license. *Ergo,* the state (in trust for the public) retains title to intertidal land. Count II recognizes that the revolution and founding of the Union gave rise to a new paradigm. Earlier English, Spanish, French grants

were nullified. Coupled with the "equal footing" doctrine, all states upon entering the Union hold title to their intertidal land. Count III resting on the Maine Constitution posits that the Judicial branch of Maine government cannot alienate by a "usage" all of Maine's intertidal land. The alienation of sovereign land is a Legislative duty. Count V, (focused on the *Almeder* holding) makes clear that the settlement of Maine would not have been possible without public ownership of intertidal land. Massachusetts legislatures (sponsors of Maine coastal settlement) recognized that fact for over 150 years. They did not believe the Ordinance had alienated all intertidal land. *Ergo*, the *Bell* holdings are incorrect.

In this plaintiff's view Count IV is a fallback argument. It recognizes that this court may not be persuaded to overturn the *Bell* holdings by any of the individual Count I, II, III, or V arguments, or by the collective weight of these arguments. That would leave abutting upland owners with title to Maine intertidal lands. But that title cannot bar the State from exercising its police powers—powers that encompass publicly and privately owned land, (including intertidal land) to protect and advance the public's health, safety, and general welfare.

To that end Count IV asserts that Part II of the *Bell II* case (holding that the 1986 Public Trust in Intertidal Land Act is an unconstitutional "taking" of plaintiff's property right) is wrongly decided at many levels. Further, the *Bell II* court's "taking" analysis is calculated to chill further efforts to use the police

power to protect legitimate state and public interests in/on intertidal lands. It forever embalms the arguably incorrect intertidal land law of a 1647 Ordinance as the law of Maine. No other state with tidal waters (except Massachusetts), indeed no other coastal nation, is similarly encumbered.

Finally, this plaintiff would note that the stated purpose of the Colonial Ordinance never required, and does not today require, that all intertidal land in the entire state be alienated to upland owners. It's time we shed this anachronism.

Dated: June 12, 2024

Respectfully Submitted,

/s/ Orlando E. Delogu

Orlando E. Delogu, Plaintiff, *pro se*

CERTIFICATE OF SERVICE

I, Orlando E. Delogu, hereby certify that on or before June 14, 2024 two copies of a Brief of Appellant, Orlando E. Delogu, *pro se* in the docketed Law Court case #Cum-24-82, Peter Masucci, et al v. Judy's Moody, LLC et al, have been hand delivered or sent by first class U.S. mail, postage prepaid, to each of the attorneys (shown below) on the Law Court's Briefing Schedule, plus counsel representing the Pacific Legal Foundation.

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