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Access for the Future: Improving Maine's Implementation of the Public Trust Doctrine through Municipal Controls to Ensure Coastal Access for Continuing Benefit to Maine's People and Economy

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ACCESS FOR THE FUTURE: IMPROVING MAINE'S
IMPLEMENTATION OF THE PUBLIC TRUST
DOCTRINE THROUGH MUNICIPAL CONTROLS TO
ENSURE COASTAL ACCESS FOR CONTINUING
BENEFIT TO MAINE'S PEOPLE AND ECONOMY

Allison Kuhns

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Allison Kuhns¹

Abstract

The public trust doctrine generally guarantees the public access to the shoreline, which is held in trust for the public by the state. In Maine, a pre-Revolutionary War ordinance limits the public trust doctrine by granting private landowners rights to the same shoreline areas. Access to the shoreline area is subject to frequent legal battles and court decisions have not cured the conflict between the public's rights and the private landowners' rights. Maine's economy relies heavily on public access to the shoreline. This comment suggests that the public's rights should be protected. First, the public trust doctrine does not violate any part of the Maine State Constitution. Second, the ordinance that grants private landowners rights does not erase the public's rights. Third, public access to the shoreline can be established through land use controls. Land use controls will enable public access without removing the rights of private landowners.

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I. INTRODUCTION

In this country, private real property ownership occupies a sacred place in the legal canon. Beyond the principle of eminent domain, which is heavily restricted through various takings doctrines,² few mechanisms can interfere with a private property owner's rights to the exclusive use and enjoyment of their land.³ History, however, established an exception to these sacred property rights that is the subject of frequent legal and legislative debate: the public trust doctrine. At its most basic meaning, the public trust doctrine is a legal principle enshrining the public's right to use of navigable waters, delegating protection of this right to the individual states.⁴ The application of this doctrine, however, is anything but basic. There are as many definitions and implementation methods of this doctrine as there are jurisdictions subject to it.⁵ Each state must determine what the public trust doctrine will look like within its jurisdiction, based generally around defining the following:

- (1) [T]he waters subject to state/public ownership;
- (2) the line or lines dividing private from public title in those waters;
- (3) the waters subject to public use rights;
- (4) the line or lines in those waters that mark the limit of public use rights; and
- (5) the public uses that the doctrine will protect in the waters where the public has use rights.⁶

With these elements defined, states must take on the task of defending them in the interest of the public. However, states are

² U.S. CONST. amend. V. The Takings Clause of this Amendment states "nor shall private property be taken for public use, without just compensation." *Id.* (This Clause forms the backbone of takings doctrines barring commandeering of private property for use by the public and applies to the states as well as the federal government).

³ Peter H. Kenlan, *Maine's Open Lands: Public Use of Private Land, The Right to Roam, and The Right to Exclude*, 68ME. L. REV. 185, 187-88 (2016).

⁴ *Public-trust doctrine*, BLACK'S LAW DICTIONARY (10th ed. 2014).

⁵ See Robin K. Craig, *A Comparative Guide to the Eastern Public Trust Doctrines: Classifications of States, Property Rights, and State Summaries*, 16 PENN. ST. ENV'T'L. L. REV. 1 (2007).

⁶ *Id.* at 3.

often hindered in attempts to implement straightforward applications of the doctrine, despite the long historical traditions supporting it. The public's rights to shoreland areas in particular face consistent obstacles. Relying on the Takings Clause and societal interests in preserving private property rights, private landowners regularly bring challenges in courtrooms, municipal settings, and before state governments when they fall subject to the doctrine as their state defines it.⁷ These legal challenges illustrate the inherent tension between the culturally iconic value of private property ownership and the history- and policy-driven public trust doctrine. This history of litigation and occasional uproar has dramatically influenced the way the public trust doctrine is defined and enforced around the country.⁸ Myriad articles and comments have been written suggesting solutions to these conflicts, but no clear answer has arisen as of yet.

Without any clear answer on the nature of the public trust doctrine in Maine, the public's rights remain vague. Because of certain court decisions, the public currently have limited access to Maine's coastal shoreland areas, where private persons own the upland lots, based entirely on the willingness of the landowners to allow the public access to the shoreline and public access to the shoreline is decided entirely by those private, upland owners.⁹ Many argue that this violates the rights protected by the public trust

⁷ See Colin H. Roberts, *It's All Mine, Stay Off, and Let Me Do What I Please: An Abyss Between the Rights and Desires of Coastal Property Owners and Public Privileges and Protections?*, 18 J OCEAN & COASTAL L.J. 255 (2013); Haochen Sun, *Toward a New Social-Political Theory of the Public Trust Doctrine*, VT. L. REV. 563 (2011).

⁸ "The nature and extent of the public's interest in the intertidal zone has been a subject of much debate, litigation, and judicial writing." *Ross v. Acadian Seaplants, Ltd.*, 2019 ME 45, ¶ 13, 206 A.3d 283.

⁹ See *Bell v. Town of Wells*, 557 A.2d 168 (Me. 1989); ORLANDO DELOGU, MAINE'S BEACHES ARE PUBLIC PROPERTY: THE BELL CASES MUST BE REEXAMINED (2017) (presenting the controversial opinion that a series of cases in the Maine Supreme Judicial Court in the 1980s, culminating in *Bell v Town of Wells*, 557 A.2d 168 (Me. 1989), were incorrectly decided and must be overturned. These cases will be discussed in this comment); MARINE LAW INST., UNIV. OF ME. SCH. OF LAW, PUBLIC SHORELINE ACCESS AND THE MOODY BEACH CASE (1990).

doctrine.¹⁰ In order to suggest a solution to this conflict between the rights of the public and the private landowners, this comment will explore the public trust doctrine in coastal Maine through its history, controversies, and current applications. It will not cover the public trust doctrine as it applies to inland waterways, although tensions exist in those contexts, as well.

To best address the concerns around the public trust doctrine in Maine, the State should pass legislation authorizing towns to enact or enforce land use and land control programs that give private landowners certain ownership rights to intertidal¹¹ lands while still allowing the State to hold those lands in trust for the people of Maine. By doing this, the State of Maine can honor the rights and interests of the private landowners while allowing the public to exercise their rights to use the land covered under the doctrine. First, this comment will summarize the history and background of the public trust doctrine in Maine and how a unique pre-Revolutionary War colonial ordinance has affected it. Next, it will discuss the ways in which Maine's current implementation of the public trust doctrine does not properly adhere to the doctrine's meanings and goals. It will then analyze three aspects related to Maine's application of the doctrine: 1) whether it aligns with the Maine State Constitution; 2) how to reconcile the doctrine with the Massachusetts Colonial Ordinance of 1641-1647; and 3) whether the use of local land use controls can improve public access to the shoreline under the doctrine. Finally, this comment will briefly map out a strategy for the State to use in amending the implementation of the public trust doctrine to better protect the public's rights while honoring the rights of littoral landowners.¹²

¹⁰ See DELOGU, *supra* note 8. See also Ross, 2019 ME 45, 206__ A.3d 283__ (Saufley, C.J., concurring); McGarvey v. Whittredge, 2011 ME 97, 28 A.3d 62 (Levy, J., concurring).

¹¹ “[D]escribed as the area from the mean high-water mark to the mean low-water mark but not more than 100 rods” Ross, 2019 ME 45, ¶ 10, 206__ A.3d 283__ (majority opinion).

¹² Littoral: “Of, relating to, or involving the coast or shore of an ocean, sea, or lake.” *Littoral*, BLACK’S LAW DICTIONARY (10th ed. 2014). In this comment, the phrase littoral landowners refers to the private property owners of the land directly adjacent to the coastal waters. Littoral owners are often referred to as “upland owners” in documents discussing the public trust doctrine.

II. BACKGROUND AND FRAMEWORK OF THE PUBLIC TRUST DOCTRINE IN MAINE

When discussing the public trust doctrine in Maine, the pre- and post-Revolutionary War history of the state provides an important legal foundation for the development and application of this doctrine.¹³ The area currently comprising the State of Maine was originally under the jurisdiction of the Colony of Massachusetts, making it subject to the laws of Massachusetts until Maine obtained statehood in 1820.¹⁴ Before Maine became a separate state, Massachusetts enacted an ordinance, the Massachusetts Colonial Ordinance of 1641-1647, that granted private shoreland landowners title in fee simple absolute¹⁵—that is, full ownership rights, including the right to exclude others from the shoreland down to the low water mark.¹⁶ The Ordinance required landowners to avoid interfering with the public’s navigation, fishing, and fowling, although the public was not allowed to interfere with the owner’s right to build wharves on this land.¹⁷

At the time, this grant of title ran counter to the English common law that formed the background of much of the legal

¹³ Ross, 2019 ME 45, ¶ 9, 206 A.3d 283.

¹⁴ Craig, *supra* note 4, at 61.

¹⁵ “An interest in land that, being the broadest property interest allowed by law, endures until the current holder dies without heirs” *Fee simple*, BLACK’S LAW DICTIONARY (10th ed. 2014). “An estate of indefinite or potentially infinite duration . . . Often shortened to *fee simple* or *fee*.” *Fee simple absolute*, BLACK’S LAW DICTIONARY (10th ed. 2014).

¹⁶ Craig, *supra* note 4, at 66 (referencing the goal of encouraging private landowners to build wharves on the intertidal land in an effort to grow commerce outside of the Crown’s control). *See also* Conservation Law Found. v. Dept. of Env’tl Protection, 2003 ME 62, ¶ 36, 823 A.2d 551, 563 (confirming that private landowners have the right to “wharf out,” subject to “reasonable regulation,” and that the public is not allowed to interfere with this right, despite the right to fishing, fowling, and navigation). The low water mark or mean low water mark is “the annual average of the height on the shore reached by the water at its lowest ebb each day.” *Low Water Mark (Mean Low Water Mark or MLW)*, THE WOLTERS KLUWER BOUVIER LAW DICTIONARY DESK EDITION (2012).

¹⁷ Craig, *supra* note 4, at 66.

framework of the colonies and the United States.¹⁸ English common law had delineated the ownership of this land to the crown, “subject to the public’s rights of ‘navigation,’ ‘commerce,’ and ‘fishing,’” while the Ordinance granted that ownership to private persons.¹⁹ Because Maine was under the jurisdiction of the Colony of Massachusetts at the time this unique Colonial Ordinance was enacted and therefore subject to it, the development of the public trust doctrine and concepts of public access and use rights to shoreland areas has not paralleled that of the rest of the United States and even the rest of the world.²⁰ Unfortunately, the result is “one of the most restrictive public trust doctrines in the country.”²¹

Although Maine’s public trust doctrine is restrictive, the Maine Supreme Judicial Court, sitting as the Law Court, has upheld at least in words the basic principles of the public trust doctrine based on the Maine Constitution.²² When asked to review the constitutionality of a bill permitting the State to release the State’s ownership interests in areas of intertidal land filled by private landowners, the court determined that this fell within the State’s role as trustees of the public interest under Maine Constitution Article IV, pt. 3, § 1 (the “Legislative Powers Clause”).²³ However, the Maine courts have stopped short of clearly identifying the constitutional foundation for the public trust doctrine.²⁴ Fortunately, the courts have repeatedly expressed adherence to the goals and policies of the public trust doctrine.²⁵ The Law Court also has taken occasion in its opinions to recognize the importance of the public trust doctrine, including the rights to fishing, fowling, and navigation, while acknowledging changing circumstances that

¹⁸ *Id.*

¹⁹ *Ross v. Acadian Seaplants, Ltd.*, 2019 ME 45, ¶ 10, 206 A.3d 283.

²⁰ *Kenlan*, *supra* note 2, at 203.

²¹ *Id.*

²² *Op. of Justices*, 437 A.2d 597, 606 (Me. 1981).

²³ *Id.*

²⁴ *Harding v. Comm’r of Marine Res.*, 510 A.2d 533, 537 (1986) (refusing to identify any specific basis for the public trust doctrine in Maine’s State Constitution).

²⁵ *See, e.g., Op. of Justices*, 437 A.2d at 606.

might influence its interpretation and application.²⁶ The Court has specifically suggested that public interests in submerged lands might be expanded as society grows.²⁷ Thus, the courts have indicated that the Maine State Constitution contains some consideration for the public trust doctrine and that the rights it protects are adaptable, despite the restrictiveness imposed on it by the Massachusetts Colonial Ordinance of 1641-1647.

While the constitutional connection has not yet been made explicit, Maine has several statutes that elaborate on the potential constitutional consideration. Although a legislative act specifically codifying the public's rights to fishing, fowling, navigation, and recreation in the intertidal zone was declared an unconstitutional taking by the Maine Supreme Judicial Court,²⁸ several other statutes clearly designate that certain intertidal and submerged lands are held by the State in trust for the public.²⁹ The specific language of these statutes varies, but each supports the conclusion that the State of

²⁶ *Ross v. Acadian Seaplants, Ltd.*, 2019 ME 45, ¶ 36 n.12, 206 A.3d 283 (listing activities deemed permissible by the courts under an expansive view of fishing, fowling, and navigation); *McGarvey v. Whittredge*, 2011 ME 97, 28 A.3d 620, ¶ 37, 39 (majority opinion) (suggesting that fishing, fowling, and navigation should be “broad[ly] underst[ood and] adapted to reflect the realities of use in each era”); *Op. of Justices*, 437 A.2d at 607.

²⁷ *Harding*, 510 A.2d at 537.

²⁸ *Bell v. Town of Wells*, 557 A.2d 168, 173-76 (Me. 1989).

²⁹ *See* ME. REV. STAT. ANN. tit. 12, § 1846 (2018) (codifying the State's holding of public reserved lands in trust for the public); Me. Rev. Stat. Ann. tit. 12, § 1862(3) (2018) (allowing the State to lease and grant easements over intertidal and submerged lands unless the lease or easement “will 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”); ME. REV. STAT. ANN. tit. 12, § 1865 (2018) (reaffirming that the State holds submerged lands in the public trust while neglecting to make a definitive statement regarding intertidal lands, although different approaches to statutory interpretation could find this either indicative of or contradictory to the State's interest in the intertidal land for the benefit of the public); ME. REV. STAT. ANN. tit. 36, § 6855 (2018) (“The Legislature, recognizing that the submerged and intertidal lands . . . are owned by the State for the benefit of the public and are impressed with a public trust . . .”); ME. REV. STAT. ANN. tit. 38, § 435 (2018) (declaring zoning and land use controls of shoreland areas to be in the public interest and to fall under the State's role as trustee of this land for the public).

Maine holds some authority over the use and disposition of intertidal lands in its role as trustee for the people.

III. MAINE'S CURRENT APPLICATION OF THE PUBLIC TRUST DOCTRINE DOES NOT PROPERLY ADHERE TO THE DOCTRINE'S MEANING AND GOALS

While it would be inaccurate to call the public trust doctrine a universal principle with the same meaning and goals in every jurisdiction,³⁰ the general current of thought in Maine's legal community clarifies a few of the basic ideals embodied in the doctrine in this state.

A. *The Public Trust Doctrine is Meant to Ensure Access to the Intertidal Zones by the General Public and Not Just Private Littoral Owners*

Although the history of the public trust doctrine in Maine is inextricably wrapped up in the Colonial Ordinance from Massachusetts and competing common and statutory law provisions, court decisions and commentators return time and again to the policy goals embodied in the public trust doctrine. These legal sources affirm that private littoral landowners have title in fee simple absolute to the low water mark in tidal areas, but they routinely assert that this title does not exempt these landowners from providing the public access to the shoreland.³¹ Although the Maine Supreme Judicial Court has declined to make a precedential ruling on the nature of these competing interests in the same property,³² a

³⁰ See Craig, *supra* note 4.

³¹ "[T]he public trust doctrine means, for the owner of coastal property, that the owner's property rights in the intertidal zone are subject to the public's rights to fishing, fowling, and navigation. However, the public's rights in these activities have always been subject to the owner's 'right to wharf out to the navigable portion of the body of water.'" Conservation Law Found. v. Dept. of Envtl. Prot., 2003 ME 62, ¶ 36, 823 A.2d 551, 563 (*quoting* Great Cove Boat Club v. Bureau of Pub. Lands, 672 A.2d 91, 95 (Me. 1996)).

³² "Our jurisprudence has not clearly established, for all purposes, the delineation between the public and private rights in and to the intertidal area."

solution to these issues need not come from a landmark court decision, an amendment to the State Constitution, nor sweeping legislative action. Examining the interactions between the principles at the foundation of the legal tangle that exists today shows that a solution requires no drastic action.

When looked at from a critical historical perspective, the Massachusetts Colonial Ordinance of 1641-47 does not establish an impenetrable right to exclude for all littoral landowners.³³ Instead, the Ordinance specifies that the reason the landowners were granted title to the land down to the low water mark was to encourage “wharfing out” in an attempt to circumvent the trade monopoly held by the British on goods shipped by sea.³⁴ Unfortunately, in trying to take power from the British Crown in favor of the Massachusetts residents, the Ordinance disrupted the ancient principles of the public trust doctrine.³⁵

Ross v. Acadian Seaplants, Ltd., 2019 ME 45, ¶ 13, 206 A.3d 283; *see also* McGarvey v. Whittredge, 2011 ME 97, 28 A.3d 620; Almeder v. Town of Kennebunkport, 2019 ME 151, 217 A.3d 1111 (determining that the Town holds title to the disputed beach by tracing ownership to colonial era land grants, wherefore the private property owners have no right to exclude the public).

³³ The right to exclude is one of the basic rights of property ownership and is particularly fiercely guarded in Maine. Kenlan, *supra* note 2, at 187.

³⁴ The Colony of Massachusetts enacted the Ordinance with myriad purposes behind it, but the grant of title to the shoreland property owners was motivated first by a desire to ensure that the residents of coastal communities could access the water for food and resources and secondly for the purpose of privatizing trade. Under British Colonial rule, all the wharves and shipping stations were controlled by the Crown, keeping the Colonies entirely dependent on British magnanimity to maintain reliable trade with the rest of the world. When the Ordinance took effect, the private property owners were encouraged to “wharf out” on their land, that is, build wharves that trading vessels could dock at and avoid the Crown’s controls. The property owners were able to build wharves only after they were granted title to the intertidal zone because the Crown had previously controlled all building in the area between the high-water mark and the low-water mark. Sidney St. F. Thaxter, *Will Bell v. Town of Wells be Eroded with Time?* 57ME. L. REV. 117, 123-25 (2005).

³⁵ “By the law of nature these things are common to all mankind--the air, running water, the sea, and consequently the shores of the sea. No one, therefore, is forbidden to approach the seashore, provided that he respects habitations, monuments, and the buildings, which are not, like the sea, subject only to the law of nations.” JUSTINIAN, INSTITUTIONS II.1.1 (Thomas Collett Sandars trans., 7th Am. ed. 1876).

Despite this, the Ordinance made clear that the grant of title was for trade purposes and was not meant to interfere with public rights, as long as the public uses did not interfere with trade.³⁶ Thus, an historically faithful adherence to the Massachusetts Colonial Ordinance does not require blind deference to the whims of the private landowners. If the Ordinance is viewed as, it was intended—preventing state-control of all trade by opening up shipping to private persons—then there need not be any conflict with the public trust doctrine. A landowner can successfully build wharves and receive trade on their coastal property while the public enjoys access to the land for fishing, fowling, navigation, and even recreation. Rather than follow the line of certain controversial Law Court cases and leave the public entirely at the mercy of landowners for gaining access to the intertidal zone for any purpose,³⁷ Maine can find a *via media* honoring the intent of both the Ordinance of 1647 and the much older public trust doctrine.

B. Ensuring Public Shoreline Access is Essential to the Character and Future of Maine

The coastline in Maine is vast but little of it is open for public access.³⁸ The general public traditionally should have the right to engage in fishing, fowling, and navigation in the intertidal zone.³⁹ These three activities intimately relate to the centrality of the coastline in Maine's culture. Much of Maine's economy depends on access to the coastline, particularly in traditional occupations such as fishing.⁴⁰ While the recent debate about the continuing

³⁵ Thaxter, *supra* note 33, at 123-24.

³⁷ *Bell v. Town of Wells*, 557 A.2d 168, 192 (Me. 1989) (Wathen, J., dissenting).

³⁸ Elizabeth Sheehan & Hugh Cowperthwaite, *Preserving Commercial Fishing Access: A Study of Working Waterfronts in 25 Maine Communities* 4 (Coastal Enterprises, Inc., 2002), <https://www1.maine.gov/dmr/mcp/downloads/workingwaterfront/preservingcommercialfishing.pdf> [<https://perma.cc/XJ47-KMZR>].

³⁹ Kenlan, *supra* note 2, at 197.

⁴⁰ "Our commercial fishing industry makes a valuable and important contribution – as a producer of high quality protein to feed our families, as a generator of over 26,000 jobs, and as a creator of real income for Maine's rural communities. In 2001, the industry's economic impact climbed to over \$860

relevance of the limits placed on access by certain court decisions has honed in on recreation, the coast continues to provide a livelihood for many Maine residents.⁴¹ Even though expansion of public shoreline access should include recreational purposes, the current implementation of the public trust doctrine falls short of guaranteeing access for the three basic uses and this threatens Maine's residents who depend on the shore for their income. Among fishing, fowling, and navigation, fishing by far occupies the most significant position in the interests of Maine's residents and economic interests.

1. Fishing

Defined under Maine statute as “to take or attempt to take any marine organism by any method or means,”⁴² fishing comprises a major segment of Maine's economy.⁴³ With only 25% of commercial fishing access provided by public facilities, access to the other 75% via private avenues necessarily falls under the public trust doctrine.⁴⁴ However, trends in coastal property ownership put this private access at risk.⁴⁵ More and more, private landowners are restricting access to the shoreline for commercial fishing.⁴⁶ Even traditionally, public access points are being converted to private use as land prices and interest in private ownership increases.⁴⁷ Because commercial fishing contributes so significantly to the Maine

million from \$773 million the year before.” Sheehan & Cowperthwaite, *supra* note 37, at 4.

⁴¹ Eaton v. Town of Wells, 2000 ME 176, ¶ 53, 760 A.2d 232, 249 (Saufley, J., concurring); see John Duff, *Public Shoreline Access in Maine: A Citizen's Guide to Ocean and Coastal Law* 6-7 (Maine Sea Grant College Program, 2016), <https://www.maine.gov/dacf/parks/docs/public-shoreline-access-in-maine.pdf>, [<https://perma.cc/8SGR-JUMU>].

⁴² “Fish, the verb. The verb ‘fish’ means to take or attempt to take any marine organism by any method or means.” ME. REV. STAT. ANN. tit. 12, § 6001(17) (2018).

⁴³ See Sheehan & Cowperthwaite, *supra* note 37.

⁴⁴ *Id.* at 5.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

economy, steps must be taken to ensure continued public access to the shoreline to prevent further damage to this industry.⁴⁸

A further concern about fishing increases the need for expediency in clarifying and guaranteeing public access rights. Recent developments in demand for sea products beyond fish have sparked debate about what exactly qualifies as fishing for the purposes of the public trust doctrine. Seaweed harvesting forms the center of these debates. The Maine statute defining fishing refers only to “tak[ing] or attempt[ing] to take *any marine organism* by any method or means,”⁴⁹ but the Law Court recently determined that harvesting rockweed, a type of seaweed that anchors in the top millimeters of the sea floor in the intertidal zone, does not fall under this definition.⁵⁰ Although the concurrence allowed that taking seaweed “was not within the reasonable access contemplated” under the public trust doctrine, it also noted that Rhode Island amended its state constitution to include seaweed harvesting in the public’s rights.⁵¹ While the status of seaweed harvesting has been settled by the courts, any future confusion can be avoided by establishing clear rights and boundaries under the public trust doctrine in Maine and creating avenues for the public and landowners to settle access debates without resorting to lengthy and costly legal action.

2. Fowling and Navigation

The other two traditionally protected activities under the public trust doctrine, fowling and navigation, have not been the subject of nearly as much legal debate. Fowling is the narrower of the two in scope, covering only bird hunting.⁵² Navigation has seen occasional legal contests, but is generally understood in the traditional sense to mean boating on the water covering the intertidal lands, mooring on the submerged land, and pulling craft up on the

⁴⁸ *Id.* (identifying six main threats to the commercial fishing industry in Maine communities related to continued reduction of public access to the shoreline).

⁴⁹ ME. REV. STAT. ANN. tit. 12, § 6001(17) (2018) (emphasis added).

⁵⁰ *Ross v. Acadian Seaplants, Ltd.*, 2019 ME 45, 206A.3d 283 Duff, *supra* note 40, at 6-7.

⁵¹ *Ross*, 2019 ME 45, ¶ 43 & n.14, 206 A.3d 283(Saufley, C.J., concurring).

⁵² Duff, *supra* note 40, at 7.

intertidal land when the tide is out.⁵³ These activities can be personal or commercial and can include taking on and discharging passengers and cargo.⁵⁴

Interestingly, the Law Court held in 2011 that crossing the intertidal zone for commercial scuba diving fell under the “navigation” umbrella, although the concurrence urged that this activity strays into recreation and that the public trust doctrine needs to essentially be modernized to include recreation as a fourth permitted activity.⁵⁵ The concurrence in *Ross v. Acadian Seaplants* went a step further and decried “the tortuous shoehorning of various activities into the constrictive trilogy by declaring the simple walk of a scuba diver across the intertidal zone to the ocean as fitting into the definition of ‘navigation.’”⁵⁶ As long as the courts and legislature are constrained by the three traditional activities of fishing, fowling, and navigation, permissible activities that do not fit easily into any of the three will be “creatively” defined.⁵⁷ This muddying of definitions will continue to take place until the rights of the public are clearly delineated. Contorted linguistic reasoning will not make the public nor the private landowners any more confident in their rights. Without a statewide system for managing public shoreline access, confusion will continue to grow.

C. *The Confusing Precedent: The Moody Beach Cases*

Much of the current confusion and debate about public rights stems from the restriction of those rights in the Moody Beach cases. A series of state court decisions from the 1980s, the Moody Beach cases are the most definitive and controversial public trust doctrine cases in the State of Maine.⁵⁸ Concluded in 1989 with the Supreme

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *McGarvey v. Whittredge*, 2011 ME 97, 28 A.3d 620.

⁵⁶ *Ross v. Acadian Seaplants, Ltd.*, 2019 ME 45, ¶ 39, 206_ A.3d 283__ (Saufley, C.J., concurring).

⁵⁷ *Id.*

⁵⁸ *Thaxter*, *supra* note 33, at 117. Although the Law Court has faced questions of public shoreline access in the ensuing years, the Court has decided those cases without relying on the public trust doctrine. *See Almeder*, 2019 ME 151, 217

Judicial Court decision in *Bell v. Town of Wells*, 557 A.2d 168 (Me. 1989), the Moody Beach cases have been the subject of near-constant discussion and, from some sectors, vociferous criticism.⁵⁹ The private landowners of twenty-eight shoreland lots in the Town of Wells, Maine brought an action against the town to enjoin the public's recreational use of Moody Beach.⁶⁰ Although the historic record shows that the public had been using Moody Beach recreationally since the nineteenth century, the landowners claimed title in fee simple absolute over the upland and intertidal areas, particularly expressing concern over the increase in public presence on the Beach and the accompanying increase in disruptions to the private landowners.⁶¹ The role of the court, then, was to decide if this title was valid and then to determine whether, notwithstanding the private landowner's title, the public had a right to use the intertidal land on Moody Beach recreationally under the public trust doctrine.⁶² This case specifically focused on whether the public have a right to use the intertidal zone recreationally, not just for fishing, fowling, and navigation.⁶³

A.3d 1111 (decided using title); Ross, 2019 ME 45, ¶ 34, 206 A.3d 283 (decided based on the definition of fishing).

⁵⁹ See generally DELOGU, *supra* note 8 (presenting the controversial opinion that the Moody Beach cases should be overturned by the Maine Law Court or, if not, by the United States Supreme Court as unconstitutional); Thaxter, *supra* note 33; Michael P. Dixon, *Drawing Lines in the Disappearing Sand: A Reevaluation of Shoreline Rights and Regimes a Quarter Century After Bell v. Town of Wells*, 16 OCEAN & COASTAL L.J.481 (2011); Kenlan, *supra* note 2.

⁶⁰ *Bell v. Town of Wells*, 557 A.2d 168, 170 (Me. 1989) (majority opinion).

⁶¹ *Bell*, 557 A.2d at 170. Intertidal zone: “[L]and bounded by tide water extend[ing] from high water mark over the shore or flats to low water mark, if not beyond one hundred rods.” *Shivley v. Bowlby*, 152 U.S. 1, 18 (1894) (defining the intertidal zone based on the Massachusetts Colonial Ordinance of 1641, from which Maine also derived its understanding of the intertidal zone). This has also been referred to as “‘flats,’ ‘foreshore,’ and ‘beachfront’” (*see Bell*, 557 A.2d at 169 n.3), but generally means the area of the shoreline between the mean high-water mark and the mean low water mark. *See also McGarvey v. Whittredge*, 2011 ME 97, ¶ 16, 28 A.3d 620, 625 (defining intertidal zone as the land between the average low tide line and the average high tide line).

⁶² *See Bell*, 557 A.2d. at 169.

⁶³ *Id.* at 187 (Wathen, J., dissenting) (“Significantly, however, we have not held, nor even suggested, that the scheme of ownership established by the Ordinance

In its controversial ruling, the court determined that the private landowners held title in fee simple absolute under the Massachusetts Colonial Ordinance and that the public trust doctrine did not grant the general public the right to use Moody Beach recreationally.⁶⁴ Part of that holding included rejecting the contention that the public had the right to use the intertidal zone through an easement established by custom of use, illustrating just how seriously the rights of private landowners are taken in Maine common law.⁶⁵ The final disposition of the legal issues in these cases is generally seen as having expanded the rights of littoral landowners while narrowing the rights of the public under the public trust doctrine.⁶⁶

In the final Moody Beach decision, the Law Court made two statements regarding the role of the legislature in addressing the tensions over intertidal lands. The court first declared the Public Trust in Intertidal Land Act of 1987⁶⁷ unconstitutional but then suggested in the conclusion of the majority opinion that a legislative solution would be the only way to successfully solve the ongoing confusion about the public's rights to use the intertidal zone.⁶⁸ This legislative solution has not yet been effectively pursued. Following this suggestion from the Law Court, however, the Legislature can enact laws and rules that will better address public access concerns in Maine.

1. The Public Trust in Intertidal Land Act Declared Unconstitutional

The Legislature tried to enact a law protecting public access rights with the Public Trust in Intertidal Land Act of 1987. When

precludes the public from using the intertidal zone for common recreational beach activities.”).

⁶⁴ *Id.* at 179-80 (majority opinion).

⁶⁵ *Id.* at 179.

⁶⁶ Orlando E. Delogu, *Friend of the Court: An Array of Arguments to Urge Reconsideration of the Moody Beach Cases and Expand Public Use Rights in Maine's Intertidal Zone*, 16 OCEAN & COASTAL L.J. 47, 47 (2011).

⁶⁷ The Public Trust in Intertidal Land. ME. REV. STAT. ANN. tit. 12 §§ 571-73 (2017) (declared unconstitutional by *Bell*, 557 A.2d).

⁶⁸ *Bell*, 557 A.2d at 180.

the court declared the Act unconstitutional, it added a further twist in the tangled relationship between judicial and legislative attempts to clarify the form and function of the public trust doctrine in Maine.⁶⁹ The Maine State Legislature quickly drafted and passed the Intertidal Land Act while the Moody Beach cases were being litigated, after the first decision and before the final Law Court opinion.⁷⁰ This legislative action is commonly seen as an attempt by the legislature to block the judiciary from interfering with the public's rights under the public trust doctrine.⁷¹ The Intertidal Land Act announced that protecting public use of intertidal lands was "of great public interest and great concern to the State"⁷² and not only codified the common law rights under the public trust doctrine (fishing, fowling, and navigation) but included a right of the public to use the intertidal zone for recreational purposes.⁷³ Before the Moody Beach case was appealed to the Law Court, the Superior Court had declared this Act unconstitutional under the separation of powers provisions of the Maine State Constitution.⁷⁴

However, the Supreme Judicial Court declined to make a separation of powers determination and instead attacked the Intertidal Land Act as an unconstitutional taking, announcing that the State, through the Act, essentially created an easement over the intertidal land for the general public.⁷⁵ Taking land without compensation is barred by both the Maine and United States Constitutions.⁷⁶ The broad language in the Act authorizing the general public to use intertidal land for "recreation" heavily burdened the fee holders, according to the court.⁷⁷ Without

⁶⁹ Thaxter, *supra* note 33, at 132.

⁷⁰ *Id.* at 131-32. The two main Moody Beach cases are commonly referred to as *Bell I* (Bell v. Town of Wells, 510 A.2d 509 (Me. 1986)) and *Bell II* (Bell v. Town of Wells, 557 A.2d 168 (Me. 1989)).

⁷¹ *Id.* at 132.

⁷² ME. REV. STAT. ANN. tit. 12 § 571 (2017).

⁷³ ME. REV. STAT. ANN. tit. 12 § 571 (2017).

⁷⁴ Bell v. Town of Wells, No. CV-84-125, 1987 Me. Super. LEXIS 256, at *45 (Sept. 14, 1987) (referring to separation of powers as delineated in Maine Constitution article III.).

⁷⁵ Bell v. Town of Wells, 557 A.2d 168, 176-77 (Me. 1989).

⁷⁶ U.S. CONST. amend. V; ME. CONST. art. 1, § 21.

⁷⁷ Bell, 557 A.2d at 177.

compensating the landowners for that burden, the State had engaged in an unconstitutional taking by enacting the Intertidal Land Act.⁷⁸ The Legislature had attempted to preempt what it saw happening in the courts in the Moody Beach cases—the slow erosion of the sanctified public trust doctrine. However, the Act failed to serve as a barrier, and the court easily dispensed with the Act and the goals of the Legislature in the final Moody Beach decision.⁷⁹

2. Suggested Legislative Solution

In striking down the Intertidal Land Act, the court did not preclude all legislative action. Ultimately, the decisions in the Moody Beach cases illustrated the tension between the sanctity of private land ownership and the long tradition of the public trust doctrine. With the facts of the cases as they stood, the Law Court concluded that the arguments for the general public's recreational use of Moody Beach were unconvincing and that the Legislature had failed to craft a constitutional law to that effect.⁸⁰ However, the discussion does not end there. While the Law Court found the Intertidal Land Act unconstitutional and concurrently granted private littoral landowners greater advantages over the public trust doctrine their final Moody Beach decision did not close the door on the issue.⁸¹ The Legislature, clearly, had failed to draft sufficiently well crafted legislation to block the courts from further limiting the general public's shoreland access and use rights. The court, however, left space for the Legislature to try again.⁸² The court suggested that a solution perhaps should not come from broad legislative acts but instead from state and municipal land controls.⁸³ Because the public trust doctrine has been developed through

⁷⁸ *Id.*

⁷⁹ *Id.* at 180.

⁸⁰ Bell, 557 A.2d.

⁸¹ *Id.* at 180.

⁸² “The solution under our constitutional system, however, is for the State or municipalities to purchase the needed property rights or obtain them by eminent domain through the payment of just compensation, not to take them without compensation through legislative or judicial decree redefining the scope of private property rights.” *Id.*

⁸³ *Id.*

common law, history, and custom, how to engage in these local-level interventions on behalf of the public is murky at best.⁸⁴

Further, the in-court debate over the future of the public trust doctrine as narrowed by *Bell v. Town of Wells* has continued, with occasional suggestions to re-assess that decision appearing in court opinions.⁸⁵ The contrasts between the interests of landowners and the interests of the public will continue to give courts and lawmakers challenges as long as the debate over how to manage the public trust doctrine remains unsettled. To prevent this, the State and local governments should implement land control and land use programs to clear up this confusion moving forward.

While conflicts over the public trust doctrine continue to simmer in the courts and the Legislature, citizens of and visitors to Maine rely heavily on coastal access—continuing confusion about the best approach to the public trust doctrine promises more conflict until a final resolution is reached. Any final plan for a successful, constitutionally valid approach to the public trust doctrine must be rooted in Maine's strong connection to the ocean and coastal areas. Maine has approximately 3,500 miles of coastline, including the islands, but only around 40 miles of that is set aside in public beaches.⁸⁶ While fishing, fowling, and navigation rights are most protected by the public trust doctrine, recreation is a valuable part of coastal use and access.⁸⁷ Particularly as Maine becomes more popular as a tourist destination and as visitors increasingly decide to move to the State permanently or purchase property, the confusion and legal mazes built up around public coastal access must be addressed to avoid further muddying of the waters.⁸⁸ In her

⁸⁴ *Id.* at 182-88 (Wathen, J., dissenting).

⁸⁵ "I concur in the result and in the reasoning of the Court. I write separately, however, because I would overrule *Bell v. Town of Wells*, 557 A.2d 168 (Me. 1989)." *Eaton v. Town of Wells*, 2000 ME 176, ¶ 49, 760 A.2d 232, 248 (Saufley, J., concurring).

⁸⁶ MARINE LAW INST., UNIV. OF ME. SCH. OF LAW, PUBLIC SHORELINE ACCESS IN MAINE: A CITIZEN'S GUIDE TO OCEAN AND COASTAL LAW 2004, 2.

⁸⁷ *Eaton*, 2000 ME 176, ¶ 51, 760 A.2d 232, 249 (Saufley, J., concurring).

⁸⁸ "Thus, we should acknowledge the problems created by our holding in *Bell* before landowners and the public are forced through years of uncertainty and

concurrence in *Ross v. Acadian Seaplants, Ltd.*, Chief Justice Saufley pointed out the irony that “[s]ince [the Moody Beach decision], a member of the public has been allowed to stroll along the wet sands of Maine’s intertidal zone holding a gun or a fishing rod, but not holding the hand of a child.”⁸⁹

Clearly, a statewide plan for public shoreline access must take recreational interests into consideration. Maine relies heavily on tourism for economic stability and the number of visitors to Maine increases every year.⁹⁰ These tourists visit Maine for numerous reasons and the coast is certainly one of them. If coastal access decreases, Maine’s tourism industry will suffer. Tourists are not the only ones with interests in accessing the coast, however. Maine residents also want access to the coast for recreational purposes and have been doing so for generations in some places.⁹¹ Therefore, although it is not a part of the traditional activities protected by the public trust doctrine, Maine should include recreational considerations in its planning for better implementation and management of the public trust doctrine.

However, a solution must consider the constitutional hurdles that already stymied the Legislature as well as the interconnectedness of Maine’s common law with the Massachusetts Colonial Ordinance.⁹² The Intertidal Land Act of 1987 attempted to find a solution that would not run afoul of the Colonial Ordinance but in doing so missed the constitutional implications.⁹³ A well-

unworkable restrictions founded upon a faulty legal analysis.” *Id.* ¶ 53(Saufley, J., concurring).

⁸⁹ *Ross*, 2019 ME 45, ¶ 34, 206 A.3d 283 (majority opinion).

⁹⁰ The State saw more than \$6 billion in tourism spending in 2017 and a 2.5% increase in visitors. *2017 Maine Office of Tourism Highlights*, MAINE OFFICE OF TOURISM (2018), <https://motpartners.com/wp-content/uploads/2018/07/2017-Maine-Tourism-Highlights.pdf>, [<https://perma.cc/SGW5-FGBM>].

⁹¹ Although the Court found the evidence of the exact nature and extent of public recreational use of Moody Beach to be inconclusive, testimony clearly showed that the public had been accessing the beach for various recreational purposes since the 17th century. *Bell v. Town of Wells*, 557 A.2d 168, 170 (Me. 1989) (majority opinion).

⁹² *Id.* at 170-72.

⁹³ *Id.* at 192 (Wathen, J., dissenting) (worrying that the Law Court dispensed with the Intertidal Lands Act of 1987 too casually and failed to suggest a proper

designed, land-use focused solution will not fall short on either of those fronts. As the State and the law move further from the Moody Beach Cases temporally and metaphysically, legal challenges to both public use and private restrictions on that use have led to plurality decisions and greater splintering of the understanding of the public trust doctrine in Maine.⁹⁴ Following the recent decisions in *Almeder v. Town of Kennebunkport* and *Ross v. Acadian Seaplants, Ltd.*,⁹⁵ the need for a solution is more apparent than ever. The hair's-breadth distinction in that case between private property and property held in trust by the State, analyzed under two distinct doctrinal approaches to the issue, illustrates the unworkability of the current jurisprudence and legal understanding of "the delineation between public and private rights in and to the intertidal area."⁹⁶ In the interests of judicial economy, landowner peace of mind, and public confidence in their rights, Maine must clarify exactly what rights belong to the public and what rights are reserved for the private landowners.

IV. MAINE SHOULD IMPROVE ITS IMPLEMENTATION OF THE PUBLIC TRUST DOCTRINE BY CLEARLY DEFINING ITS LEGAL STANDING AND ESTABLISHING SPECIFIC METHODS FOR IMPLEMENTING IT

way forward to address what the dissent characterized as "public rights [. . .] quickly and completely extinguished.").

⁹⁴ "[The Moody Beach decision] has generated significant and expensive litigation resulting from the Court's limitation of the public's allowable activities to those that can be forced into the definitions of 'fishing, fowling, and navigation.' . . . The constrictive trilogy of that holding has bedeviled the State of Maine since that opinion was issued." *Ross v. Acadian Seaplants, Ltd.*, 2019 ME 45, ¶ 37, 206 A.3d 283 (Saufley, C.J., concurring). *See, e.g.,* *McGarvey v. Whittredge*, 2011 ME 97, 28 A.3d 620 (resulting in a plurality decision in which the Law Court agreed that scuba diving fell under the public trust doctrine's "navigation" provision but refused to rule on the lower court's characterization of the final Moody Beach case as no-longer useful authority).

⁹⁵ *Almeder*, 2019 ME 151, 217 A.3d 1111 (holding that the Town has title to the contested beach therefore mooted the issue of property owner's rights to exclude); *Ross*, 2019 ME 45, 206 A.3d 283 (majority opinion) (holding that rockweed, a species of seaweed that grows in the intertidal zone, belongs to the upland owners and is not part of the shoreland property "subject to certain public rights") (internal citation omitted).

⁹⁶ *Id.* at ¶ 13.

Most of the discussion around improving the understanding and application of the public trust doctrine in Maine focuses on overruling the Moody Beach cases.⁹⁷ Unless the Law Court makes dramatic changes in their approach to *stare decisis*, however, the Moody Beach cases will not be overturned.⁹⁸ This focus on overruling those cases misses what the Law Court itself suggests, a solution combining legislative and local municipal powers.⁹⁹

A. *Where the Public Trust Doctrine Stands in Maine's Legal System*

Fortunately, for public shoreline access advocates, there is no question that the public trust doctrine is established in Maine's legal framework. In its many cases concerning coastal access, the Supreme Judicial Court has acknowledged unequivocally that the public trust doctrine exists and applies in Maine.¹⁰⁰ Although the Public Trust in Intertidal Land Act was declared unconstitutional in

⁹⁷ See, e.g., DELOGU, *supra* note 8.

⁹⁸ Thaxter, *supra* note 33, at 139-40 (expressing concern over Justice Saufley's concurrence in *Eaton v. Town of Wells*, 2000 ME 176, 760 A.2d 233, which suggested that the Law Court had held too tightly to *stare decisis* in their decision in that case). See also Ross, 2019 ME 45, ¶ 40, 206 A.3d 283 (Saufley, C.J., concurring) (warning that *stare decisis* may cause the Moody Beach decision to become essentially unchangeable without quicker action to counter act it).

⁹⁹ Bell v. Town of Wells, 557 A.2d 168, 180 (Me. 1989) (majority opinion).

¹⁰⁰ "There can be no question that, pursuant to the original public trust doctrine, the public has the right to use the ocean itself, subject to certain governmental regulation." McGarvey v. Whittredge, 2011 ME 97, ¶ 12, 28 A.3d 620, 625. The Moody Beach decision did not abolish this right. "The Moody Beach ruling noted that the public still had the right, by virtue of the public easement originating in the Colonial Ordinance, to use privately-owned intertidal land, but only if engaged in fishing, fowling, or navigation. The land to which this easement applies is the area between mean high water and mean low water (or to 1,650 feet seaward from the high water, if the mean low watermark is even farther seaward). If the shoreline is beach, this is the wet sand area. If the shoreline is marsh, mudflat, or ledge, the intertidal area will commonly consist of gravel beaches or mud flats. However, the decision in the Moody Beach case was close (a 4-3 ruling regarding the issue of public rights in the intertidal area), tempting those who argue that the public's rights ought to be interpreted more broadly." Duff, *supra* note 40, at 6

the final Moody Beach Case, the Legislature clearly showed its intent to honor and enshrine the public trust doctrine. When declaring this law unconstitutional, however, the court said that the method of implementation was wrong, not the intent of the legislation, endorsing the goal of the Legislature.¹⁰¹

To move forward with protecting the public trust doctrine and its implementation, there are three issues Maine must address before progress can be made. The first issue to address is identifying the exact constitutional backing for the public trust doctrine in the State. As of yet, there is no consensus from the courts and the Legislature regarding the constitutional nature of the doctrine. Before any other steps can be taken, there must be a firm statement that the public trust doctrine does not violate the State's Constitution and is in fact impliedly established in the State Constitution.

The second issue is reconciliation between the public trust doctrine and the Massachusetts Colonial Ordinance. As discussed above, this Colonial Ordinance creates particular difficulty for the public trust doctrine by granting fee simple to the low water mark for the littoral landowners. Just as it has repeatedly affirmed the existence of the public trust doctrine, the Law Court has also repeatedly adhered to the Colonial Ordinance, making it just as anchored in Maine's coastal land law. The relationship between the two must be defined.

The third and final issue to address in resolving the confusion around the public trust doctrine is the method for regulation and implementation. Because Maine already has a strong history of allowing municipalities active control over shoreline access in their jurisdictions for many purposes, these systems of municipal control are the appropriate vehicle for moving ahead with an improved approach to the public trust doctrine.

¹⁰¹ See *Bell v. Town of Wells*, 557 A.2d 168 (Me. 1989).

1. Finding a Constitutional Consensus in the Language of the Maine State Constitution and in the Common Law

Before any further work can be done establishing a workable application of the public trust doctrine in Maine, it must be determined that the doctrine is included in some way in Maine's Constitution.¹⁰² This is necessary because the courts rely heavily on the State Constitution when analyzing legislative action that touches on public and private land access and use.¹⁰³ Future legislation on the public trust doctrine will continue to meet challenges from various angles, but a clear statement that the doctrine itself is implied under the Maine Constitution will protect at least the foundational premise of that legislation. When the court actively declined making such a clear statement, it indicated that the Legislative Powers Clause¹⁰⁴ would be the likely section of the constitution to base such a statement on.¹⁰⁵ That Clause states, "The Legislature, with the exceptions hereinafter stated, shall have full power to make and establish all reasonable laws and regulations for the defense and benefit of the people of this State, not repugnant to this Constitution, nor to that of the United States."¹⁰⁶ Based on the language of this Clause and the nature of the public trust doctrine, there can be a categorical determination that the public trust doctrine is protected by Maine's constitution.

¹⁰² The Supreme Judicial Court has cited this lack of clarity in the constitutional status of the doctrine when analyzing challenges to statutes limiting public access. *Harding v. Comm'r of Marine Res.*, 510 A.2d 533, 536-37 (Me. 1986).

¹⁰³ *See, e.g.*, *Bell*, 557 A.2d (finding the Intertidal Land Act unconstitutional under a takings analysis); *Harding*, 510 A.2d (refusing to determine whether the public trust doctrine is implied in Maine's Constitution but stating that state action limiting public and private land use and access must pass constitutional muster); *Me. State Hous. Auth. v. Depositors Tr. Co.*, 278 A.2d 699 (Me. 1971) (stating that the legislature has the power to enact laws for the benefit of the people of Maine so long as those laws are not "repugnant" to the Maine and United States Constitutions); *Op. of Justices*, 231 A.2d 431 (Me. 1967) (opining that proposed legislation did not violate the powers of the legislature to enact laws affecting land use and access).

¹⁰⁴ ME. CONST. art. IV, pt. 3, § 1.

¹⁰⁵ *Harding*, 510 A.2d at 537.

¹⁰⁶ ME. CONST. art. IV, pt. 3, § 1.

In order to make this determination, the basics of the doctrine must be compared with the language of the state constitution and the application of that language in the common law. First, the basic principle of the public trust doctrine is that the state holds the lands encompassed by the doctrine in trust for the people.¹⁰⁷ Generally, this means that the state holds those lands for the benefit of the people. Second, the language of the state constitution limits the legislative powers to actions “for the defense and benefit of the people.”¹⁰⁸ Clearly, the language of the state constitution and the principles of the public trust doctrine parallel each other in their interest in the benefit of the people. Third, the court has used the language of the Legislative Powers Clause to determine that “a statute that violated the State’s legal responsibilities as trustee for the public would not be reasonable for the public benefit and would therefore exceed the Legislature’s constitutional powers.”¹⁰⁹ According to the court’s interpretation of this clause, any enactment from the Legislature must be three things: 1) reasonable; 2) for the benefit of the people; and 3) not “repugnant to any other provision of the Maine or United States Constitution.”¹¹⁰

While there has been some debate in the courts over the role of the judiciary in “determining whether any particular release by the Legislature of the people’s rights in submerged or intertidal lands conforms with the constitutional limitations laid down by the Legislative Powers Clause,”¹¹¹ the specific role of the courts is less relevant than the language itself. With the historic application of the public trust doctrine “for the benefit of the people” and the exact same language in the Maine Constitution, it is clear that the doctrine is encompassed by the state constitution. There are no foreseeable problems with this reading, although the courts might face challenges reconciling it with jurisprudence from cases like *Bell*.

¹⁰⁷ ME. REV. STAT. ANN. tit. 12, § 1846 (2018) (codifying the State’s holding of public reserved lands in trust for the public).

¹⁰⁸ ME. CONST. art. IV, pt. 3, § 1.

¹⁰⁹ Op. of Justices, 437 A2d 597, 606 (Me. 1981).

¹¹⁰ *Id.*

¹¹¹ *Id.* (criticizing suggestions in *Moor v. Veazie*, 32 Me. 343, 360 (1850) that the Law Court does not have responsibility for determining the constitutionality of legislative acts under the Legislative Powers Clause).

Regardless, any future questions about the doctrine can start from an assumption that the doctrine is enshrined in the state constitution.

2. Reconciling the Massachusetts Colonial Ordinance of 1641-1647 with the Public Trust Doctrine

Even with a clear determination that the public trust doctrine is part of Maine's Constitution, it must be reconciled with another, older foundational basis for Maine's handling of coastal land—the Massachusetts Colonial Ordinance. As discussed above, the Colonial Ordinance created a possessory property interest for littoral landowners at odds with the long history of public ownership of the intertidal zone. There is no question that the land granted to the private landowners under the Ordinance was historically the possession of the state in trust for the public.¹¹² This does not mean, however, that the Colonial Ordinance is irreconcilable with the public trust doctrine. In fact, despite its inherent restriction on public rights through grant of title to landowners, the Ordinance expanded certain rights, adding “fowling” to uses guaranteed to the public.¹¹³ The Ordinance, therefore, does not need to be viewed as a staunch enemy of the public's rights. In certain cases, courts have made statements seeming to indicate that any land privately held under the authorization of the Colonial Ordinance is not subject to any public access rights under the public trust doctrine.¹¹⁴ What

¹¹² “The shores of the sea and navigable rivers, within the flux and reflux of the tide, belong *prima facie* to the king, and may belong to a subject. ‘The *jus privatum* of the owner or proprietor is charged with, and subject to that *jus publicum* which belongs to the king's subjects.’ Hale, *De Jure Maris*, c. 6; *De Portibus Maris*, c. 7. Whatever right the king had by his royal prerogative in the shores of the sea and of navigable rivers, he held as a *jus publicum* in trust for the benefit of the people for the purposes of navigation and of fishery. These positions have been approved in judicial decisions too numerous to be mentioned. They are not known to have been denied by any respectable authority. . . . ‘The *jus privatum* that is acquired to the subject, either by patent or prescription, must not prejudice the *jus publicum* wherewith public rivers and arms of the sea are affected.’ Hale, *De Jure Maris*.” *Moulton v. Libbey*, 37 Me. 472, 485-86 (1854). *See also* *Barrows v. McDermott*, 73 Me. 441, 448 (1882).

¹¹³ *Ross v. Acadian Seaplants, Ltd.*, 2019 ME 45, ¶ 10, 206 A.3d 283.

¹¹⁴ *See, e.g., Sawyer v. Beal*, 97 Me. 356, 357-58 (1903) (“In this State under the Colonial Ordinance of 1641, as modified by that of 1647, which has become the common law of this state, the owner of land upon the sea shore owns to low

these cases show, however, is that the Colonial Ordinance is established law, not that it supersedes the public trust doctrine. Just as the courts have repeatedly stated that the Colonial Ordinance is the law, they have also repeatedly stated that the public trust doctrine is the law.¹¹⁵

In order to reconcile the private ownership with the public trust doctrine, a review of the language of these cases affirming both policies clarifies the relationship between the two. In *State v. Wilson*, 42 Me. 9 (1856), the court stated that the private owners did own the intertidal zone but this ownership did not give them the power to interfere with the public's rights of fishing, fowling, and navigation.¹¹⁶ Courts have further stated that the public retains the rights under the public trust doctrine and only the Legislature has the power to curb those rights, not private landowners.¹¹⁷ The Colonial Ordinance itself specifies that the private landowner may not interfere with the right of the public to fish and fowl.¹¹⁸ In the final Moody Beach case, however, the Law Court listed the public's rights as fishing, fowling, *and navigation*.¹¹⁹ Although the Law Court devoted a great deal of energy in the Moody Beach cases to cementing the Colonial Ordinance in Maine's common law, it did concede that, although the landowner holds title to the intertidal zone, that title is subject to the rights of the public.¹²⁰

While the public trust doctrine and the Colonial Ordinance clearly coexist at common law, it is not clear exactly what form the

water mark, unless the tide recedes more than one hundred rods, although of course the ownership of upland and flats may become divided by the act of the owner. Within the limits of his ownership he has all the exclusive rights of an owner.").

¹¹⁵ See, e.g., *Conservation Law Found. v. Dep't of Envtl. Prot.*, 2003 ME 62, ¶ 36, 823 A.2d 551, 563; *Great Cove Boat Club v. Bureau of Pub. Lands*, 672 A.2d 91, 95 (Me. 1996); *Whitmore v. Brown*, 102 Me. 47, 56 (1906).

¹¹⁶ *State v. Wilson*, 42 Me. 9, 28 (1856).

¹¹⁷ *Barrows v. McDermott*, 73 Me. 441, 449-50 (1882).

¹¹⁸ THOMAS G. BARNES, *THE BOOK OF THE GENERAL LAWES AND LIBERTYES CONCERNING THE INHABITANTS OF THE MASSACHUSETTS* at 35 (1975).

¹¹⁹ *Bell v. Town of Wells*, 557 A.2d 168, 173 (Me. 1989).

¹²⁰ "The plaintiffs' title is subject to the public right of use declared by the Colonial Ordinance." *Bell v. Town of Wells*, 510 A.2d 509, 516 (Me. 1986).

public trust is held in under that regime. Generally, the public trust doctrine requires that the state hold the intertidal land in trust for the benefit of the public but the Colonial Ordinance takes that ownership from the State and grants it to the private landowners. This distinction is ultimately one of form rather than function. The Colonial Ordinance does grant title to those landowners but it specifically does not take away the rights of the public. The rights specified in the Ordinance do not include navigation,¹²¹ but no court has stated that this third right of the public trust doctrine is not available in Maine. When approached from within the intricacies of centuries of common law and contorted legal analysis, the Ordinance and the doctrine appear starkly at odds. However, the courts, with the possible exception of the final Moody Beach case,¹²² have simply stated over and over again that the private ownership may not interfere with the public's rights.

3. Ensuring Public Access to the Intertidal Zone with Land Use Controls

Having established that the public has retained its rights to use of the intertidal zone despite the Massachusetts Colonial Ordinance's grant of title to the private landowners, the legal avenue for preserving those rights must be determined. The legislative solution attempted during the Moody Beach cases failed, not because of the rights it sought to preserve, but because of the manner in which it preserved them.¹²³ Other laws exist in Maine that seem to create avenues for public shoreline access but they have been rife with legal conflict. For example, Maine's prescriptive easement law has been addressed as related to public shoreline access numerous

¹²¹ BARNES, *supra* note 122, at 35.

¹²² Despite the language of the court affirming the public rights preserved under the Colonial Ordinance, the holding in that case indicates that the public may only use the intertidal land with permission of the landowners. Likely due to the confusion around the public trust doctrine in Maine, the court attempted to use easements as a way to distinguish the public rights from the private, resulting, unfortunately, in a determination that the public must have permission of landowners. *Bell v. Town of Wells*, 557 A.2d 168 (Me. 1989).

¹²³ *Id.* at 176-77.

times in the courts, but the results are inconsistent.¹²⁴ Recently, the Law Court determined that there is a “presumption of permission” when the public uses the shoreland areas and this presumption prevents a prescriptive easement from being established by eliminating the required adverse nature of the use.¹²⁵ Beyond prescriptive easements, no other statutory provision has had significant bearing on public shoreline access litigation.

Fortunately, a legislative solution can be created that will honor the interests of both the general public and the private landowners. What the Legislature cannot do, however, is repeat the same errors of the Intertidal Land Act and create laws that amount to an unconstitutional taking of private land. Obviously, any takings challenge could be avoided if the landowners were adequately financially compensated, but equitable financial compensation is an unattractive option, as the landowners would resent the governmental action and the costs would likely be extreme. A better legislative solution should instead make use of the significant powers granted to municipalities under Maine’s Constitution.¹²⁶ This constitutional provision designates Home Rule¹²⁷ power to municipalities in Maine, meaning these municipalities are a vehicle for protecting public access rights under local authority. The legislative solution, therefore, is a statute directly authorizing local

¹²⁴ See, e.g., *Eaton v. Town of Wells*, 2000 ME 176, 760 A.2d 232 (majority opinion) (holding that the town and therefore the public had acquired a prescriptive easement over the beach); *Almeder v. Town of Kennebunkport*, 106 A.3d 1115 (Me. 2014) (questioning the possibility of acquiring prescriptive easements in the shoreland context); *Cedar Beach/Cedar Island Supporters, Inc. v. Gables Real Estate LLC*, 2016 ME 114, 145 A.3d 1024 (ruling that the public did not have a prescriptive easement to a road leading to the beach).

¹²⁵ *Almeder*, 106 A.3d 1115. 14 M.R.S.A. § 812 (2018).

¹²⁶ ME. CONST. art. VIII, part 2, § 1 (“The inhabitants of any municipality shall have the power to alter and amend their charters on all matters, not prohibited by Constitution or general law, which are local and municipal in character. The Legislature shall prescribe the procedure by which the municipality may so act.”).

¹²⁷ “A state legislative provision or action allocating a measure of autonomy to a local government . . .” *Home rule*, BLACK’S LAW DICTIONARY (10th ed. 2014).

municipalities to enact ordinances to address and manage the public's rights.¹²⁸

Setting up programs in municipalities to closely manage and organize public shoreline access is not a novel idea in Maine. Towns already exercise a certain amount of control over fishing activities, including implementation of ordinances and systems for managing shellfish harvesting and designating conservation spaces.¹²⁹ Under municipal management programs, towns allow and regulate various manners of fishing access. People wanting to fish on Maine's coast via privately owned land may access public paths for clamming, mooring places for boats on private shoreline, and even wharves for larger operations.¹³⁰ These systems set up for fishing access are generally successful in ensuring public access while keeping private landowners satisfied¹³¹ and can be used as models for creating new programs for other forms of public access or for improving plans already in place. In order to design effective and durable programs for increasing and preserving public access to the coast, elements such as the stability of the public trust doctrine in Maine's legal cannon and the relationship between the State Legislature and the municipal governments must be taken into account. With this solid

¹²⁸ Another possible option is a statute similar to the Intertidal Development Regulations in Massachusetts (310 MASS. CODE REGS. §9.53 (2017)), which require that development in intertidal areas "not significantly interfere" with public rights of fishing, fowling, and navigation. This kind of regulation, however, does not establish systems through which public access is established. Due to limitations from cases such as *Bell v. Town of Wells*, 557 A.2d 168 (Me. 1989), any legislation Maine undertakes must address not only public use of the intertidal zones, but also public access to those zones, typically achieved by crossing privately owned land.

¹²⁹ State of Maine, Dept. of Marine Res., *General Shellfish Ordinance Information* (2016), <http://mainegov-images.informe.org/dmr/shellfish-sanitation-management/programs/municipal/ordinances/index.html>, [https://perma.cc/Z8RT-YFC7].

¹³⁰ David Kallin & Rita Heimes, *Legal Tools to Enhance Public Coastal Access While Protecting Private Property Rights*, UNIVERSITY OF MAINE SCHOOL OF LAW MARINE LAW INSTITUTE 5 (March 2008), http://www.accessingthemainecoast.com/coastal_access_toolkit/Legal_Tools_for_Access.pdf, [https://perma.cc/WZ83-2K2Z].

¹³¹ *See id.*

legal and legislative foundation, an improved program for public shoreline access will be less vulnerable to legal challenges.

Because of the coastal character of much of the State of Maine, models and systems already exist where municipalities exercise authority over their coastlines under statutory authority.¹³² Rather than write totally new legislation, the Legislature may amend the already existing shoreland zoning statute to include specific authorization for municipalities to engage in certain programs to ensure public access rights. There are two main ways in which municipalities can accomplish this: zoning ordinances and contracts. Zoning ordinances restrict how a landowner uses their property, for example by limiting development that would reduce shoreline access. Contracts are agreements between municipalities and landowners or developers that establish certain terms that the parties will both abide by. Each of these options has benefits and drawbacks and they will be addressed in turn.

a. Zoning as a Tool for Ensuring Public Access

By statutory mandate, all towns in Maine with shoreline within their boundaries must have a shoreland-zoning plan.¹³³ Because of Maine's constitutional provision of Home Rule, municipalities have a great deal of flexibility in creating these plans. Maine also has specific statutory mandate that coastal plans must "[s]upport shoreline management that . . . *promotes public access to the shoreline* and that considers the cumulative effects of development on coastal resources."¹³⁴ A zoning ordinance could require, for example, that a developer set aside a certain amount of land as a public access point, such as a roadway or footpath.

¹³² ME. REV. STAT. ANN. tit. 38 § 435 (2018) ("To aid in the fulfillment of the State's role as trustee of its waters and to promote public health, safety and the general welfare, it is declared to be in the public interest that shoreland areas be subject to zoning and land use controls. . . . The purposes of these controls are . . . to conserve shore cover, and visual as well as actual points of access to inland and coastal waters [I]t is the intention of the Legislature to recognize that it is reasonable for municipalities to treat shoreland areas specially and immediately to zone around water bodies rather than to wait until such time as zoning ordinances may be enacted for all of the land within municipal boundaries.").

¹³³ ME. REV. STAT. ANN. tit. 38 § 435 (2018).

¹³⁴ ME. REV. STAT. ANN. tit. 38 § 1801(3) (2018) (emphasis added).

This kind of zoning ordinance, however, still potentially creates an unconstitutional taking by depriving the landowner of exclusive use of that portion of their land. Therefore, these ordinances must include incentives to landowners and developers to ensure the taking is compensated. Some possible incentives for developers and landowners include tax incentives (such as reduced tax rates in exchange for providing public access points or a tax credit where land dedicated for public access is treated as a charitable donation), modified density and setback requirements (allowing developers to construct more units than typically allowed so that they receive more economic benefit from the land not set aside for public access), and reduced licensing and permitting fees for developers. Finally, the private landowners would significantly benefit from these ordinances, as the public access points would be limited to specific areas and they would not face challenges from the public for preventing access.

b. Establishing Contracts Between Municipalities and Private Landowners

Another option, utilized substantially in the Town of Kennebunkport, is the creation of contracts between municipalities and landowners to ensure public access to the shore.¹³⁵ These contracts do not convey any property rights and should be for use rights only. They must meet all of the legal requirements for a valid contract, meaning the municipality must give the landowners something of value in return for a pledge to allow public access. In Kennebunkport, for example, the landowners agreed to allow public access to Goose Rocks Beach and in return, the Town maintains parking spaces and enforces limits on activities such as camping, fires, and loitering.¹³⁶ The contract, enacted as a town ordinance in 2013, also establishes certain areas of the Beach that are off limits to the general public and indemnifies private landowners for any

¹³⁵ Duff, *supra* note 40 at 10.

¹³⁶ Beach Use Ordinance for Kennebunkport, Maine, section IV(C) (2013).

claims brought against them by the public.¹³⁷ In circumstances where a zoning ordinance is not practical or would be ineffective (such as in areas where there is no active development or where funds for compensation would be unavailable), such contracts for shoreline access and use can sufficiently address public and private interests. Further, when a contract is enacted in an ordinance, it will remain in effect in perpetuity unless the voters choose to amend or repeal it.

c. Other Options Exist which are less likely to be Effective and Useful than Zoning and Contracts

Occasionally, other tools can be used in local settings to ensure public shoreline access. These tools are less likely to be effective than those discussed above and should only be considered where there are no other options.¹³⁸ Private landowners may choose to grant access by means of a gift, an easement, a right-of-way, a lease, or a license.¹³⁹ These private agreements are slightly troublesome, however, as they can create situations where the well-heeled public might pay landowners for exclusive access or where only certain special interest groups are allowed to cross the private land.¹⁴⁰ Although such private agreements make some progress towards addressing public access concerns, they should be considered last resort options where zoning and contracts are available.

V. CONCLUSION

The public trust doctrine is here to stay. Despite the complexity of reconciling the doctrine with the Colonial Ordinance

¹³⁷ Beach Use Ordinance for Kennebunkport, Maine, section VII(J) (2013). Such release from liability is also covered under the Maine Tort Claims Act, ME. REV. STAT. ANN. tit. 14 § 159-A (2018) (“Maine Recreational Use Statute”).

¹³⁸ Keeping in mind that these tools will serve to maintain the duty of the State to preserve public use rights to the intertidal zone. Where zoning or contracts are not an option, the duty will still remain and less attractive tools can be utilized.

¹³⁹ Duff, *supra* note 40, at 3.

¹⁴⁰ A landowner might agree to let certain outdoor recreation clubs cross their land to access the water for kayaking, for example.

of 1641-1647, the State of Maine can honor both of these foundational common law policies. In fact, Maine must adopt ways to work with both of these competing ideas of shoreline ownership and access in order to ensure continued growth and development of the State as a whole. Maine's economy relies heavily on the coastline and as access shrinks, so do the benefits reaped from this feature. Without creating systems through which the interests of private landowners and the public are effectively managed, Maine will continue to see confusion and conflict in this area of the law. A solution is readily available in the form of municipal action authorized by the Legislature. By placing the power of managing public access in the hands of municipalities, Maine can establish better public shoreline access while avoiding running afoul of the rights and interests of private littoral landowners.

