

FISHING, FOWLING, AND DOCKOMINIUMS: MAINE'S NEED FOR A NEW APPROACH TO PUBLIC AND PRIVATE INTERTIDAL RIGHTS

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FISHING, FOWLING, AND DOCKOMINIUMS: MAINE'S NEED FOR A NEW APPROACH TO PUBLIC AND PRIVATE INTERTIDAL RIGHTS

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"The use of sea and air is common to all; neither can a title to the ocean belong to any people or private persons, forasmuch as neither nature nor public use and custom permit any possession thereof."

- Elizabeth I Tudor, Letters (1533-1603)¹

I. INTRODUCTION

In the sixteenth century, Queen Elizabeth recognized the public's inalienable right to the sea. Despite the intuitive concept embodied in the Queen's pronouncement, a centuries-old debate over the public's right to the seashore continues to occupy the attention of Maine's bar and bench. In 2011, for example, the Supreme Judicial Court of Maine, sitting as the Law Court, handed down a decision that maintains Maine's prevailing judicial analytical framework for resolving property disputes in the intertidal zone.² In *McGarvey v. Whittredge*,³ the plaintiffs, claiming ownership of the intertidal zone, brought an action in trespass and sought a declaratory judgment that the neighboring commercial scuba diving business operators and their customers had no right to cross the intertidal zone to access the ocean to scuba dive.⁴ The court's unanimous judgment resolved the property interest at issue by holding that, as a matter of Maine common law, the public has a right to walk across the intertidal zone to access the ocean for purposes of scuba diving.⁵

By confining its holding to a precise activity—traversing the intertidal zone to reach the ocean in order to scuba dive—the court was able to reach a unanimous judgment; however, the justices arrived at this common result through two evenly divided analyses supported by fundamentally different doctrinal approaches. Specifically, the analyses relied on disparate interpretations of the public trust

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1. See 1 L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 410 (Ronald F. Roxburgh, ed., 3d ed, 2008) (citing ELIZABETH I TUDOR (1533-1603), LETTERS).

2. The intertidal zone generally refers to the stretch of land between the ocean and the dry upland, which comprises much of Maine's coastline. More specifically, it is the land located between the mean high-water and mean low-water marks of tidal waters, but extending seaward no more than 100 rods from the high-water mark. See *Britton v. Donnell*, 2011 ME 16, ¶ 6, 12 A.3d 39, 42.

3. 2011 ME 97, 28 A.3d 620 (discussed in Part III.A).

4. *Id.* ¶ 1.

5. *Id.* As discussed further in Part II, there has been significant and ongoing debate in Maine as to whether the public trust rights with respect to the intertidal zone ought to be construed according to the Law Court's pronouncements, which essentially confer fee ownership to the intertidal zone to the upland landowner and bestow to the public a limited right of use and access. Nonetheless, for purposes of this Comment, the author assumes that the challenge to the fee ownership of the intertidal zone is settled according to the Law Court's declarations.

doctrine and a seventeenth century colonial grant to espouse what I refer to here as either a “fundamentally purpose-driven” or an “elastic, activities-based” doctrinal approach. Not surprisingly, the public trust doctrine and the historical grant are either silent or at best vague with respect to the proper designation of water-related property rights among public and private entities, and even less clear about how to address new and evolving uses of Maine’s water resources—many of which were not imaginable when these principles were established. The fact that there is much disagreement both within and outside of Maine’s courtrooms regarding how they ought to be interpreted is therefore not remarkable. It is noteworthy, however, that the modern judicial approach to resolving water use conflicts in light of this disagreement seems to favor the judicial principle of narrow construction, as opposed to the “Grand Style” of appellate decisionmaking.⁶ While such an approach to judicially resolving conflict is often in the nature of the common law tradition, it has not advanced a useful framework for the allocation of property rights and interests in Maine’s intertidal zone.

The Law Court’s practice of resolving intertidal rights conflicts in Maine on a case-by-case and use-by-use basis is complemented by a similarly disordered overlay of federal, state, and municipal laws and rules applicable to emerging water uses. Each of these levels of government is charged with safeguarding public interests, including public trust rights with respect to the intertidal zone. Accordingly, the administrative overlay is afflicted with problems typically associated with jurisdictional overlap—namely, the risks that regulatory decisions by three independent administrative levels of government will be made inefficiently, inconsistently, or both. The more pressing problem with Maine’s regulation of emerging water uses, however, is not the lack of uniformity, but the irregular consideration of the public interest. This regulatory gap, which is created by both statutory restrictions and legal limitations of administrative agencies undertaking property rights assessments, means that there is presently no assurance that regulators at any level of government will evaluate emerging water uses with an eye toward their potential deleterious effects on the public trust.

Maine’s current judicial and administrative approaches to resolving water use conflicts are not without consequence. They leave the bench, the bar, the landowner, and the public without a stable property rights framework upon which to rely to resolve future water use and access conflicts in the intertidal zone. Furthermore, these approaches tend to engender the incremental privatization of the public’s property interest in Maine’s water resources. In a state where water access is the backbone of a dominant tourism industry, such privatization is, to say the least, a vulnerability. To contextualize these consequences, Part II presents an overview of Maine’s cyclical demand for water access, and how the dockominium⁷

6. KARL LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* (1960). Llewellyn is credited for the term “Grand Style.” See Thomas W. Mayo, *Charles D. Breitler—Judging in the Grand Style*, 47 *FORDHAM L. REV.* 5, 5-12 (1978) (discussing the foundations and principles of Llewellyn’s central thesis).

7. The dockominium is a relatively modern real estate instrument modeled on the land-based condominium through which a boat owner may acquire a fee interest to a boat slip and attendant dock space. Gurdon H. Buck, *Drafting Documentation for Dockominiums*, 18 *JUN PROB. & PROP.* 38, 38 (2004).

offers an innovative market solution to Maine's water access problems and at the same time raises serious questions about the long-term privatization of Maine's seashore. Part III then explores the relevant history and evolution of Maine's judicial framework of riparian and littoral⁸ property rights and interests, identifies the doctrinal inconsistencies with the Law Court's modern approach to resolving intertidal rights conflicts, and flags two underlying policies motivating the court's modern approach. Part IV highlights how the court's doctrinal inconsistencies augment the regulatory discord at the administrative levels of government. Finally, Part V summarizes the legal uncertainty facing public and private entities who wish to make novel use of Maine's intertidal zone, calls on the Law Court to adopt a unified voice regarding the scope of the public trust, and recommends a factors-based approach to resolving public and private intertidal rights conflicts—one that honors both of the policies underlying the court's divergent doctrinal approaches in *McGarvey*.

II. MAINE'S DEMAND FOR WATER ACCESS, AND THE DOCKMINIUM SUPPLY-SIDE SOLUTION

Maine is a water-rich state. Within its confines are roughly 5,000 miles of coastline, and nearly 1,500 square miles of inland waters that include 5,800 lakes and ponds and 32,000 miles of rivers and streams.⁹ These abundant waters, intermingled with Maine's attractive landscape and highly valued natural resources, are the backbone of the state's tourism industry.¹⁰ It should come as no surprise, then, that Maine is an outdoor recreation haven not only for its own residents,¹¹ but also for the Northeast region of the United States and beyond.¹² Maine's concentration of housing units that are for seasonal, recreational, or occasional

8. Littoral refers to the shore of a lake or ocean, whereas riparian refers to the bank of a river or stream. JONATHAN S. LYNTON, *BALLENTINE'S LEGAL DICTIONARY & THESAURUS* 386 & 590 (1995).

9. *Maine State Comprehensive Outdoor Recreation Plan 2009-2014*, MAINE DEPT. OF CONSERVATION, BUREAU OF PARKS AND LANDS IV-1 (Dec. 2009), <http://www.maine.gov/doc/parks/programs/SCORP/index.html> [hereinafter SCORP]. The SCORP analyzes the demand for and supply of outdoor recreation areas and facilities. It highlights the outdoor recreation issues of statewide importance, based on public and focus group comments, and presents broad priorities for expenditure of federal Land and Water Conservation Fund (LWCF) dollars in Maine. *Id.*

10. Tourism, Maine's largest industry, "produc[es] \$10.1 billion in goods and services, \$425 million in tax revenue, and 140,000 jobs." *Id.* at III-3.

11. Maine residents participate in outdoor recreation at levels above regional and national averages. Maine participation rates are especially high in nature-based activities; for example, activities in which Mainers participate at least 10% above both regional and national levels include "boating (any)" and "motorboating." *Id.* at III-7.

12. "In 2008, there were 15.4 million overnight visitors and 16.5 million day visitors in Maine," with nonresidents comprising over 90% overnight visits and 53% of day visits. *Id.* at III-4. Moreover, Maine has a relatively high proportion of nonresident participation in recreation activities. For example, Maine's state parks report approximately 40% nonresident camper registrations. *Id.* at III-1. In fact, "natural attractions are a significant calling card drawing visitors—visitors who after coming to Maine, value what they experience." *Id.* at III-5.

use—the highest rate of second-home ownership in the nation¹³—is just one of many indicators of the state’s appeal as a vacation destination.

Just as the interplay of attractive rural landscapes and access to amenities and services has driven the demand for second homes,¹⁴ so the allure of Maine’s water resources and attendant infrastructure has supported a steady stream of recreational boaters. Nearly 57% of Maine residents—roughly 612,000 people—participate in some type of boating activity each year.¹⁵ These boaters have traditionally gained access to Maine’s waters by using public boating facilities, privately owned non-commercial boat launches, or commercial marinas.¹⁶ Notwithstanding the abundance of natural waters in Maine, it is the presence or absence of accessible recreational infrastructure—in the form of boat launches, boat slips, parking areas, signage, fuel stations, and maintenance services—that enables recreational boating on some waters and impedes it elsewhere.

Presumably in recognition of a need to secure access to Maine’s waters for public recreational boating, the Maine Legislature established the Boating Facilities Fund in 1963 and assigned administration of the fund to Boating Facilities Division of Maine’s Bureau of Parks and Lands in 1997.¹⁷ The fund assists local governments and other entities in acquiring, enhancing, and restoring boat launching facilities that are open to the public.¹⁸ Although these and other legislative and non-governmental efforts have helped to secure public boating access to many waters throughout the state, demand for more access remains, even in light of recent economic slow-down.¹⁹

The demand for access to Maine’s waters is consistent with national trends. The \$6.5 billion boating industry in the United States is predicted to grow at a rate

13. *Id.* at II-6. “Maine’s attractive landscapes and recreational amenities, along with its proximity to large population centers in the Northeast contribute to high percentages of seasonal homes.” *Id.*

14. *Id.* at IV-6.

15. *Id.* at III-8 tbl.7.

16. Maine supports 459 public boat launches, of which ninety-two are hand-carry sites and seventeen are tidal water sites, which are owned and maintained by state governmental agencies or municipal governments. *Id.* at IV-16 tbl.11.

17. 38 M.R.S.A. § 322 (1965), *repealed by* P.L. 1997, ch. 678, § 13 (effective June 30, 1998). In 1997, as part of the consolidation of the Bureau of Parks and Recreation with the Bureau of Public Lands (which formed the Bureau of Parks and Lands), the provisions of the law that established the fund were moved from Title 38 to Title 12. *See* 12 M.R.S.A. § 1896 (2005) (pursuant to P.L. 1997, ch. 678, § 13). While there is no legislative history on point, it stands to reason that the need to secure public boating access prompted the Legislature to establish the Fund.

18. SCORP, *supra* note 9, *Introduction* at 6. “Sites on both tidal and non-tidal waters are eligible. Funding is available to assist in the development of hand-carry as well as trailered boat launching facilities. However, since the Fund derives its revenue from a portion of the gasoline taxes generated by recreational motor boaters, priority is given to funding launching facilities that can be used by both motor and non-motorized watercraft.” *Id.* From 2003 to 2008, the Bureau acquired thirty new boating facilities and carried out forty facilities improvement projects. *Id.* at I-2.

19. For example, while the recession appears to have slowed demand for coastal water access in recent years, economist Charles Colgan predicts that, “[n]ew demands on the waterfront are emerging. The coast will be more crowded than ever.” Janet Krenn, *Working Waterfronts and Waterways*, 43 V.A. MARINE RESOURCE BULL., Winter 2011, at 8-9, available at http://vaseagrant.vims.edu/wp-content/uploads/2011/03/VMRBWinter11_web.pdf.

of approximately 8% through 2014.²⁰ At the same time, increasing land values for waterfront property during the most recent real estate boom induced the conversion of marinas with public boat slips to more lucrative residential development, leading to an access crisis for recreational boaters in some parts of the country.²¹ Congress has attempted to respond to the problem on several occasions with bills such as the 2009 and 2011 *Keep America's Waterfronts Working Act*.²² The bills aimed to preserve and expand access to coastal waters for water-dependent commercial uses through a state-administered grant program.²³ While these bills were ultimately defeated in committee,²⁴ they are an indicator of the political challenges of preserving public access to the water as coastal property increases in value.

Access problems for recreational boaters are not recent phenomena; rather, they are closely tied to the nation's economic cycles. In the booming 1980s, for example, demand for docking and mooring space far outstripped supply, thereby elevating premiums for slip rental rights and propelling the boating industry on a "bubble of frantic searches for places to moor pleasure boats."²⁵ The early 1990s were marked by falling boat slip prices, consistent with the decade's real estate bust.²⁶ As beneficiaries of the expanding economy began to purchase boats again in the early 2000s, boat slip prices rose accordingly.²⁷

It is likely that demand for recreational boat slips will again outstrip supply with the next economic upswing. After all, whenever the natural human inclination to live near and play in the water²⁸ becomes viable—as tends to happen with the availability of discretionary income during times of economic expansion—it encounters the natural, regulatory, and market limitations on expanding boating

20. Freedonia Group, *Recreational Boating to 2014—Market Research, Market Share, Market Size, Sales, Demand Forecast, Market Leaders, Company Profiles, Industry Trends*, <http://www.freedoniagroup.com/Recreational-Boating.html> (June 2012).

21. See Ryck Lydecker, *Boaters Get Bumped By Hot Real Estate Market*, BOATUS (Mar. 2006), http://www.boatus.com/gov/fed/fed_archives/waterfront_article606.asp.

22. *Keep America's Waterfronts Working Act of 2009*, H.R. 2548, 111th Cong. (2009); *Keep America's Waterfronts Working Act of 2011*, H.R. 3109, 112th Cong. (2011).

23. *Id.*

24. *Keep America's Waterfronts Working Act of 2009*, GOVTRACK.US (last visited Oct. 20, 2012), <http://www.govtrack.us/congress/bills/111/hr2548>; *Keep America's Waterfronts Working Act of 2011*, GOVTRACK.US (last visited Oct. 20, 2012), <http://www.govtrack.us/congress/bills/112/hr3109>.

25. Buck, *supra* note 7, at 38.

26. *Id.*

27. *Id.* at 38-39.

28. See, e.g., Mike Richards, *Water in History, H2O—THE MYSTERY, ART, AND SCIENCE OF WATER*, <http://witcombe.sbc.edu/water/history.html> (last visited Nov. 6, 2011).

Humans have generally settled near convenient sources of water. Most of the great ancient civilizations depended on a particular source of water Water facilitated relatively rapid transportation prior to about 1850 C.E. In the era of exploration and discovery from the late 15th through the 18th centuries, Europeans explored all the major oceans and seas. Water was also thought to be an essential aspect of imperialism from the 16th century on Water was also an important source of power in the period before the Industrial Revolution Beginning with the Industrial Revolution, however, water increasingly becomes a hidden factor in human history. For many, it quite literally went underground, hidden from sight until one turned on a faucet or flushed a toilet. Increasing [sic], there was a tendency to view it as something to master and control. This is, of course, in accord with a more general approach to nature as a whole: mastery and control.

Id.

infrastructure. These limitations include natural resource controls, such as physical and geographic features of the water resource and its adjoining shoreland that restrict the placement of the boat ramps, boat slips, and associated infrastructure; regulatory limits imposed through a range of local and federal permitting requirements; and market-based pressures to allocate access infrastructure to highest-and-best uses (which, as discussed, often means converting commercial marinas to other uses). Accordingly, this type of unmet demand for water access is likely to place increased pressures on the market, in the form of higher prices for securing water access and attendant infrastructure; on natural resources, in the form of increased use of shores and waters; and on regulatory regimes, in the form of additional administrative and judicial actions spurred by increased permit requests and frequent water use conflicts.

A. The Dockominium “Solution” to the Recreational Boating Access Problem

A relatively recent market response and an innovative legal solution to this cyclical access demand is the dockominium. A dockominium is functionally a collection of boat slips, which is legally premised on a condominium ownership theory: Persons may purchase an ownership interest in a dockominium in order to gain both the exclusive right to use a boat slip space (and presumably to exclude others from it) and a fractional interest in any association common areas, such as parking lots and off-season boat storage space.²⁹

A dockominium usually comes into being with the transformation of an established commercial marina offering short-term rental or day use boat slips to the public.³⁰ Where states have adopted a version of the Uniform Common Interest Ownership Act (UCIOA), as Maine has done,³¹ “any estate or interest in, over, or under land . . . [including] spaces that may be filled with air or water” is deemed real estate that may be developed into a common interest community, which is then divided into units and conveyed just like any interest in land.³² The “units” are essentially segments of riparian or littoral rights, consisting of the right to tie up a vessel to a dock within a measured and specific location.³³ The location, with respect to the lateral configuration, is a two-dimensional space on the water’s surface that usually corresponds to some percentage of a floating dock or finger pier.³⁴ With respect to the vertical configuration, upper and lower boundaries are

29. See Karin J. Wagner, Note, *Geneva Lake Dockominiums: An Exercise of Riparian Rights in Violation of the Public Trust Doctrine*, 4 WIS. ENVTL. L.J. 243, 244 (1997) (citing Catherine Robinson Hall, *Dockominiums: In Conflict with the Public Trust Doctrine*, 24 SUFFOLK U. L. REV. 331, 331-50 (1990)).

30. Sarah Williams, *Riparian Landowners Versus the Public: The Importance of Roads and Highways for Public Access to Wisconsin’s Navigable Waters*, 2010 WIS. L. REV. 185, 215-16.

31. 33 M.R.S.A. §§ 1601 to 1604-118 (1999 & Supp. 2011) (Maine Condominium Act).

32. Buck, *supra* note 7, at 39 (internal quotations omitted). The Maine Condominium Act defines real estate as “any leasehold or other estate or interest in, over or under land . . . [including] parcels with or without upper or lower boundaries and spaces that may be filled with air or water” 33 M.R.S.A. § 1601-103(21). As part of the declaration, declarants must record a plat or plan bearing the seal and signature of the preparer, and must show the locations and dimensions of the vertical boundaries of each unit, as well as any horizontal unit boundaries. *Id.* § 1602-109(a), (d).

33. Buck, *supra* note 7, at 42.

34. *Id.*

usually not specified or, if they are, run “vertically from the center of the earth to the heavens.”³⁵

Because the UCIOA adopts such a broad definition of the type of real estate that may be developed into common interest communities—and because the Maine Condominium Act bars the enactment of zoning, ordinances, or other regulations that prohibit the condominium form of ownership³⁶—riparian and littoral rights can be severed from shoreland property and transferred separately from any land ownership interest.³⁷ As a result, the dockominium, as a real estate instrument, effectively serves at least three market purposes: First, it affords recreational boaters a secure tenure—namely, the exclusive right to occupy a three-dimensional space on, under, and above the water surface—during times of increasing demand for water access. Second, it offers commercial marinas the opportunity to maximize profit by severing and selling off some or all of the boat slip inventory or by entirely privatizing the facility and eliminating all resource-intensive shore-side boating services.³⁸ Third, it can serve as an attractive investment opportunity during times of economic expansion.³⁹

*B. Every Solution is a Problem: The Dockominium “Solution”
in Light of the Public’s Intertidal Rights*

Although the dockominium can serve as a market-based tool to ease the unmet demand for recreational water access, it is not without its own set of problems. As a real estate instrument, the dockominium raises questions concerning the scope of water-based property interests of public and private entities. This is because the dockominium literally bridges the gap between the upland and the water. Notwithstanding the numerous ways of installing a dockominium and its attendant infrastructure (e.g., dredging, filling, or simply wharfing out), some portion of the dockominium will therefore either occupy or alter the intertidal zone—or both. And, consequently, that portion will exclude the public from the three-dimensional space which it occupies.⁴⁰ This begs the question: Do dockominiums, because they functionally privatize access to and use of the horizontal and vertical space affected by the facilities, come into conflict with any of the public’s reserved rights under the public trust doctrine?

Several commentators have explored the potential property rights conflicts presented by dockominiums.⁴¹ In general, legal scholars contend that these types

35. *Id.*

36. 33 M.R.S.A. § 1601-106. Notably, the Act also prohibits governmental entities from enforcing any regulations or policies that are in conflict with its provisions. *Id.*

37. See Wagner, *supra* note 29, at 245; Dunton v. Parker, 97 Me. 461, 467, 54 A. 1115, 1118 (1903) (ownership of intertidal zone may be separated by deed from ownership of adjacent upland).

38. Mark Cheung, *Dockominiums: An Expansion of Riparian Rights that Violates the Public Trust Doctrine*, 16 B.C. ENVTL. AFF. L. REV. 821, 822-23 (1989).

39. See Buck, *supra* note 7, at 38-39 (citing reports to high and rising prices for boat slip dockominiums during troubled national economic climates).

40. A dockominium is also likely to spur water use and access conflicts between dockominium “residents” and other boaters and users of the intertidal zone, and thereby may functionally exclude the public from some unfixed area beyond the footprint taken up by its physical infrastructure.

41. See, e.g., Cheung, *supra* note 38; Hall, *supra* note 29; Wagner, *supra* note 29.

of facilities do threaten the public's right of access to state waters under the public trust doctrine because such a legal construct grants private entities an exclusive property interest in the affected water.⁴² Courts, however, have been largely silent on the issue. Only the Wisconsin courts have held that the conversion of a marina to a dockminium may violate that state's public trust doctrine, notwithstanding riparian owners' established rights to reasonable use of state waters.⁴³ Dockminium developments nonetheless remain quite popular on the east coast.⁴⁴

That different jurisdictions might adopt different approaches regarding the legitimacy of dockminiums in this respect should come as no surprise, given the Supreme Court's long-standing instruction that the public trust doctrine should be enforced by each state "according to its own views of justice and policy."⁴⁵ Consequently, to fully appreciate the property rights issues presented by dockminiums in Maine, the underpinnings of Maine's public trust doctrine and other established water rights doctrines—as well as relevant statutory and regulatory frameworks—form necessary context. This context is the subject of Parts III and IV, *infra*.

III. MAINE'S JUDICIAL FRAMEWORK OF RIPARIAN AND LITTORAL RIGHTS

A. Colonial Roots

Maine common law recognizes three categories of waters that are subject to some form of public servitude: great ponds, tidal waters, and nontidal navigable rivers or streams.⁴⁶ Each of these categories is defined quite differently. Great

42. See, e.g., Cheung, *supra* note 38; Hall, *supra* note 29; Wagner, *supra* note 29. Relatedly, scholars seem to agree that dockminiums do not conflict with the riparian rights doctrine. *Id.* Thus, the owner of shoreland adjoining a lake or river is free to transfer his littoral or riparian rights to one or more entities without any legal ties to the adjoining land, despite the fact that the land vested in him *solely* because of his original title to the shoreland.

43. See, e.g., *ABKA P'ship v. Wis. Dep't of Natural Res.*, 2001 WI App 223, ¶¶ 1-4, 247 Wis.2d 793, 802-03, 635 N.W.2d 168, 171-72 (Wis. Ct. App. 2001), *aff'd on other grounds*, 2002 WI 106, 255 Wis. 2d 486, 648 N.W.2d 854 (Wis. 2002). In 1994, ABKA sought administrative approval for the conversion of a 407-unit rented boat slip marina on Lake Geneva into dockminiums; however, the Wisconsin Department of Natural Resources asserted that ABKA was legally required to withhold some of the slips from sale for rent by the public. *Id.* ¶ 1, 247 Wis. 2d at 802-03, 635 N.W.2d at 171-72. The Court of Appeals of Wisconsin upheld the administrative decision, stating that the dockminium development violated the public trust doctrine and was not a reasonable riparian use of state waters. *Id.* ¶ 4, 247 Wis. 2d at 803, 635 N.W.2d at 172. The Supreme Court of Wisconsin also held that the conversion violated the public trust doctrine, but based its decision on Wisconsin statutory law rather than on common law. *ABKA P'ship*, 2002 WI 106 at ¶ 2, 255 Wis. 2d at 493-94, 648 N.W.2d at 857. See also Melissa K. Scanlan, *Implementing the Public Trust Doctrine: A Lakeside View Into the Trustees' World*, 39 *ECOLOGY L.Q.* 123 (2012) (discussing Wisconsin's legal framework for protecting public water rights, and the state's successes and failures in administering the public trust doctrine); Sarah Williams, Comment, *Riparian Landowners Versus the Public: The Importance of Roads and Highways for Public Access to Wisconsin's Navigable Waters*, 2010 *WIS. L. REV.* 185, 216-17 (2010).

44. Williams, *supra* note 43, at 216.

45. *Shively v. Bowlby*, 152 U.S. 1, 26 (1894).

46. See Knud E. Hermansen & Donald R. Richards, *Maine Principles of Ownership Along Water Bodies*, 47 *ME. L. REV.* 35, 39 (1995). Hermansen & Richards also identify nonnavigable streams as a category of water bodies recognized by Maine common law. *Id.* This water category, however, is beyond the scope of this Comment because Maine common law does not recognize the imposition of a

ponds are identified by their physical characteristics: they are bodies of standing water with a surface area of ten acres or more.⁴⁷ The definition of tidal waters is tethered to the influence of the tides; thus, tidal waters include not only ocean waters, but also rivers affected by the ebb and flow of the tide, irrespective of the fresh or brackish quality of the water.⁴⁸ By contrast, nontidal navigable rivers and streams are defined based on their function as flowing waters capable of being used at least part of the year “for the purposes of commerce, for the floating of vessels, boats, rafts or logs,”⁴⁹ and for reasonable public transportation or commercial use.⁵⁰

Despite their disparate contexts, these definitions—and their attendant public servitudes—share roots in the English common law tradition. Hale’s treatise, *De Jure Maris*,⁵¹ was particularly influential in the development of common law in the United States with regard to riparian and littoral title.⁵² In essence, Hale characterized the beds of all freshwater rivers and streams as private property, but emphasized a sovereign interest in “common passage”; thus, the King had a duty to protect, for the public’s safety and convenience, those streams and rivers which were navigable by large or small vessels.⁵³ Moreover, Hale regarded both tidal waters and intertidal lands as belonging, *prima facie*, to the sovereign.⁵⁴

Hale’s private property right and public use characterizations have been quoted in Maine case law contending with water rights from as early as 1825⁵⁵ and

public servitude on nonnavigable streams. See *Davis v. Winslow*, 51 Me. 264, 297 (1863) (“The general doctrine . . . in reference to the use of navigable rivers, or public streams, as public highways, is, that each person has an equal right to their reasonable use.”).

47. *Flood v. Earle*, 145 Me. 24, 28, 71 A.2d 55, 57 (1950).

48. See *Lapish v. President of the Bangor Bank*, 8 Me. 85, 93 (1831) (holding that riparian owners’ rights extended to the edge of a stream “at all hours of the tide in its ebbing and flowing; or, in other words, as far as low water mark”); *Stone v. City of Augusta*, 46 Me. 127, 137 (1858) (holding that the an interest in land bounded by the “bank” of a tidal brook only extended to the high tide mark, but noting that in some cases a boundary that is a river itself could include the low tide mark). “*Stone* makes clear that the intent of the Massachusetts Colonial Ordinance is directed at the ebbing and flowing of the tide and not at whether the nature of the water is fresh, brackish, or salty.” Hermansen & Richards, *supra* note 46, at 39 n.12.

49. *Brown v. Chadbourne*, 31 Me. 9, 20-22 (1849) (holding that “streams or rivers as are not floatable, that cannot, in their natural state, be used for the carriage of boats, rafts, or other property, are wholly and absolutely private; not subject to the servitude of the public interest, nor to be regarded as public highways, by water, because they are not susceptible of use, as a common passage for the public.”); see also Hermansen & Richards, *supra* note 46, at 41-42.

50. See *Brown*, 31 Me. at 22-23.

51. MATTHEW HALE, *DE JURE MARIS*, reprinted in STUART A. MOORE, *A HISTORY OF THE FORESHORE AND THE LAW RELATING THERETO AND HALL’S ESSAY ON THE RIGHTS OF THE CROWN IN THE SEA-SHORE* 370-413 (3d ed. 1888) [hereinafter *DE JURE MARIS*].

52. See, e.g., Robert W. Malmshiemer & Donald W. Floyd, *Fishing Rights in Nontidal, Navigable New York State Rivers: A Historical and Contemporary Perspective*, 62 ALB. L. REV. 147, 157-58 & n.84 (1998).

53. *DE JURE MARIS*, *supra* note 51, at 372; see also *Commonwealth v. Chapin*, 22 Mass. (5 Pick.) 199, 201-02 (1827).

54. *DE JURE MARIS*, *supra* note 51, at 376, 378 (characterizing a sovereign proprietary right to the branches of the sea which lie within the *fauces terrae*, including the shore, which is “that ground that is between the ordinary high-water and low-water mark”).

55. See, e.g., *Bell v. Town of Wells*, 557 A.2d 168, 181 (Me. 1989); *State v. Leavitt*, 105 Me. 76, 72 A. 875, 876 (1909); *Veazie v. Dwinel*, 50 Me. 479, 489-90 (1862); *State v. Inhabitants of Freeport*, 43 Me. 198, 201-02 (1857); *Treat v. Lord*, 42 Me. 552, 561-62 (1856); *Pike v. Munroe*, 36 Me. 309, 313

including, most recently, by the Law Court in *McGarvey v. Whittredge*.⁵⁶ Moreover, definitions paralleling Hale's characterizations are codified in several Maine statutory provisions.⁵⁷ In short, both Maine's common law and the state's statutory framework of water rights are grounded in large part on Hale's doctrine. Thus, in Maine, the beds of tidal waters (so-called submerged lands) are owned by the state, the beds of nontidal waters are privately owned by the upland owners, and private ownership beneath navigable waters is subject to the public's use of the water as a public highway.⁵⁸

Two exceptions to this grounding in Hale's doctrine, however, are Maine's property rights treatment of great ponds and of intertidal lands. Maine common law, unlike that of most states, has been heavily influenced by the Massachusetts Colonial Ordinance of 1641,⁵⁹ which reads in part:

Everie Inhabitant who is an hous-holder shall have *free fishing and fowling, in any great Ponds, Bayes, Coves and Rivers so far as the Sea ebs and flows*, within the precincts of the town where they dwell, unless the Free-men of the same town, or the General Court have otherwise appropriated them . . . [I]t is declared that in all creeks, coves and other places, about and upon salt water where the Sea ebs and flows, the *Proprietor of the land adjoining shall have proprietie to the low water mark where the Sea doth not ebb above a hundred rods*, and not more wheresoever it ebs farther. Provided that such *proprietor shall not by this libertie have power to stop or hinder the passage of boats or other vessels* in, or through any sea creeks, or coves to other mens houses or lands.⁶⁰

Notably, the Ordinance was amended in 1647 to forbid towns to appropriate "to any particular person or persons any great pond containing more than ten acres of land" and to grant a common right of pedestrian access across privately owned land to reach any such great pond.⁶¹ The Ordinance's recognition of a public right

(1853); *Moor v. Veazie*, 32 Me. 343, 357 (1850); *Brown v. Chadbourne*, 31 Me. 9, 14 (1849); *Littlefield v. Littlefield*, 28 Me. 180, 184 (1848); *Deering v. Proprietors of Long Wharf*, 25 Me. 51, 55 (1845); *Wadsworth v. Smith*, 11 Me. 278, 282 (1834); *Spring v. Russell*, 7 Me. 273, 290 (1831); *Berry v. Carle*, 3 Me. 269, 273 (1825).

56. 2011 ME 97, ¶ 36, 28 A.3d 620.

57. See, e.g., 12 M.R.S.A. §§ 1862 & 1865 (2005 & Supp. 2011) (addressing right of the State to lease submerged and intertidal lands owned by the State, contingent upon consideration of the public trust); 38 M.R.S.A. §§ 436-A(7) & 480-B(5) (2001 & Supp. 2011) (a "great pond" is any inland body of water which has a surface area in excess of ten acres); 12 M.R.S.A. §§ 571-73 (2005) (codifying the public trust in the Submerged & Intertidal Lands Act, discussed further at Part II.B).

58. See Robin Kundis Craig, *A Comparative Guide to the Eastern Public Trust Doctrines: Classifications of States, Property Rights, and State Summaries*, 16 PENN. ST. ENVTL. L. REV. 1, 61-62 (citing to *Stanton v. Trustees of St. Joseph's Coll.*, 233 A.2d 718, 721-22 (Me. 1967); *In re Opinions of the Justices*, 118 Me. 503, 567, 106 A. 865, 868 (1919); *Brown v. Chadbourne*, 31 Me. 9 (1849)).

59. See Sidney St. F. Thaxter, *Will Bell v. Town of Wells be Eroded with Time?*, 57 ME. L. REV. 117, 119-20 (2005).

60. BOOK OF THE GENERAL LAWES AND LIBERTYES CONCERNING THE INHABITANTS OF THE MASSACHUSETTS (Thomas G. Barnes, ed., 1975) (emphasis added).

61. Specifically, the Ordinance was amended to read: "And for great ponds lying in Common, through within the bounds of some Town, it shall be free for any man to fish and fowle there, and may pass and repass on foot through any man's propriety for that end, so they trespass not upon any man's Corn or Meadow." THE COLONIAL LAWS OF MASSACHUSETTS 91 (William H. Whitmore, ed., 1887), available at http://books.google.com/books?id=Vzno-EGGVcoC&ots=OC_uZHJ0ei#v=onepage&q&f=false.

to access great ponds was a “radical departure from the principles of law recognized by . . . the common law of England,”⁶² which had long recognized a private property right in all ponds and no reserved *jus publicum*.⁶³

As more fully explained in Part III.B, the Law Court has repeatedly stated that the Colonial Ordinance was incorporated into Maine common law as a matter of custom and usage.⁶⁴ Consequently, the court has held that the Maine common law, interpreted according to the terms of the Ordinance’s grant, vests in the public a right to cross privately owned woodland to access great ponds.⁶⁵ Similarly, the court has invoked this same principle as the foundational control on the public’s rights to the intertidal zone: Applying the Ordinance-grounded common law to water law controversies, the court has consistently declared that private landowners hold fee title to the lands between the high-water and low-water marks, extending no more than 100 rods from the high-water mark,⁶⁶ and the court has unwaveringly held that this private ownership is subject to the public’s right to use the intertidal zone.⁶⁷

B. Judicial Interpretation of Colonial Roots to Resolve Modern Water Use Conflicts

The Supreme Court’s line of cases in the 1800s established that the states (1) acquired title to the beds and banks of navigable waters at the time of statehood, (2) have broad authority to redefine any such acquired property rights,⁶⁸ and (3) have an inalienable duty to protect lands in the public trust—i.e., the *jus publicum*.⁶⁹ After these cases, virtually every state in the union modified its inherited English common law to curtail riparian rights for private owners and expand them for public access and use.⁷⁰ The Law Court, however, in a series of cases handed down since the mid-1980s, blazed a different trail, by declining to interpret the scope of public rights within the intertidal zone to include an easement for general

62. Herbert E. Locke, *Right of Access to Great Ponds by the Colonial Ordinance*, 12 ME. L. REV. 148, 149 (1919).

63. *See id.*

64. *See, e.g.*, Bell v. Town of Wells, 557 A.2d 168, 184 (Me. 1989).

65. Barrows v. McDermott, 73 Me. 441, 451 (1882).

66. *See, e.g.*, Craig, *supra* note 58, at 61-62 (citing to State v. Lemar, 87 A.2d 886, 887 (Me. 1952); Gerrish v. Proprietors of Union Wharf, 26 Me. 384 (1847); Duncan v. Sylvester, 24 Me. 482 (1844); Laphis v. President of Bangor Bank, 8 Me. 85 (1831)).

67. *See, e.g., id.*; *see also, e.g.*, McGarvey v. Whittredge, 2011 ME 97, ¶ 9, 28 A.3d 620.

68. *See* Craig, *supra* note 58, at 5-7 & nn.13 & 16 (citing to Shively v. Bowlby, 152 U.S. 1, 40 (1894); Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 435 (1892); Hardin v. Jordan, 140 U.S. 371, 380 (1891); Packer v. Bird, 137 U.S. 661, 669 (1891)).

69. On the distinct property rights of *jus publicum* and *jus privatum*:

[P]ublic trust land is viewed as being ‘vested with two titles: the *jus publicum*, the public’s right to use and enjoy trust lands and waters for commerce, navigation, fishing, bathing and other related public purposes, and the *jus privatum*, or the private proprietary rights in the use and possession of trust lands.’ In other words, while in many ways the *jus publicum* title may be considered something less than fee simple ownership, it also cannot be sold.

Michael P. Dixon, *Drawing Lines in the Disappearing Sand: A Re-Evaluation of Shoreline Rights and Regimes A Quarter Century After Bell v. Town of Wells*, 16 OCEAN & COASTAL L.J. 481, 490 (2011) (internal citations omitted).

70. *Id.* at 491-92.

public recreation. In what have become known notoriously as the “Moody Beach decisions,”⁷¹ the court stated that the public right did not extend to “bathing, sunbathing, and [recreational] walking on privately owned intertidal lands.”⁷²

The court’s pronouncement—that the public’s right to access and use the intertidal zone is necessarily constrained by the plain meaning of the Colonial Ordinance—was a major deviation from its earlier case law⁷³ and has been a source of significant controversy. Although the debate in Maine has revolved around the origins of public and private property rights to the intertidal zone and whether the court erred in finding that the Colonial Ordinance granted title to the intertidal zone to private landowners, the controversy has also focused on the scope of the public’s rights in light of the Ordinance’s explicit language, its underlying purpose, and the evolution of Maine’s common law since the Ordinance’s incorporation.⁷⁴ In essence, the Moody Beach cases triggered an ongoing debate about whether the public trust should be construed narrowly and consistent with the Ordinance’s expressly referred rights of “fishing,” “fowling,” and the passage of boats and vessels (typically denoted as the right of “navigation”); whether the public’s rights should be construed consistent with the Ordinance’s underlying purpose to enable access to the ocean in order to obtain sustenance or economic benefit; or whether the public’s rights should be interpreted more broadly through the lens of the *jus publicum*, irrespective of the Ordinance.

Nonetheless, the Law Court has reaffirmed the Moody Beach holding in several cases since 1989, framing the public interest in the intertidal zone as a relatively narrow right limited to “fishing, fowling, and navigation, or other activities with the permission of the landowner.”⁷⁵ The court has also

71. See Orlando E. Delogu, *An Argument to the State of Maine, the Town of Wells, and Other Maine Towns Similarly Situated: Buy the Foreshore—Now*, 45 ME. L. REV. 243, 243 (1993) (observing the usage of the common name); see also *Bell v. Town of Wells*, 510 A.2d 509 (Me. 1986) (deciding procedural issues in the principal case); *Bell v. Town of Wells*, 557 A.2d 168 (Me. 1989) [hereinafter *Bell II*] (addressing the balance of public and private rights in the intertidal zone).

72. *Bell II*, *supra* note 71, at 176. See also *id.* at 173 (“The terms ‘fishing,’ ‘fowling,’ and ‘navigation,’ liberally interpreted, delimit the public’s right to use [the intertidal zone].”)

73. See *James v. Inhabitants of the Town of W. Bath*, 437 A.2d 863, 865 (Me. 1981) (“A consistent theme in the decisional law is the concept that Maine’s tidal lands and resources . . . are held by the State in a public trust for the people of the State”); *Opinion of the Justices*, 437 A.2d 597, 607 (Me. 1981) (noting that other public uses may be recognized in intertidal zone, beyond historical purposes for which public trust principle was developed).

74. See Mark Cheung, *Rethinking the History of the Seventeenth-Century Colonial Ordinance: A Reinterpretation of an Ancient Statute*, 42 ME. L. REV. 115 (1990) (arguing for examination of the “historical precedents upon which the Ordinance is based”); Orlando E. Delogu, *Intellectual Indifference—Intellectual Dishonesty: The Colonial Ordinance, The Equal Footing Doctrine, and The Maine Law Court*, 42 ME. L. REV. 43, 44 (1990) (arguing that the *Bell II* court failed to “examine or appreciate the intent and purpose of the Colonial Ordinance”); Alison Rieser, *Public Trust, Public Use, and Just Compensation*, 42 ME. L. REV. 5, 35 (1990) (“Contrary to suggestions that the Colonial Ordinance of 1641-47 abrogated the English common law respecting the foreshore, the fundamental principle of English law was in fact incorporated into the Colonial Ordinance.”); but see Sidney St. F. Thaxter, *Will Bell v. Town of Wells be Eroded with Time?*, 57 ME. L. REV. 117 (2005) (responding to critics of *Bell II* and arguing that decision correctly applies the existing law of private property, of which the Ordinance is just one source).

75. *Conservation Law Found., Inc. v. Dep’t of Envtl. Prot.*, 2003 ME 62, ¶ 33 n.8, 823 A.2d 551; see also, e.g., *Eaton v. Town of Wells*, 2000 ME 176, ¶¶ 34,, 760 A.2d 232 (finding that prescriptive

acknowledged that the public's interest is further "subject to the [adjacent upland or intertidal land]owner's 'right to wharf out to the navigable portion of the body of water,'"⁷⁶ even though "[t]hese rights have long been subject to reasonable regulation . . . to protect the public's rights, pursuant to the public trust doctrine."⁷⁷

C. *Post-Moody Beach Elucidation?*

The Law Court revisited the scope of Maine's public trust doctrine last year in *McGarvey v. Whittredge* when several owners of oceanfront property bordering Passamaquoddy Bay in the Town of Eastport filed a declaratory judgment action seeking a determination that their neighbors, who operated a commercial scuba diving business, had no right to cross the intertidal zone to access the ocean.⁷⁸ The unanimous Law Court held that the public's right included the "right of the public to pass over the intertidal zone to reach the ocean in order to scuba dive."⁷⁹ However, the court declined to speak to whether the public has a trust right to any other uses of the intertidal zone. The court's equally split opinion reached this holding on starkly divergent reasoning.

While solidly affirming that the upland owner's fee title to the intertidal zone was an artifact of the Colonial Ordinance, Chief Justice Saufley, joined by Justices Mead and Jabar, acknowledged not only that Hale's treatise suggests that a public right of access over the zone existed long before the Ordinance's enactment,⁸⁰ but also that "nothing in the Colonial Ordinance, or the pronouncement of the common law that followed in the decades after [its] expiration . . . evidenced an intent to change or limit the *jus publicum*—the public's right in the intertidal lands—except to the extent that those rights might interfere with the right of the landowner to wharf out."⁸¹ Moreover, Justice Saufley rejected the "rigid interpretation of the public trust rights" championed in the Moody Beach decisions as exclusively restricted to fishing, fowling, and navigation,⁸² and instead reasoned that the respondents' underlying purpose for crossing the intertidal zone—namely, to reach the ocean to scuba dive—was among the purposes consistent with the *jus*

easement granted general recreational public right across dry sand portion of intertidal zone, but declining to extend the public trust doctrine holding in *Bell II*; *but see Norton v. Town of Long Island*, 2005 ME 109, ¶ 33, 883 A.2d 889 (noting the continued viability of *Bell II*, but also observing that Maine is unusual among other states in this area of law); *Eaton*, 2000 ME 176, ¶ 50, 760 A.2d 232 (Saufley, J., concurring) (stating that *Bell II* should be overruled).

76. *Conservation Law Found.*, 2003 ME 62, ¶ 36, 823 A.2d 551 (quoting *Great Cove Boat Club v. Bureau of Pub. Lands*, 672 A.2d 91, 95 (Me. 1996)). The common law provides owners of land abutting a body of water certain rights beyond those of the public, including (1) the right to have the water remain in place and retain, as nearly as possible, its natural character, (2) the right of access to the water; (3) subject to reasonable restrictions, the right to wharf out to the navigable portion of the body of water, and (4) the right of free use of the water immediately adjoining the property for the transaction of business associated with wharves. *Great Cove Boat Club*, 672 A.2d at 95.

77. *Britton v. Donnell*, 2011 ME 16, ¶ 8, 12 A.3d 39; *see also Great Cove Boat Club*, 672 A.2d at 95 ("[T]he right to wharf-out, [is] not absolute, but rather [is] subject to [] reasonable regulation . . .").

78. *McGarvey v. Whittredge*, 2011 ME 97, 28 A.3d 620.

79. *Id.* ¶ 10.

80. *Id.* ¶ 18 & n.9.

81. *Id.* ¶ 35.

82. *Id.* ¶ 56.

publicum—namely, the right to cross the zone “to reach the ocean for ocean-based activities.”⁸³ In essence, Justice Saufley espoused a fundamentally purpose-driven doctrinal approach to interpreting the public’s intertidal rights.

In contrast, Justice Levy, joined by Justices Alexander and Gorman, emphasized the doctrine of *stare decisis* and the import to society of a stable property rights regime⁸⁴ as the basis for essentially upholding the Moody Beach decisions and circumscribing the public’s right to the intertidal zone by “the terms ‘fishing’ fowling, and navigation.”⁸⁵ Even so, the concurring opinion acknowledged that the Ordinance’s triad “should be given a ‘sympathetically generous’ and broad interpretation . . . so as to account for evolving social and commercial circumstances.”⁸⁶ Then, applying the “expansive and adaptive force” of the common law, Justice Levy reasoned that scuba diving was an activity within the ambit of the right to navigation and concluded that traversing across the intertidal zone for that purpose was incidental to that right.⁸⁷ Thus, Justice Levy championed what might be loosely characterized as an elastic, activities-based doctrinal approach to interpreting the public’s intertidal rights.

Despite its divergent reasoning, the *McGarvey* court adhered to a long line of cases wherein it resolved water rights controversies through a string of functional definitions. For example, while the Law Court has affirmed in all three water categories⁸⁸ the common right to fish and navigate the state’s navigable waters,⁸⁹ it has recognized the public’s right to cut ice, bathe, skate, ride upon the ice, and take water for domestic or agricultural purposes or for use in the arts only on great ponds.⁹⁰ Consequently, *McGarvey* has done little to ameliorate the pragmatic effect of the Moody Beach decisions. Even if lawyers were to take their cues from the Chief Justice’s opinion, which seems to liberate courts from a strict Moody Beach-style interpretation of the Colonial Ordinance, it gives little guidance to what other uses of the intertidal zone will fall within the *jus publicum*. As before, lawyers will likely continue to resort to heavy use of the “analogize-and-distinguish” tool in the advocacy toolbox (depending on which side of the “v.” they represent). Accordingly, a party seeking to establish a new public activity in the intertidal zone will argue that the activity is similar to digging for worms⁹¹ or

83. *Id.* ¶¶ 49-51. The Chief Justice made clear that the foundational purpose for the public’s right to the intertidal was to access the ocean and tidal zone, stating that “[t]here can be no question that . . . the public has a right to use the ocean itself.” *Id.* ¶ 12.

84. *Id.* ¶¶ 63-67 (Levy, J., concurring in the judgment).

85. *Id.* ¶ 59 (quoting *Bell II*, *supra* note 71, at 173).

86. *Id.* ¶ 68 (quoting *Bell II*, *supra* note 71, at 173).

87. *Id.* ¶¶ 76-77.

88. See *supra* Part III.A (identifying the three categories).

89. See *Gratto v. Palangi*, 154 Me. 308, 312, 147 A.2d 455, 458 (1958) (recognizing rights to use “great ponds,” including right to fish); *Moulton v. Libbey*, 37 Me. 472, 485 (1854) (recognizing a right to fish in “seas or creeks or arms thereof”); *Moor v. Veazie*, 32 Me. 341, 356 (recognizing a right to navigate on all navigable waters, including “lakes and fresh water rivers, which are navigable”).

90. *Gratto v. Palangi*, 154 Me. 308, 313, 147 A.2d 455, 458 (1958) (recognizing rights of swimming, boating, fishing, fowling, bathing, skating, riding upon the ice, and taking water for domestic or agricultural purposes or for use in the arts in great ponds); *Flood v. Earle*, 145 Me. 24, 28, 71 A.2d 55, 57 (1950) (recognizing a right to cut ice upon great ponds).

91. *State v. Lemar*, 87 A.2d 886, 887 (Me. 1952).

clams,⁹² recreational power boating,⁹³ traveling over frozen waters,⁹⁴ discharging and taking on boat passengers,⁹⁵ driving or resting cattle,⁹⁶ and scuba diving⁹⁷—uses the court has accepted as within the sphere of the enumerated public trust rights. Conversely, the other side will argue that the activity is more like cutting ice,⁹⁸ harvesting mussel-bed manure,⁹⁹ and bathing¹⁰⁰—uses the court has, to date, rejected. Thus, even though Maine’s property framework of riparian and littoral rights originates in “established” common law,¹⁰¹ the court continues to resolve many of its water-related property rights controversies in a largely reactive, use-by-use fashion.

Notwithstanding the Law Court’s use-by-use approach to resolving intertidal rights controversies, *McGarvey* sheds light on two key public policies that are at the heart of much of Maine’s modern water rights jurisprudence: (1) society’s interest in a stable and predictable property rights regime,¹⁰² and (2) society’s interest in a continually evolving common law that “reflect[s] the realities of a changing world.”¹⁰³ The *McGarvey* court recognized these policies as the motivation behind both the fundamentally purpose-driven and the elastic, activities-based doctrinal approach to resolving intertidal rights conflicts; however, each opinion unmistakably emphasized one policy at the expense of the other. Thus, the court did not reach consensus, or even majority agreement, as to how a balance among these policies ought to be struck.

In the end, *McGarvey* offers neither much predictability nor much evolutionary accommodation when it comes to resolving use conflicts in the intertidal zone, as both doctrinal approaches leave unclear what emerging uses might fall within or outside the scope of the public trust. Moreover, the modern judicial method, when combined with an inconsistent administrative approach to resolving such conflicts (discussed immediately below), serves to augment the policy discord.

92. *Moulton*, 37 Me. at 493-94.

93. *See Gratto*, 154 Me. at 312-14, 147 A.2d at 458-60.

94. *See French v. Camp*, 18 Me. 433, 434-35 (1841).

95. *See Andrews v. King*, 124 Me. 361, 362-64, 129 A. 298,299 (1925).

96. *See Bell II*, *supra* note 71, at 173 n.15.

97. *McGarvey v. Whittredge*, 2011 ME 97, ¶ 77, 28 A.3d 620 (Levy, J., concurring in the judgment).

98. *See Bell II*, *supra* note 71, at 188 n.13 (Wathen, J., dissenting).

99. *See Marshall v. Walker*, 93 Me. 532, 536, 498 (1900).

100. *Bell II*, *supra* note 71, at 176.

101. Whether that common law ought to originate in the Colonial Ordinance, the *ius publicum*, or a combination of both is likely to remain fodder for infinite academic and courtroom debate. This academic debate is not modern. From as early as the turn of the 20th century, this Journal has published commentaries focusing on the origins of Maine’s common law in this regard. *See, e.g., Locke*, *supra* note 62, at 152.

102. *McGarvey*, 2011 ME 97, ¶¶ 64-65, 28 A.3d 620 (Levy, J., concurring in the judgment).

103. *Id.* ¶ 9; *see also id.* ¶ 70 (Levy, J., dissenting) (“The common law requires courts to account for ‘the ever varying circumstances of new cases presented and . . . the newly developed industries of the age [while not] setting aside its plain doctrines because they are not in accord with our own views of what it should be.’ (internal citations omitted)).

IV. THE ADMINISTRATIVE OVERLAY:
MAINE'S STATUTORY AND REGULATORY PATCHWORK

Federal, state, and municipal entities play a key role in regulating land uses in the state and, in doing so, can define the scope of private property and public use rights. Indeed, water rights, like all other rights, are subject to such reasonable regulations as are essential to the general public welfare.¹⁰⁴ However, the concurrent regulatory authority of many agencies at different levels of government—and with sometimes disparate objectives—presents the risk that regulators will pull at the strands of the property rights fiber in different directions. The overlay applicable to emerging water uses illustrates that Maine's riparian and littoral rights regime has certainly not curtailed this risk.

A. Federal Review: The Army Corps of Engineers

At the federal level, the United States Army Corps of Engineers (“the Corps”) has jurisdiction to regulate waterway obstructions over all navigable waters of the United States.¹⁰⁵ The Corps generally defines navigable waters as “those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce.”¹⁰⁶ Accordingly, in Maine, the Corps can regulate emerging water uses such as dockminiums located on any tidal waters and their tributaries to the head of tide, as well on any major river of the state and on Lake Umbagog.¹⁰⁷

While the primary focus of the Corps' regulatory program has been to safeguard navigation,¹⁰⁸ a relatively recent secondary objective involves the

104. Of course, the statutory and regulatory overlay is not free of judicial scrutiny: “A state legislature’s or judiciary’s action amending prior state property law pertaining to water rights may . . . have the effect of taking the property without compensation where those rights were firmly vested through reliance on the prior state law and the subsequent legislative or judicial action places ‘a sufficient cloud upon the title of the plaintiffs so as to interfere substantially with the financing of improvements or any potential sale of their lands.’” James H. Davenport & Craig Bell, *Governmental Interference with the Use of Water: When Do Unconstitutional “Takings” Occur?* 9 U. DENV. WATER L. REV. 1, 25-26 (2005) (internal citations omitted).

105. 33 U.S.C.A. § 403 (2001 & Supp. 2012). Section 10 of the Rivers and Harbors Appropriations Act of 1899, ch. 425, 30 Stat. 1121, 1151 (codified at § 403), grants the Corps broad authority to regulate waterway obstructions. See *United States v. Alaska*, 503 U.S. 569, 579-80 (1992). Section 403 codifies section 10 of the Act; accordingly, Corps permits that are issued for docks, marinas, and similar structures under § 403 are commonly referred to as section 10 permits. See, e.g., Jeffrey W. Peters, *United States v. Alaska: Section 10 Permits, the Territorial Sea, and Federalism*, 1 OCEAN & COASTAL L.J. 59, 60 (1994).

106. Corps of Engineers, Definition of Navigable Waters of the United States, 33 C.F.R. § 329.4 (2011).

107. See *What Are the Limits of the Corps Jurisdiction?*, ARMY CORPS OF ENGINEERS—NEW ENGLAND DISTRICT, 4 (Jul. 2012), <http://www.nae.usace.army.mil/Regulatory/JD/JurisdictionLimits.pdf>.

108. See, e.g., *Wyandotte Transp. Co. v. United States*, 389 U.S. 191, 194-95 (1967) (affirming the propriety of Corps action to remove a sunken barge containing containers of liquid chlorine from the Mississippi River); *Wisconsin v. Illinois*, 278 U.S. 367, 405 (1929) (“[Sections 9 and 10 of] [t]he act of Congress of 1899 . . . [looked] to the regulation, prevention, and removal by federal authority of obstructions to navigation and alteration of capacity of the navigable waters of the United States . . .”).

protection of the nation's water resources.¹⁰⁹ Thus, the Corps' general regulatory policies applicable to the review of all of its permit applications invoke a "public interest review," which calls for an "evaluation of the probable impacts . . . of the proposed activity and its intended use on the public interest" through "a careful weighing" of public and private interest factors.¹¹⁰ These factors include "conservation, economics . . . general environmental concerns . . . navigation . . . considerations of property ownership, and, in general, the needs and welfare of the people."¹¹¹ The Corps' general regulatory policies also include consideration of property ownership, recognizing that the "right to reasonable private use . . . is subject to the rights and interests of the public in the navigable and other waters of the United States" and that "[a] riparian landowner's general right of access to navigable waters . . . is subject to the similar rights of access held by nearby riparian landowners and to the general public's right of navigation on the water surface."¹¹² The policies stress that projects which create "undue interference with access to, or use of, navigable waters" are not likely to be authorized.¹¹³

However, the agency's general regulatory policies also emphasize that Corps permits do not convey any property rights or exclusive privileges, and stress that the agency will not undertake any independent reviews of an applicant's affirmation that he or she possesses "the requisite property interest" to undertake the project.¹¹⁴ Consequently, any section 10 permits issued by the Corps for emerging water uses in Maine would likely presume the presence of clear title, and would instead focus on whether or not the proposals would create physical barriers to the navigable channels of waters.

B. State Review: The Bureau of Parks and Lands

The Bureau of Parks and Lands ("the Bureau"), within Maine's Department of Conservation, administers intertidal and submerged lands owned by the state.¹¹⁵ In general, submerged land consists of land from the mean low-water mark out to the seaward boundary of coastal waters, land below the mean low-water mark of tidal rivers, land below the natural mean low-water mark of great ponds, and the riverbeds of international boundary rivers.¹¹⁶

As discussed in Part III, title to Maine's submerged lands has long been held by the state, according to Maine's enduring common law tradition rooted in Hale's property rights doctrine, whereas title to intertidal lands is generally privately held by the owner of the upland. In fact, in 1989, the court went so far as to find the Public Trust in Intertidal Lands Act (PTILA)—enacted by the Maine Legislature in

109. See Cheung, *supra* note 38, at 845.

110. Corps of Engineers, General Regulatory Policies, 33 C.F.R. §§ 320.1(a)(1), 320.4(a)(1) (2011).

111. *Id.* § 320.4(a)(1).

112. *Id.* § 320.4(g)(1), (3).

113. *Id.* § 320.4(g)(3).

114. *Id.* § 320.4(g)(6).

115. P.L. 1998, ch. 678 (codified at 12 M.R.S.A. §§ 1802, 1862-1867 (2005 & Supp. 2011)). This statute is commonly referred to as the "Submerged and Intertidal Lands Act." See, e.g., Britton v. Donnell, 2011 ME 16, ¶ 4, 12 A.3d 39.

116. JEFFREY A. THALER & GREGORY M. CUNNINGHAM, MAINE ENVIRONMENTAL LAW HANDBOOK § 5.2.1, at 102-103 (2d ed. 2002).

1986 largely in response to the court's first Moody Beach decision and declaring that the "intertidal lands of the State are impressed with a public trust," including a "right to use intertidal land for recreation"¹¹⁷—a facially unconstitutional taking of private property without just compensation because it functionally created an unlimited public recreational easement that went beyond the recognized common law right of fishing, fowling, and navigation.¹¹⁸ The court was heavily criticized for failing to recognize both that (1) the police power could be applied to limit the potential nuisance effects of public recreation and (2) the legislative branch ought to play its judicially-recognized role in defining the scope of the common law public rights.¹¹⁹ Nonetheless, the lasting effect of the Moody Beach decisions was to suppress the authority of the state's executive and legislative branches to interpret the scope of the public trust beyond the court's construction of the Colonial Ordinance. As a result, the Bureau's authority to regulate emerging uses in the intertidal zone is limited to the rare instance where the *state* holds fee title to intertidal land—i.e., when it acquires such land through fee purchase.¹²⁰

In those rare instances, pursuant to legislative authority under the Submerged and Intertidal Lands Act (SILA),¹²¹ the Bureau is empowered to transfer the state's interest in intertidal lands to private entities under certain conditions, as it may do with its submerged lands. For example, as part of its submerged lands leasing program, the Bureau may lease the right, or grant assignable thirty-year easements, to construct "causeways, bridges, marinas, wharves, docks, pilings [or] moorings" on state-owned submerged and intertidal lands.¹²² The Bureau may refuse to issue such a lease if it determines that the lease would "unreasonably interfere" with "navigation . . . fishing or other existing marine uses of the area, [or] ingress and egress of riparian owners."¹²³ Likewise, the Bureau may refuse to issue either a lease or a term easement if it determines that such a lease or easement would unreasonably interfere with "customary or traditional public access ways to or public trust rights in, on or over the intertidal or submerged lands and the waters above those lands."¹²⁴

In accordance with the SILA, the Bureau promulgated rules to "ensure a consistent and standard approach to the management of the Submerged Lands of Maine . . ." ¹²⁵ Under these rules, the Bureau will issue a lease or grant a term easement if it finds that the proposed use of the state-owned lands (1) will not "unreasonably interfere" with, *inter alia*, "navigation," "ingress and egress of riparian owners," and "customary or traditional public access ways to, or public trust rights in, on or over Submerged Lands and the waters above those lands"; and

117. 12 M.R.S.A. §§ 571 & 573(1)(B) (2005).

118. *Bell II*, *supra* note 71, at 176-79.

119. *See, e.g.*, Alison Rieser, *Public Trust, Public Use, and Just Compensation*, 42 ME. L. REV. 5, 5-10 (1990) ("With respect to state tidelands law and the role the legislature plays in defining the scope of common law public rights, the Law Court was deafeningly silent.").

120. *See* THALER & CUNNINGHAM, *supra* note 116, § 5.2.1 at 104.

121. 12 M.R.S.A. §§ 1801, 1803, 1862 (2005 & Supp. 2011).

122. *Id.* §§ 1862(2), (3).

123. *Id.* § 1862(2)(A)(6).

124. *Id.* §§ 1862(2), (3).

125. Bureau of Parks & Lands, Submerged Lands Rules, 04-059 C.M.R. Ch. 053, § 1.2 (2011).

(2) is not otherwise “contrary to the public interest.”¹²⁶ In addition to specifying the standards of review, the area of lands conveyed by leases and easements, and renewal and termination provisions, the rules stipulate that the Bureau may require mitigation measures such as boat launching ramps, parking spaces, or public walkways from the lessee or easement holder to compensate the public for the loss of its customary access rights.¹²⁷ Notably, the rules also specify that any interest conveyed by a lease or easement in state-owned submerged lands may not be severed from the title in the adjacent upland without invalidating the lease or extinguishing the easement interest.¹²⁸

Moreover, the use of state-owned submerged and intertidal lands for dockominiums is plainly within the statutory authority of the SILA. The Act, for example, defines dockominiums as “slip space that is *sold* or leased by a lessee of submerged lands to a boat or vessel owner for more than one year.”¹²⁹ The SILA also contemplates how the fee structure should be calculated for dockominium-related slips that are not rented or leased to the general public.¹³⁰ And, in 1988, the Maine Legislature enacted a statutory “brake” on the development of dockominiums on state-owned submerged and intertidal lands,¹³¹ thereby indicating that the pre-1988 regulations also contemplated dockominiums as a permitted use on these lands.

Accordingly, when the Bureau’s regulatory authority under SILA is triggered, administrative consideration of the impacts of proposed dockominiums and other emerging uses on the public trust appears, on its face, quite rigorous. The advantages of working within an established operative regulatory framework are reason alone for the Bureau to be charged with assessing the public trust impacts of all proposed shoreland structures, regardless of whether they are sited in the intertidal zone or on submerged land. (Besides, the Bureau’s review will be invoked with some frequency anyway because, as discussed in Part II.B, shoreland structures typically occupy or alter some portion of submerged lands—over which the Bureau has clear authority—in order to create access from the upland to the ocean.) But given the Law Court’s longstanding declaration that private landowners hold fee title to the intertidal zone, combined with its recent declaration that the PTILA is unconstitutional, it is not surprising that this regulatory trigger is rarely pulled beyond the confines of Maine’s submerged lands.

C. Municipal Review: Home Rule Authority

Municipal review of emerging water uses can be as varied as the municipalities themselves. This is because municipalities are authorized under

126. *Id.* § 1.7(C)(2), (3), (9).

127. *Id.* § 1.6(B)(18).

128. *Id.* § 1.6(B)(1)(b).

129. 12 M.R.S.A. § 1862(1)(B) (emphasis added).

130. *Id.* § 1862(1)(D).

131. An amendment to Title 12 halted the development of dockominiums “where a person or entity obtained a lease of submerged or intertidal lands for a period of 30 years and then sold portions to individuals using a condominium concept for use as docking space for boats.” CASPAR F. COWAN & J. GORDON SCANNELL, JR., 1 MAINE PRACTICE SERIES: REAL ESTATE LAW & PRACTICE § 15:3 (2d ed. 2007).

Maine's home rule laws¹³² to "exercise any power or function . . . which is not denied to them" by the Maine Legislature.¹³³ Accordingly, although no Maine municipality appears to have promulgated rules specifically related to dockminium developments to date, most towns and cities have enacted general land use standards and permitting requirements that, when combined with specific standards applicable to uses similar to dockminiums (such as commercial marinas), establish a regulatory framework by which municipal officials could review, and approve or reject, proposed dockminium developments.

The Town of Kittery, for example, has adopted a land use and development ordinance that establishes a range of land use zones and identifies the uses allowed in each zone upon receipt of a permit, by special exception, or through a variance process.¹³⁴ Under this framework, the Town accommodates, under certain circumstances and only in certain zones, functionally water-dependent uses¹³⁵ and private marinas owned or used by a private group, club, association, "or other legal entity's organization" primarily as moorings or docking facilities.¹³⁶ Thus, the Town could grant a permit for the construction of a marina-turned-dockminium on its shores by interpreting its ordinance, in light of these two definitions, to include dockminiums among permitted uses.¹³⁷ However, absent more explicit regulatory language, the Town is not likely to address issues surrounding the form of ownership contemplated for the dockminium development beyond establishing that the proposed developer of the dockminium is, in fact, the fee owner of the shoreland adjoining the river and that title will eventually transfer from the developer to the dockminium association.

The Town of Kittery is far from unusual. In fact, any land use framework that relies on static lists of land and water uses will suffer a similar fate of needing to fit proverbial "square uses" into "round zones" in order to adapt to a dynamic world of evolving and emerging uses. The Town's framework nonetheless illustrates a broader point: Although Maine communities can, and often do, regulate land and water uses in starkly varied ways, when it comes to emerging water uses, municipalities rarely if ever appear to question the effects of such uses on public trust interests—despite having the home rule authority to do so. Thus, even though dockminiums are likely to significantly alter the property rights of Maine's waters, municipal reviews of such proposals are usually limited to establishing a

132. Home rule powers are granted to municipalities by the Constitution of Maine. ME. CONST. art. VIII, pt. 2. These powers are codified at 30-A M.R.S.A. §§ 2101-2109 (2011 & Supp. 2011).

133. 30-A M.R.S.A. § 3001 (2011). This power is broad: There is, for example, "a rebuttable presumption that any ordinance enacted under this section [by a municipality] is a valid exercise of a municipality's home rule authority." *See id.* § 3001(2) (granting the presumption with respect to the home rule ordinance power defined in § 3001). Moreover, unless the ordinance in question is held to "frustrate the purpose of any state law," the courts must presume that the Legislature did not implicitly deny any power granted to municipalities under Title 30-A. *Id.* § 3001(3).

134. Kittery, Me., Land Use & Dev. Code, tit. 16 §§ 1.1 - 16.7.3.5.1 (2010), available at http://www.kitteryme.gov/Pages/KitteryME_TownCode/Title%2016%20%20Part%201.pdf [hereinafter Kittery Code].

135. E.g., uses that must be located on submerged lands or that require direct access to waters, such as commercial and recreational boating facilities, waterfront dock and port facilities—but not marinas.

136. *See* Kittery Code, *supra* note 134, § 16.2.2 (definition of "private marina use structure").

137. *See id.*

permit applicant's right, title, or interest to the shoreland adjoining the dockominium, in the form of deeds, leases, or option agreements, and possibly to the submerged lands, in the form of a lease from the Bureau.

D. Regulatory Discord

An examination of regulation of dockominiums at the federal, state, and municipal levels reveals both gaps in jurisdiction among these three levels of government and disparate treatment of water-related property rights where jurisdictions overlap. For example, the Corps retains jurisdiction over the construction of dockominiums on navigable rivers, tidal waters, and the intertidal zone, but not on great ponds. In contrast, the Bureau has jurisdiction over dockominiums on tidal waters (submerged lands) and those facilities that extend below the low-water mark of great ponds, but not on navigable rivers or most intertidal lands. As a result, dockominium proposals on some categories of public waters are—at least ostensibly—subject to review by the Corps, others by the Bureau, and still others by both agencies. To complicate matters, municipalities may, but are not required to, exert home rule authority over any proposed dockominium development within their municipal boundaries.

Moreover, even though both the Corps and the Bureau are called upon in statute and rule to weigh the potential impacts of dockominiums on existing public property interests, these jurisdictional problems combine with practical and legal limitations on undertaking property ownership assessments of private ownership rights and public trust rights. Accordingly, the Corps does not undertake independent evaluations of asserted property interests, and it is at best unclear whether such evaluations would be solicited by the Bureau. At present, these governmental agencies are in no position to protect the public trust from the potential ill effects of emerging water uses and associated facilities, or to assuage the incremental privatization of Maine's intertidal zone.

V. LEGAL UNCERTAINTY IN THE INTERTIDAL ZONE, AND THE NEED FOR A UNIFIED JUDICIAL VOICE

The dockominium serves as a useful illustration of the layers of legal uncertainty facing public and private entities in Maine who wish to make novel use of the intertidal zone.

At the administrative level, the problems appear primarily in the form of jurisdictional disparity.¹³⁸ The central issue, however, is not that the three levels of government overlap in their regulatory orbit. After all, different layers of government can and often do coordinate reviews of development proposals. Rather, the problem is that administrative agencies give unpredictable depth and breadth of consideration to the public's interest in water resources when evaluating emerging water use proposals. Such incongruent, inconsistent, and all-too-often nonexistent regulatory assessment of public trust rights leaves a path of uncertainty with respect to the administrative protections offered to the public's interest in the intertidal zone whenever a proposal for an emerging water use is presented.

138. See *supra* Part IV.

The case-by-case judicial approach to resolving water use conflicts¹³⁹ compounds this administrative uncertainty. In *McGarvey*, Chief Justice Saufley frankly acknowledged “the inconsistency of this incremental jurisprudential approach,” and recognized the need for a “gradual evolution” of the common law.¹⁴⁰ However, the court’s two divergent doctrines in *McGarvey* do little to illuminate whether the court will, in fact, depart from the rigid Moody Beach holding in favor of a clearer view of the scope of the public’s interests in the intertidal zone. Moreover, even if the court were to eventually embrace the reasoning in Chief Justice Saufley’s opinion, little guidance exists therein as to which types of public uses implicating the intertidal zone will be found consistent with the *jus publicum* and within the realm of “ocean-based activities,” and which types of emerging private uses will be found to interfere with the public trust.

Consequently, Maine is left with an approach to public and private intertidal rights that, on the one hand, leaves the public with an unclear path as to what new public uses of the intertidal are within the scope of the public’s rights and, on the other hand, leaves private entities with uncertainty as to what emerging private uses may be subject to regulations aimed at protecting the public’s interests.

A. *Incomplete Administrative Solutions*

There are, of course, several fixes to some of the more egregious jurisdictional holes in the administrative reviews of emerging water uses. While an obvious patch would be to expand the jurisdictional scope of the federal or state agencies that presently have a role in evaluating many emerging water uses, this approach would likely be fraught with political challenges and institutional hurdles and, in any event, may not be the most efficient method of solving the problem. Efforts at expanding the jurisdictional scope of the Corps are likely to be met with significant political resistance and, consequently, may have little chance of success. And any future legislative attempts to broaden or clarify the Bureau’s purpose and mission might be viewed as a duplicitous effort to undermine the court’s 1989 Moody Beach decision invalidating the Public Trust in Intertidal Lands Act on constitutional takings grounds, and could run the risk of another separation of powers battle between Maine’s judicial and legislative branches.

Alternatively, municipalities whose boundaries adjoin coastal waters could exercise their home rule authority to resolve some of the administrative problems associated with emerging water uses. For instance, municipalities could adopt a dynamic zoning and regulatory framework by which municipal officials or boards are empowered to review, and approve or reject, proposed structural development associated with emerging water uses. To be effective, such a framework would need to include explicit analysis of the impacts of proposed water uses on public trust interests, rather than merely requiring developers to demonstrate right, title, or interest to the adjoining shoreland. Although a municipal ordinance that brings emerging uses into the regulated sphere would not eliminate the need to regularly update review standards to address issues specific to already-identified emerging

139. See *supra* Part III.

140. *McGarvey v. Whittredge*, 2011 ME 97, ¶ 11 n.5, 28 A.3d 620.

uses such as dockominiums, it would certainly ameliorate the “square use, round zone” phenomenon.

Although establishing meaningful municipal control over emerging water uses could certainly introduce an incongruent patchwork of town-by-town regulations, the benefits are at least three-fold. First, Maine’s deep-rooted culture of local control would serve as a natural cushion against the type of political and administrative opposition that state- or federal-level jurisdictional expansions would likely face. Second, the residents of the municipalities adjoining coastal resources are, in many respects, most likely to be directly affected by decisions about the allocation of water-related interests between public and private entities. After all, residents are the most likely fee owners of the intertidal zone at issue, and residents are the most likely users of the public trust due to their geographic proximity to the resource. As a result, municipalities are well-positioned to do the kind of balancing of interests that is called for in resolving water use conflicts.¹⁴¹ Finally, addressing the problem of emerging water uses at the municipal level would present the opportunity for a varied and customized set of solutions to the allocation problem. In other words, there exists the opportunity for some creative bargaining.

Unlike the situation in *McGarvey*, where public actors were allegedly intruding on a private right, emerging uses are more apt to trigger municipal involvement when a private actor allegedly intrudes on the public interest. Dockominiums are a case in point: Under a well-written, forward-thinking ordinance, a developer seeking municipal approval for a change in use of an existing water-based facility or for the construction a new facility would need to address the possibility that the proposal could affect the public’s rights. The municipality would have an obligation to evaluate the impacts of a proposed dockominium on these public interests, and the ordinance would clarify the breadth and depth of this obligation. If any adverse impacts were found, a municipality might be justified in simply denying the proposal. However, a well-written ordinance could make possible other forms of redress, including approval contingent upon the implementation of impact minimization and mitigation measures such as pedestrian public access easements across swaths of the intertidal zone and set-asides of a certain number of dock slips for public use. Regulatory exactions such as these, which are aimed at offsetting the impacts of development on public resources, are within the scope of a municipality’s home rule authority. Moreover, they would not cloud title so as to cause an unconstitutional taking of property, as long as a clear nexus exists between the exactions and the impacts and as long as the exactions are proportionate to the projected impacts of the development.¹⁴² At the very least, resolving water use conflicts through local decision making—and guided by ordinances tailored to the needs of the directly-affected community—would

141. Local control is generally seen as beneficial because it fosters democratic tendencies, allows broad participation in government, and allows people to arrange their local conditions as they desire. See, e.g., ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 67-94 (Arthur Goldhammer, trans., Library of America 2004).

142. See *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

engender much-needed open discourse about the appropriate allocation of water-related property rights among public and private entities.

B. The Need for a Unified Judicial Voice

Municipalities have broad power to protect the public interest when there is a direct structural intrusion upon the public's interest to access the ocean; however, even the best administrative patches are not enough to fully address the legal ailments associated with public trust rights in Maine's intertidal zone. As discussed in Part V.A, municipal solutions under home rule authority would not resolve the *McGarvey*-type problems: public intrusion on private rights. And, absent additional guidance from the Law Court, even those municipalities with well-drafted ordinances would need to speculate (either as part of rulemaking or during post-rulemaking application) as to which water-based public uses should fall within or outside municipal considerations when evaluating the impacts of proposed water-based uses on the public trust.

Given the court's divergent views of the scope of public trust rights in *McGarvey*, this kind of municipal speculation carries with it some obvious risks. An overly broad interpretation of the public trust might lead municipalities to demand exactions that are not proportionate to the impacts, whereas an overly narrow interpretation might lead to insufficient mitigation measures and, consequently, harm to public interests through excessive privatization. Moreover, saddling municipalities (or any administrative agency for that matter) with the task of setting the scope of the public trust would be a misplaced abdication of judicial responsibility, and would inevitably engender heterogeneous, town-by-town interpretations of uses that fall within or outside the protections of the public trust. This is hardly the formula for a stable and predictable property rights regime. For these reasons, the difficult task of striking the proper balance with respect to public and private interests in the intertidal zone remains best placed with the Law Court. Many of the challenges faced by municipalities and other administrators would be eased if the court were to present a unified judicial voice regarding the scope of the public trust and the related balancing of society's interests in a stable, yet evolving property rights regime.

Auspiciously, the two fundamental objectives underlying the Law Court's purpose-driven and elastic, action-based doctrinal approaches to resolving water rights controversies in *McGarvey* can be harmonized. Despite their seeming inconsistency, society's interest in a stable and predictable property rights regime is not inherently in dissonance with society's interest in an evolving common law that embraces emerging water uses, whether public or private. Both of these objectives could be honored if, rather than evaluating emerging uses on a case-by-case basis and with only static precedent as guidance, the court were to embrace a factors-based approach to assessing novel uses of the intertidal zone.

These factors do not necessarily need to deviate from the Colonial Ordinance's three descriptive terms—so long as there is recognition that “fishing, fowling, and navigation” are to be interpreted as comprising certain *classes* of public uses. For example, instead of itemizing the ways humans have or will “navigate” through or across the intertidal zone, the court could set forth performance-based evaluation

factors such as *whether the use in controversy involves traversing the intertidal zone for the primary purpose of accessing upland, submerged land, or ocean*. Likewise, the court could assert that *uses involving the harvesting of plant or animal matter attached to the floor of the intertidal zone* are outside the scope of “fishing” and “fowling,” rather than listing the various flora and fauna that humans now or in the future might wish to harvest. The factors could, of course, also be based on other considerations, such as the underlying purposes of the Colonial Ordinance or principles of nuisance law, such as *whether the use is a transient use causing de minimis nuisance on private ownership rights*.

Judicial enumeration of such factors would bring about much-needed predictability to Maine’s intertidal rights framework by making use of a familiar analytical tool to book-end the scope of the public trust in Maine’s intertidal zone. At the same time, a factors-based approach would leave much-needed room to accommodate emerging (and heretofore unimaginable) public and private uses of the intertidal zone.

C. *Interim Measures for Practitioners*

As a legal construct, a dockominium situated on Maine’s coastal waters must grant private entities an exclusive property interest to a three-dimensional space in, on, and above the water’s surface, without infringing upon the public trust rights which burden that same space and without infringing upon the wharf-out rights which burden adjoining spaces. In light of the existing judicial and administrative uncertainty with respect to Maine’s public and private intertidal rights, attorneys representing prospective purchasers and developers of dockominiums and similar emerging water-based uses that implicate the intertidal zone may wish to take a few simple, precautionary steps to protect their clients’ interests.

First, attorneys should assess whether the emerging development proposal might fall within the ambit of the Wharves and Weirs Act. If so, issues concerning the impact of the proposal on public trust rights, while not entirely eliminated, are significantly narrowed.¹⁴³ Second, attorneys should recognize—in option agreements, deeds, and other real estate instruments—that the intertidal zone in Maine is burdened by a limited public easement, which, at the very least, encompasses the public’s right to fishing, fowling, and navigation, “generously interpreted,” and uses reasonably incidental or related thereto.¹⁴⁴ This recognition is particularly relevant if the emerging development proposal will clearly and directly infringe on the public trust by permanently excluding the public from the three-dimensional space which it occupies. Finally, notwithstanding the broad UCIOA definition for common interest communities, developers of dockominiums or similar facilities in Maine would be well advised to avoid unintentionally representing to future slip owners that they will hold an exclusive property interest in the affected water.

143. The issues are not entirely eliminated, however, because an owner’s right to wharf out is still subject to reasonable regulation to protect public trust rights. *See supra* note 77.

144. *See Bell II, supra* note 71, at 173.

VI. CONCLUSION

The Law Court will soon be presented with another opportunity to reconsider the scope of the public trust in Maine's intertidal zone. A property dispute case, *Almeder v. Town of Kennebunkport*—referred to colloquially as the Goose Rocks Beach case—is presently before the Superior Court (York County, *Brennan, J.*)¹⁴⁵ Although the case varies somewhat in its facts from both the Moody Beach cases and from *McGarvey*, the underlying concern is the same: The upland property owners have filed a quiet title action and seek a declaratory judgment that they hold fee title to the intertidal zone, and that the public's interest does not include a right to use the zone for general recreational purposes.¹⁴⁶

Among other grievances, the owners claim that members of the public have unlawfully used the intertidal zone for sunbathing, setting bonfires, picnicking, and storing boats on the beach.¹⁴⁷ The Town of Kennebunkport¹⁴⁸ counterclaimed that it holds fee simple title to the property, and that it acquired easement rights to the property by prescription and custom.¹⁴⁹ In addition, the State of Maine, having been granted intervenor status, sought to have the scope of the public trust doctrine clarified in light of *McGarvey*.¹⁵⁰

After an extensive trial, the Superior Court issued a partial judgment favoring the Town, stating that “the public has the right to engage in, or cross over in order to engage in ‘ocean-based activities’ which can be categorized as fishing, fowling or navigating in the intertidal zone.”¹⁵¹ The court reiterated the two *McGarvey* analyses and concluded, without exposition, that the public's right “includes the right to cross the intertidal zone for such ocean-based, waterborne activities as jet-skiing; water skiing, knee-boarding or tubing; surfing; windsurfing; boogie boarding; rafting; tubing; paddleboarding; and snorkeling,” but not “swimming, bathing or wading; walking; picnicking or playing games in the intertidal zone.”¹⁵²

The Superior Court ruling is sure to be appealed,¹⁵³ and the Law Court should be poised to present a single, coherent theory regarding the scope of the public trust in Maine's intertidal zone. Of course, the court could also continue its practice of resolving public trust conflicts in a case-by-case manner. The implications of the judicial status quo, however, are solemn. Clearly, judicial doctrine has a direct effect on the specific water rights controversies that come before Maine's courts,

145. See Complaint for Declaratory Judgment & Quiet Title, *Almeder v. Town of Kennebunkport*, YORSC-RE-09-111 (Me. Super. Ct., Yor. Cty., Oct. 23, 2009).

146. *Id.* ¶¶ 46-49.

147. *Id.* ¶ 40.

148. The original named defendants were the Town of Kennebunkport and all persons, known and unknown, who claim the right to use or title in the property other than persons claiming ownership or easement under a recorded instrument. *Id.* ¶¶ 28-29.

149. See Answer, Defenses & Counterclaims of Town of Kennebunkport, *Almeder v. Town of Kennebunkport*, RE-09-111 (Me. Super. Ct., Yor. Cty., Nov. 19, 2009).

150. See Partial Judgment, *Almeder v. Town of Kennebunkport*, RE-09-111, at 1-2 (Me. Super. Ct., Yor. Cty., Oct. 16, 2012) (*Brennan, J.*).

151. *Id.* at 20-21.

152. *Id.* at 21 (internal quotations omitted).

153. See Tom Porter, *Judge Sides with Town in Kennebunkport Beach Dispute*, THE MAINE PUBLIC BROADCASTING NETWORK (Oct. 18, 2012) (reporting that plaintiffs will appeal to the Law Court), <http://www.mpbn.net/Home/tabid/36/ctl/ViewItem/mid/3478/ItemId/24261/Default.aspx>.

and little has been done to date to stem the tide of this type of litigation.¹⁵⁴ But the modern judicial approach to resolving intertidal rights conflicts also hinders federal, state, and municipal governments from resolving the discord permeating Maine's regulatory review of emerging water uses. Absent better guidance from the Law Court regarding the scope of the public's rights in the intertidal zones, regulators will continue to struggle with—and likely altogether avoid—evaluating the impacts of emerging water use proposals on the public trust. Consequently, the public's interest in the intertidal zone might well continue to erode through piecemeal privatization. The Law Court's chosen method for deciding these types of cases will thus either signal the continuation of a case-by-case approach to addressing use conflicts in Maine's intertidal zone with its attendant judicial and regulatory consequences, or represent a seminal step toward a comprehensive and predictable framework for intertidal rights among public and private entities.

154. Goose Rocks Beach is not the only case in point. *See, e.g.*, Susan Morse, *Cliff Walk Backers Eye Goose Rocks Ruling*, SEACOASTONLINE (Nov. 18, 2012, 2:00 AM) (reporting that the Town of York, Maine, may seek a declaratory judgment as to the ownership of Cliff Walk, an historic stretch of oceanfront property in southern Maine), <http://www.seacoastonline.com/articles/20121125-NEWS-211250344>.