PUBLIC TRUST, PUBLIC USE, AND JUST COMPENSATION

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INTRODUCTION

In its recent decision, *Bell v. Town of Wells*,[1] the Maine Law Court declined to grapple with one of the major legal conceptual problems presented by the case. The court failed entirely to reckon with the intersection of two competing, dynamic principles of American property law; these principles are increasingly significant in an era of growing conflict between public and private interests in land and natural resources. The first principle protects particular expectations of private owners of property through application of the just compensation (or "takings") clause of the fifth amendment.[2] The second principle recognizes that certain property is held by the law to be "inherently public"[3] and therefore is afforded special consideration by courts and legislatures.[4] Navigable waterways, the waters of the sea, and the lands covered by the tides are included in this special category.

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1. 557 A.2d 168 (Me. 1989) [hereinafter *Bell II*]. In the first decision, Bell v. Town of Wells, 510 A.2d 509 (Me. 1986) [hereinafter *Bell I*], the Maine Supreme Judicial Court, sitting as the Law Court, vacated the Superior Court's dismissal of the plaintiff landowners' quiet title action. The Law Court held the sovereign immunity doctrine, which insulates a governmental entity from liability without its consent, did not bar the plaintiffs' action because the plaintiffs, and not the State, presumptively hold fee title to the intertidal land. In dicta, the court concluded the State is not "a trustee of the public easement in the intertidal zone at Moody Beach." *Id.* at 517; *Bell II*, 557 A.2d at 170, n.8. *But see* Harding v. Commissioner of Marine Resources, 510 A.2d 533, 537 (Me. 1986) ("the needs of a growing society may lead to a wider variety of public uses" of tidal and submerged lands); Opinion of the Justices, 437 A.2d 597, 607-610 (Me. 1981) (the public trust requires legislation extinguishing the State's interest in filled submerged and intertidal lands to meet "a high and demanding standard of reasonableness"); James v. Inhabitants of the Town of West Bath, 437 A.2d 863, 865 (Me. 1981) (State holds tidal lands and resources in a public trust for the people of the State).

2. U.S. CONST., amend. V. *See also* ME. CONST. art. I, § 21.

3. Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 720 (1986).

4. *See, e.g.*, Illinois Cent. R.R. v. Illinois, 146 U.S. 387, 435 (1892); Opinion of the Justices, 437 A.2d 597 (Me. 1981); Boston Waterfront Dev. Corp. v. Commonwealth, 378 Mass. 629, 393 N.E.2d 356 (1979). This recognition, with respect to tidally-influenced land, is embodied in the public trust doctrine. *See generally* Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970); Note, *The Public Trust in Tidal Areas: A Sometime Submerged Traditional Doctrine*, 79 YALE L. J. 762 (1970).

The purposes of this Article are threefold. First, the Article discusses the *Bell II* court's evaluation of the takings clause challenge to the Public Trust in Intertidal Land Act;[5] it outlines the major authority upon which the *Bell II* court relied for its finding that the Act violated the constitutional provision that property shall not be taken for public purpose without just compensation. The Law Court also drew considerable support from an advisory opinion by the Massachusetts Supreme Judicial Court that contained many analytical deficiencies. Second, a brief review of recent United States Supreme Court cases demonstrates the court's error in ignoring these important federal decisions. Two Supreme Court decisions are discussed in particular: *Nollan v. California Coastal Commission*,[6] in which the Court invalidated a public beach access condition under the just compensation clause, and *Phillips Petroleum Co. v. Mississippi*,[7] in which the Court made important findings concerning the application of state property law to define rights in tidally-influenced lands. The Article concludes with a discussion of how just compensation clause challenges to particular classes of governmental actions—those aimed at vindicating public rights in waters and tidally-influenced lands—should be evaluated by the courts. It outlines an alternative mode of analysis that, had it been followed, would have made an important contribution, both within the state and beyond, to the ongoing debate about the boundary between public and private expectations in land and natural resources.

I. THE BELL II COURT'S DISPOSITION OF THE TAKINGS CHALLENGE

The Law Court held that by virtue of the common law of the state, lands located between the high and low water marks along the ocean coast are subject to an easement for public uses. This easement is limited to fishing, fowling, and navigation and uses reasonably related to these three activities.[8] It does not include the right of general recreation.[9] A right of recreation did not exist prior to enactment of the Colonial Ordinance of 1641-48,[10] nor develop as a com-

5. ME. REV. STAT. ANN. tit. 12, §§ 571-73 (Supp. 1988) [hereinafter Intertidal Land Act].

6. 483 U.S. 825 (1987).

7. 484 U.S. 469 (1988).

8. *Bell II*, 557 A.2d 168, 173, 176 (Me. 1989).

9. *Id.* at 176. The term "general recreation" is used to distinguish it from the recreational pursuit of fishing and navigation, which are uses that are included within the public easement. *Id.* at 186 (Wathen, J., dissenting) (quoting Barrows v. McDermott, 73 Me. 441, 449 (1882)).

10. The Colonial Ordinance was adopted by the Massachusetts Bay Colony in two stages: first, as section 16 of the 1641 Body of Liberties guaranteeing all householders free fishing and fowling in the waters of the colony within their town of residency, and second, as part of a general revision in 1648 of all colonial statutes into the Book of General Lawes and Libertyes to recognize that the owner of property adjoining

mon law right after statehood.[11] The court found the Intertidal Land Act,[12] which defined the common law public rights in intertidal lands to include general recreation, to be an unconstitutional taking of private property without just compensation.[13]

The court characterized the law as having "imposed upon all intertidal land (defined by the Act in accordance with the Colonial Ordinance) an easement for use by the general public for 'recreation' without limitation."[14] It found the Act to take "for public use much greater rights in the intertidal zone than are reserved by the common law."[15] The Act was on its face a "taking of private property for public use"[16] because it created a comprehensive and unlimited[17]

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tidal waters has "propriete" to the low water mark or to 100 rods, whichever is less. This "liberte" was qualified by the prohibition against interference with the passage of vessels. THE BOOK OF THE GENERAL LAWS AND LIBERTYES, *Liberties Common* § 2 (1648), *reprinted in* THE LAWS AND LIBERTIES OF MASSACHUSETTS 35 (intro. by M. Farrand 1929). *See id.* at 182-83 (Wathen, J., dissenting); *Bell I*, 510 A.2d 509, 512-15 (Me. 1986).

11. *Bell II*, 557 A.2d at 176.

12. ME. REV. STAT. ANN. tit. 12, §§ 571-73. Enacted in 1986, the Act declared that the "intertidal lands of the State are impressed with a public trust," and that public trust rights include a "right to use intertidal land for recreation." *Id.* at §§ 571, 573(1)(B).

13. *Bell II*, 557 A.2d at 176-79. In a decision on motions for summary judgment on April 9, 1987, the trial court indicated that the Act was not a *per se* taking, even were one to assume that the public had no preexisting right of recreation. Brief for Appellant at 136, Bell v. Town of Wells, 557 A.2d 168 (Me. 1989) (No. YOR-87-430). When it issued its decision in September, 1987, the trial court offered several "findings of facts" concerning the taking clause argument. The court did not reach the issue; it chose instead to invalidate the Act on separation of powers grounds under the Maine Constitution. Noting the difficulty of determining the Act's effect upon the property's fair market value, the court conceded the impact would vary among the individual property owners, depending upon their distance from the town's rights of way. It found that "the impact of the Intertidal Act will diminish plaintiffs' fair market value from minimal to no more than 25%." Bell v. Town of Wells, No. CV-84-125 (Me. Super. Ct., York Cty., Sept. 14, 1987) at 38.

14. *Bell II*, 557 A.2d at 176.

15. *Id.* at 176-77.

16. *Id.* at 177.

17. *Id.* at 169, 177, 179. The court was particularly troubled that the term "recreation" was left unlimited and undefined by the statute. The appellees characterized the Act as imposing "an open-ended public intrusion onto and occupation of otherwise private land for nearly limitless recreational use." Brief for Appellees at 157, 166-67, *Bell II*, 557 A.2d 168 (Me. 1989) (No. YOR-87-430). The court pointed out that the public could make use of the intertidal lands in "unrestricted numbers" for many activities, including horseback riding, camping, and ball games. *Bell II*, 557 A.2d at 177. The court apparently found that the existing uses under the easement (fishing, fowling, and navigation) are more limited and less "burdensome," at least practically if not legally, by their very nature. *Id.* at 175-76.

The argument that the easement is objectionable because of its limitlessness failed to recognize that the police power could be used to control and limit the exercise of general recreation, just as it does with fishing, fowling, and navigation. Moreover, one can imagine that a surf casting fishing tournament could draw dozens, if not hun-

public recreational easement, which included rights that were "sharply differ[ent] in nature and magnitude from the easement for fishing, fowling, and navigation and related uses that the common law alone reserved in favor of the public out of the fee ownership . . . it at the same time vested in the upland owners."[18] The absence of any offer of compensation to the landowners rendered it an unconstitutional taking. In the court's view, the preexistence of the public easement did not preclude the state's obligation to compensate the landowner for this additional easement.[19] The state had simply attempted to sanction a physical invasion of private property "under the guise of interpreting its common law."[20]

The court did not base its finding on an application of principles it gleaned from the United States Supreme Court's recent and much discussed takings clause decisions,[21] as one might have expected, but on a 1974 advisory opinion of the Massachusetts Supreme Judicial Court.[22] Apart from the questionable value of advisory opinions as precedent,[23] especially one from another jurisdiction,[24] deficiencies in the Massachusetts court's takings clause analysis made the *Bell II* court's reliance upon it particularly inappropriate.[25] The Massachu-

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dreds of people, to the intertidal zone. This activity would, however, fall precisely within the public easement for fishing. Similarly, an entire regatta of sailing vessels could choose to exercise its collective rights to occupy the waters or flats while the tide was out.

The existing easement may already not be as narrow as the court suggests. The dissent noted this issue:

> I firmly believe that it is primarily the intensity of the modern use rather than the nature of the use that provides the impetus for this litigation. Given similar degrees of intensity of use, one would imagine that a shore-owner might prefer the presence of sunbathers, swimmers and strollers over fowlers and fishermen.

Id. at 189 (Wathen, J., dissenting).

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

19. *Id.* at 178. *See infra* note 37.

20. *Bell II*, 557 A.2d at 178 n.21.

21. *See infra* notes 61-132 and accompanying text.

22. Opinion of the Justices, 365 Mass. 681, 313 N.E.2d 561 (1974). Before discussing the relevance of the Massachusetts Justices' opinion, the court cited an early Maine decision holding that the takings clause applies to appropriations of title to, as well as easements in, land. *Bell II*, 557 A.2d at 177 (quoting Cushman v. Smith, 34 Me. 247, 265 (1852)).

23. Opinion of the Justices, 281 A.2d 321, 322 (Me. 1971) (advisory opinions given pursuant to ME. CONST. art. VI, § 3, are only non-binding opinions of each justice as an individual; the rule of *stare decisis* does not apply). The court noted in *Bell I*, 510 A.2d 509, 516 n.14 (Me. 1986), that advisory opinions are not binding on the court.

24. The 1974 Massachusetts opinion is not even binding on the Massachusetts court. *See* City of New Bedford v. New Bedford, Woods Hole, Martha's Vineyard and Nantucket S.S. Auth., 336 Mass. 651, 655-56, 148 N.E.2d 637, 640 (1958).

25. This reliance was inappropriate even if one assumes the Law Court was correct in concluding that public rights are limited to those enumerated in the Colonial Ordinance. In defining the scope of Maine common law, the *Bell II* court may have

setts opinion did not reflect current takings clause jurisprudence, preceding as it did the United States Supreme Court's major takings clause cases of 1987. Moreover, it failed to evaluate the bill in the context of the public trust doctrine, an established feature of Massachusetts property law.[26]

Rather than rely on such questionable precedent, the *Bell II* court should have analyzed the Intertidal Land Act according to its own view of the just compensation clause, articulating and applying standards based on its own prior case law,[27] illuminated by the United States Supreme Court's recent takings clause decisions and its recent review of state tidelands property law.[28] Instead, the Law Court distinguished its own takings clause decisions as instances of government *regulation* of private property analytically distinct from claims of taking for public use. In the regulation cases, the court makes a factual inquiry into the substantiality of the diminution in value of the whole property. In a taking for public use, the court determines whether the law effects a permanent physical invasion of a specific part of the property.[29] Therefore, the factual inquiry into diminution of value that the court undertook in *Seven Islands Land Co. v. Maine Land Use Regulation Commission*[30] is "inappropriate . . . when the issue . . . is the constitutionality of a statute that authorizes a physical invasion of private property."[31]

The court cited two sources of authority for its application of this *per se* takings rule. The first was a 1967 commentary by Professor Frank Michelman[32] noting that courts never deny compensation for physical takeovers of property. The second authority cited, without discussion, was the 1987 United States Supreme Court decision in

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been justified in looking to decisions of the Massachusetts Supreme Judicial Court for its interpretation of the Colonial Ordinance; both Maine and Massachusetts' tidelands law were affected by the enactment of the ordinance. However, deference to the Massachusetts court on the constitutional definition of taking without compensation is an excessive delegation of the court's function.

26. *See, e.g.*, Opinion of the Justices, 383 Mass. 895, 424 N.E.2d 1092 (1981); Boston Waterfront Dev. Corp. v. Commonwealth, 378 Mass. 629, 393 N.E.2d 356 (1979).

27. *See, e.g.*, Seven Islands Land Co. v. Maine Land Use Regulation Comm'n, 450 A.2d 475, 482-83 (Me. 1982) (timber harvesting conditions in state land development permit not a taking). The *Bell II* court also cited other of its taking precedents. *See* Hall v. Board of Envtl. Protection, 528 A.2d 453, 456 (Me. 1987) (sand dune building permit restrictions not a taking); Curtis v. Main, 482 A.2d 1253, 1258 (Me. 1984) (zoning restrictions not a taking).

28. *See infra* notes 61-133, 192-206 and accompanying text for discussion of relevant cases.

29. *Bell II*, 557 A.2d at 178. *See supra* note 27.

30. 450 A.2d 475, 482-83 (Me. 1982). The *Seven Islands* court's analysis considered factors identified in then-current Supreme Court taking cases, including a separate consideration of takings and due process arguments.

31. *Bell II*, 557 A.2d at 178.

32. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1184 (1967).

Nollan v. California Coastal Commission.[33] A "permanent physical occupation" occurs when "individuals are given a permanent and continuous right to pass to and fro, so that the real property may continually be traversed, even though no particular individual is permitted to station himself permanently upon the premises."[34] In a footnote, the Court rejected the argument, based on *PruneYard Shopping Center v. Robins*,[35] that because the public already has a right to occupy the tidelands for certain purposes, there is no physical invasion of the property.[36]

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. Presumably, the majority believed it had eliminated the "so-called public trust doctrine"[37] from consideration in the *Bell I* dicta, where it concluded that the state held neither title to intertidal lands nor the public interests in trust.[38] This apparent rejection of the doctrine and failure to consider the legislature's role in defining it was inappropriate, however, in view of the Law Court's previous statements[39] and in light of the recent holding of the United States Supreme Court portraying the public

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33. 483 U.S. 825 (1987). *See infra* notes 93-132 and accompanying text for discussion of *Nollan*. The court cites generally as supporting authority Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) and Kaiser Aetna v. United States, 444 U.S. 164 (1979). *See infra* notes 65-74 and accompanying text for discussion of *Kaiser Aetna*. *See infra* notes 75-91 and accompanying text for discussion of *Loretto*.

34. *Bell II*, 557 A.2d at 178 (quoting Nollan v. California Coastal Comm'n, 483 U.S. 825, 832 (1987)). The *Bell II* court took this quotation out of context and thus distorted the Supreme Court's conclusion. *See infra* notes 102-105 and accompanying text.

35. 447 U.S. 74 (1980).

36. *Bell II*, 557 A.2d at 178 n.21 (citing PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980)). Appellants argued that *PruneYard* distinguished a permanent physical occupation from a mere interference with an owner's right to exclude. The latter is not a taking where the type of property, by its nature, does not exclude the public. Brief for Appellants at 140, Bell v. Town of Wells, 557 A.2d 168 (1989) (No. YOR-87-430). The court found a significant difference between the property and privacy interests of individual homeowners and those of a major commercial property owner who encourages use of her property through advertising. *Bell II*, 557 A.2d at 178-79 at 179, n.21. ("The decision affirmed in *PruneYard* granted no easement or other inherent right of access to the public . . . it merely regulated the terms under which the property owner could lawfully permit selective public access.").

37. *See* Harding v. Commissioner of Marine Resources, 510 A.2d 533, 537 (Me. 1986).

38. *See Bell II*, 557 A.2d at 170 n.8 (citing *Bell I*, 510 A.2d 509, 517 (Me. 1986)).

39. *See, e.g.*, Opinion of the Justices, 437 A.2d 597, 607 (Me. 1981) (other public uses may be recognized in intertidal lands, beyond the "historical purposes" for which the public trust principle was developed); James v. Inhabitants of the Town of West 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.").

trust doctrine as a vital element of state property law.[40]

The discussion below will demonstrate that the court erred in several significant ways in its constitutional analysis of the Intertidal Land Act, and by so doing, seriously shortchanged both the just compensation clause and the public trust doctrine.[41] First, the court misunderstood and misapplied the *per se* taking rule. The *Bell II* court should have analyzed the claim in light of the United States Supreme Court's recent taking cases that had significantly qualified the *per se* taking rule, instead of relying on the outdated and erroneous 1974 Opinion of the Justices in Massachusetts. Moreover, the court misread the *Nollan* decision, erroneously using the quoted language to find the Act a taking by analogy.[42] Closer reading of *Nollan* reveals it was not an application of the *per se* rule; the physical invasion was used to trigger a heightened scrutiny of the regulatory decision, not to invalidate the requirement.[43]

Furthermore, in its rush to find a physical invasion, the Law Court ignored the fact that the public already has a right to be physically present on the intertidal lands. In modern cases considering the *per se* taking rule, this public right has been very relevant. The United States Supreme Court, for example, evaluates the reasonable expectations of the landowners in terms of their ability to exclude the public, an ability severely limited by any coexisting public right. By relying uncritically on the Massachusetts court's advisory opinion and refusing to undertake an independent analysis, the Law Court failed to recognize the "public right" qualification of the takings standard.

Finally, the court seriously erred in failing to recognize the relevance of the public trust doctrine, and the role it gives the state's legislature and courts to promote the public's interest in waters and tidal lands, and to incorporate accordingly the doctrine into its own takings jurisprudence.

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40. Phillips Petroleum Co. v. Mississippi, 484 U.S. 469 (1988) (the state, as the sovereign, holds intertidal lands in trust for the public). The Law Court's only discussion of *Phillips* led to its conclusion that it did not overturn Shively v. Bowlby, 152 U.S. 1, 18-19 (1893). The Law Court apparently interpreted *Shively* as deciding that Massachusetts and Maine exercised their statehood powers to convey the states' property interests in the tidelands, the former by enactment of the Colonial Ordinance, the latter through its affirmative adoption of Massachusetts' law when obtaining statehood.

41. Even assuming the court was correct in its interpretation that the common law did not, prior to enactment of the Intertidal Land Act, afford the public a general right of recreation, the court's constitutional analysis of the Act was wrong. The Act did not deprive the owners of the beneficial use of their intertidal property nor significantly diminish its economic value to them. *See infra* notes 219-26 and accompanying text.

42. *See infra* notes 93-133 and accompanying text.

43. *See infra* notes 100-105.

II. THE *Bell II* COURT'S MISAPPLICATION OF THE *Per Se* TAKING RULE

To demonstrate the error involved in the court's takings analysis, it is instructive to compare the 1974 *Opinion of the Justices* with the United States Supreme Court's recent applications of the *per se* takings rule.

A. The Massachusetts Opinion of the Justices (1974)

The Legislature asked the Massachusetts Supreme Judicial Court to review a bill that declared a public right of foot passage during the daytime along the shore between the high and low water marks.[44] In rejecting the argument that the Colonial Ordinance gave the Commonwealth "the right to allow all significant public uses in the seashore,"[45] the court observed that, in its prior cases from 1804 to 1961, it had declared the public's rights to be limited in nature.[46] It explained that "the grant to private parties effected by the colonial ordinance has never been interpreted to provide the littoral owners only such *uncertain* and *ephemeral* rights as would result from such an interpretation."[47] The Commonwealth's noncompensatory power over tidelands is limited to regulation and improvement of navigation and fisheries.[48]

Because the bill established a permanent physical intrusion into private property, the Massachusetts court found it unnecessary to draw the line between a proper exercise of the police power and a taking without compensation. The bill involved more than mere regulation, but "a wholesale denial of an owner's right to exclude the public." Further, "[i]f a possessory interest in real property has any meaning at all it must include the general right to exclude others."[49]

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44. Opinion of the Justices, 365 Mass. 681, 687-89, 313 N.E.2d 561, 566-68 (1974).

45. Opinion of the Justices, 365 Mass. 681, 688, 313 N.E.2d 561, 567 (1974).

46. *Id.* at 687, 313 N.E.2d at 566-67. Compare Massachusetts' line of cases with Maine's decisional law employing a liberal interpretation of public rights. *See, e.g.*, Andrews v. King, 124 Me. 361 (1925) (charter boat may pick up and discharge passengers on tidal flats); Barrows v. McDermott, 73 Me. 441, 449 (1882) (recreational fishing, fowling, and navigation are included within the public easement in intertidal lands); French v. Camp, 18 Me. 433 (1841) (public has a right to skate over frozen flats).

47. Opinion of the Justices, 365 Mass. at 688, 313 N.E.2d at 567 (emphasis added).

48. *Id.* (quoting Michaelson v. Silver Beach Improvement Ass'n Inc., 342 Mass. 251, 256, 173 N.E.2d 273, 277 (1961)).

49. *Id.* at 689, 313 N.E.2d at 568 (citing Nichols, EMINENT DOMAIN (Rev. 3d ed.) § 5.1 [1] (1970)). The Massachusetts justices distinguished the contemporaneous New Jersey holding in Borough of Neptune City v. Borough of Avon-by-the-Sea, 61 N.J. 296, 308-309, 294 A.2d 47, 54 (1972) ("public rights in tidal lands are not limited to the ancient prerogatives of navigation and fishing, but extend as well to recreational uses"), on grounds that its application was restricted to state-owned lands below the high tide line. Opinion of the Justices, 365 Mass. at 688, 313 N.E.2d at 567. *But cf.*

Such action to provide "recreational facilities" to the public must be accompanied by an adequate provision for fair compensation, which the bill failed to do.[50]

B. Bell II Court's Application of Massachusetts Opinion

The *Bell II* court found the reasoning in the Massachusetts opinion to have "precise relevance" to the constitutionality of the Intertidal Land Act.[51] However, as discussed above, the question before the Massachusetts court had been different in several significant ways. First, although the Massachusetts bill involved a more limited public right of daytime foot passage along the intertidal zone, the Massachusetts court had previously ruled in litigated cases, not advisory opinions, that public rights on intertidal lands are limited *under Massachusetts law* to those identified in the Colonial Ordinance.[52] Until the *Bell* case, the Maine Law Court never considered the precise question of whether general recreation was included in the public easement. Moreover, in all prior cases involving the Colo-

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Matthews v. Bay Head Improvement Ass'n, 95 N.J. 306, 322-26, 471 A.2d 355, 363-66 (1984) (public right of swimming includes right to use privately owned dry sand area above the high tide line).

50. Opinion of the Justices, 365 Mass. at 692, 313 N.E.2d at 570. The Massachusetts bill included an indirect mechanism for compensation, allowing landowners to petition the courts for a determination that the Act caused them to suffer a compensable injury. *Id.* at 690, 313 N.E.2d at 568. The Massachusetts court concluded that the bill's probable intent was to afford recovery only when littoral owners proved damages to the *upland property*. Such limitation failed to compensate for the taking of the tidal lands interest. *Id.* at 690-91, 313 N.E.2d at 569. Even absent such a legislative intent, the provision was an unconstitutional transfer of legislative power to the courts. The delegation of the decision on *whether* to compensate was a violation of both the eminent domain and separation of powers provisions in Articles 10 and 30 of the Declaration of Rights of the Massachusetts Constitution. *Id.* at 691-92, 313 N.E. at 569. The court also found a procedural due process defect in the compensation scheme; it afforded property owners no notice of their right to recover damages. *Id.* at 692-94, 313 N.E.2d at 569-71.

51. *Bell II*, 557 A.2d at 177. The court was very selective in its reference to Massachusetts case law. It neglected to consider the subsequent Massachusetts Opinion of the Justices, 383 Mass. 895, 424 N.E.2d 1092 (1981), and Boston Waterfront Dev. Corp. v. Commonwealth, 378 Mass. 629, 649-50, 393 N.E.2d 356, 367 (1979). Both decisions found the state had a continuing interest in lands once covered by the tides, to the extent that title could revert to the Commonwealth if the private use failed to serve the public purpose for which it was granted. The Law Court again ignored these Massachusetts decisions in its own later Opinion of the Justices, 437 A.2d 597 (1981), concerning the validity of the Filled Intertidal Lands Act of 1980, ME. REV. STAT. ANN. tit. 12, § 559 (1981). *See infra* notes 173-91 for discussion of the *Bell I* court's retreat from the public trust doctrine.

52. Opinion of the Justices, 365 Mass. at 687-88, 313 N.E.2d at 567 (citing Butler v. Attorney General, 195 Mass. 79, 83-84, 80 N.E. 688, 689 (1907) (public bathing not included within public rights reserved by the Colonial Ordinance) and Michaelson v. Silver Beach Improvement Ass'n, Inc., 342 Mass. 251, 259, 173 N.E.2d 273, 278 (1961) (littoral owner is entitled to injunction against use of accreted beach for public bathing)).

nial Ordinance, the court had never viewed the public rights in intertidal lands restrictively nor limited them by a literal reading of the Ordinance's language.[53] However, when the time came for the Law Court to rule on the issue of general recreation for itself, it adopted the Massachusetts court's opinion rather than decide the question as a matter of Maine law, despite the absence of any legal or policy principle compelling the court to do so.

On the question of what constitutes a compensable taking, there was again no legal or policy reason for the Maine Law Court to follow the Massachusetts court. In fact there were several very good reasons to ignore that court's takings clause analysis. First, there is the technical matter that the opinion was advisory and therefore not legally binding, not even in Massachusetts.[54] Secondly, and more importantly, the taking analysis in the Massachusetts *Opinion of the Justices* was wrong and outdated. It predated the United States Supreme Court's most significant decisions concerning the "permanent physical occupation" standard's role in just compensation clause analysis. In particular, it preceded the decision in *Penn Central Transportation Co. v. New York City*,[55] where the Court identified the principal factors to be weighed in a takings clause analysis.[56]

In 1979 and 1980, several years after the Massachusetts opinion, the United States Supreme Court decided two important takings clause cases where physical intrusions were alleged: *Kaiser Aetna v. United States*[57] and *PruneYard Shopping Center v. Robins*.[58] These cases were followed by the major case on the *per se* taking rule, *Loretto v. Teleprompter Manhattan CATV Corp.*,[59] where the Court's use and justification of the rule suggested its limited applicability.[60] The Law Court, if it chose to use the physical taking standard, should have considered these cases. Its failure to do so renders highly questionable its application of this rule to the Intertidal Land Act. A brief review of these cases will demonstrate their relevance and the court's error in failing to consider them.

III. The United States Supreme Court's Development of the Per Se Takings Rule

A. *Penn Central: Balancing Test for Takings Clause Analysis*

Before the recent spate of takings decisions, the United States Supreme Court's major articulation was its 1978 decision in *Penn Cen-*

53. *Bell II*, 557 A.2d at 186-89 (Wathen, J., dissenting).
54. *See supra* notes 23-24 (discussion of precedential value of advisory opinions).
55. 438 U.S. 104 (1978).
56. *Id.* at 128-38. *See infra* notes 61-64 for discussion of *Penn Central.*
57. 444 U.S. 164 (1979). *See infra* notes 65-74.
58. 447 U.S. 74 (1980). *See infra* notes 72-74.
59. 458 U.S. 419 (1982).
60. *Id.* at 435-38.

tral Transportation Co. v. New York City.[61] *Penn Central* is frequently cited for the proposition that there is no "set formula" for determining whether compensation is due for a governmental restriction on private property.[62] The Court engages in "essentially ad hoc, factual inquiries," considering the economic impact of the regulation, especially the degree of interference with investment-backed expectations, and the character of the governmental action.[63] Amplifying this second factor, the Court explained that a "taking may more readily be found when the interference with property can be characterized as a *physical invasion by government* . . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good."[64]

B. Kaiser Aetna and PruneYard: Temporary Physical Invasions

A year after *Penn Central*, the Supreme Court explored the physical invasion standard in an interesting and unique context. In *Kaiser Aetna v. United States*,[65] the Court held that an "actual physical invasion" occurred when the Army Corps of Engineers imposed the federal navigation servitude[66] to require a public right of access to the waters of a privately-constructed marina.[67] This physical invasion constituted a taking, not simply because the easement was imposed, but because the easement interfered with the owners' investment-backed expectations of a right to exclude the public, an expectation which the Army Corps had encouraged by its prior statements that the navigation servitude would not apply.[68] This

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61. 438 U.S. 104 (1978). The case involved the designation of Grand Central Terminal as an historic landmark under New York City's Landmark Preservation Law. Penn Central, owner of Grand Central, brought suit when the Landmark Preservation Commission forbade the construction of an office building above the terminal. Penn Central claimed the application of the statute constituted an uncompensated taking. The United States Supreme Court ultimately held there was no taking.

62. *Id.* at 124 (quoting Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962)). *See also* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922) (the takings determination is "a question of degree—and therefore cannot be disposed of by general propositions").

63. Penn Cent. Transp. Co. v. New York City, 438 U.S. at 124.

64. *Id.* (citation omitted) (emphasis added).

65. 444 U.S. 164 (1979).

66. *Id.* The federal navigation servitude, under the commerce clause of the United States Constitution, imposes a public right of navigation on the waterways of the United States. The existence of this public right affects a court's analysis under the takings clause. *Id.* at 174-76. The private riparian owner is not entitled to compensation when government actions promoting public navigation diminish the owner's access to navigable waters. *Id.* at 175-76 (quoting Scranton v. Wheeler, 179 U.S. 141, 163 (1900)).

67. *Id.* at 180.

68. *Id.* at 179. Early in the majority opinion, Justice Rehnquist indicated his desire to consider the impact on the owners' investment-backed expectations:

> The question before us is whether the Court of Appeals erred in holding

right of exclusivity had existed before the property (formerly a fish pond) was dredged out, connected to navigable waters, and converted to a recreational boat marina.[69]

However, the government action in *Kaiser Aetna* did not constitute a *per se* taking.[70] The Court's decision suggested the distinction that its subsequent *Loretto* decision would make explicit. Temporary or transitory physical invasions require a balancing of interests analysis to determine if a taking has occurred. The test includes a consideration of the reasonableness of the owner's expectations. A permanent, physical occupation is a taking regardless of the governmental interests served.[71] For example, in *Kaiser Aetna*, the government's action, as a temporary physical invasion, required just compensation because it interfered with the investment-backed expectations of the developers which were encouraged by the statements of the Army Corps. The Corps' interest in ensuring public access and use of navigable waters did not outweigh the exclusivity expectations of the owner.

In *PruneYard Shopping Center v. Robins*,[72] the Court's next physical invasion case, the reasonableness of the owner's expectation of exclusivity also played an important role. The Court upheld a state constitutional provision that required shopping center owners to allow the public to exercise free speech and petition rights on the property. Because the law caused only a temporary and limited

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> that petitioners' improvements to Kuapa Pond caused its original character to be so altered that it became subject to an overriding federal navigational servitude, thus converting into a public aquatic park that which petitioners had *invested millions of dollars in improving on the assumption that it was a privately owned pond.*

Id. at 169 (emphasis added).

The dissenting justices noted with concern the majority opinion's implication that the amount of private investment should influence the takings analysis. *Id.* at 183 n.2 (Blackmun, J., dissenting).

69. *Id.* at 179-80. The pond, like all such fish ponds in Hawaii, had always been considered private property under Hawaii law. *Id.* at 166-67. However, the pond was affected by the incoming and outgoing tides and was thus, at least arguably, always subject to the navigation servitude. *See id.* at 181-84 for discussion of "ebb and flow" test of navigability (Blackmun, J., dissenting).

70. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 433 (1982).

71. *Id.* at 435 n.12 (citing *Kaiser Aetna* as case dealing with "temporary limitations" on the right to exclude, which are "subject to a more complex balancing process to determine whether they are a taking."). The balancing of interests analysis referred to by the Court is the ad hoc factual inquiry described in *Penn Central Transportation Co. v. New York City*. *See* notes 56-59.

72. 447 U.S. 74 (1980). The case involved an injunctive suit by a group that had been soliciting signatures for a petition in the shopping center. The shopping center had ejected them for violation of shopping center regulations forbidding any activity not directed to its commercial function.

physical invasion, it was not a taking *per se*.[73] A balancing of the interests of the state against those of the owners revealed that, unlike the marina developers in *Kaiser Aetna*, *PruneYard* had shown neither an interest in excluding the public (beyond a limited group of persons) nor an investment-backed expectation in exclusivity.[74] The fact of the physical invasion was not determinative of the takings challenge.

C. *Loretto: Permanent Physical Invasion*

1. *The majority opinion*

With its decisions in *Kaiser Aetna* and *PruneYard*, the Court endorsed a balancing of interests analysis for cases where government acts led to invasions of private property, thereby avoiding the notion of a *per se* taking. In its 1982 decision, *Loretto v. Manhattan Teleprompter CATV Corp.*,[75] however, the Court rejected the balancing approach in certain cases. A permanent physical occupation caused by government action to mandate installation of cable equipment on the owner's building constituted a taking, *regardless* of either the economic impact upon the property or the value of the governmental purpose served. Considerably expanding on *Penn Central*,[76] the Court stated that when a permanent physical invasion is the result, " 'the character of the government action' not only is an important factor . . . but also is determinative."[77]

Justice Marshall, writing for the majority, discussed the history of the "permanent physical occupation" rule in takings jurisprudence. He quoted from Professor Michelman's 1967 summary of case law that articulated the following rule: "[t]he one incontestable case for compensation (short of formal expropriation) seems to occur when the government deliberately brings it about that its agents, or the public at large, 'regularly' use, or 'permanently' occupy, space or a thing which theretofore was understood to be under private ownership."[78] The Court justified this *per se* rule by noting that such ac-

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73. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. at 434 (characterizing the invasion in PruneYard Shopping Center v. Robins, 447 U.S. 74, 84 (1980) as "temporary and limited in nature").

74. *Id.*

75. 458 U.S. 419 (1982). The case involved a suit for an injunction or monetary damages brought by a landlord to challenge the application of a New York statute. The statute required landlords to allow installation of cable television wiring on their buildings in return for reasonable compensation determined by a state commission. The New York courts held the installation was not a taking because the regulation did not have "an excessive economic impact upon appellant when measured against her aggregate property rights." *Id.* at 425. The United States Supreme Court reversed.

76. 438 U.S. 104. *See supra* notes 61-64.

77. Loretto v. Manhattan Teleprompter CATV Corp., 458 U.S. at 426.

78. *Id.* at 427 n.5 (quoting Michelman, *Property, Utility, and Fairness: Com-*

tion affects and destroys all of the owner's property rights.[79] It leaves the owner with no right to possess the governmentally occupied space (i.e. the space occupied by the cable equipment) nor power to exclude the occupier. Moreover, the owner is forever denied the power to control the use of the occupied property, including a nonpossessory, profitable use that excludes others. The owner, finally, is effectively precluded from selling the occupied space because buyers will be unable to make use of the property.[80]

The advantage of the *per se* rule is the ease with which it can be proven by the "obvious fact" that a fixed structure has been placed on the land, in the air space above it, or in the ground below it. It is irrelevant to the takings analysis that the occupation affects only a trivial portion of the property; the size of the occupation bears only on the amount of compensation due. Similarly, evidence that the occupation increases the property's resale value does not defeat the finding of a *per se* taking but will influence the appropriate level of compensation.[81]

Loretto signaled the Court's intention to limit the *per se* taking rule to cases of actual permanent, physical occupations.[82] In cases of temporary invasions, the Court would still undertake a balance of interests analysis; to prevail, the property owner must establish a reasonable expectation that she can enjoy the property free from the invasion.[83]

2. *The Loretto dissent*

The Court's apparent intent to limit the *per se* rule to permanent physical occupations is sharply criticized in Justice Blackmun's dis-

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ments on the Ethical Foundations of the "Just Compensation" Law, 80 HARV. L. REV. 1165, 1184 (1967)).

79. *Id.* at 435-36. The Court writes:

> The historical rule that a permanent physical occupation of another's property is a taking has more than tradition to commend it. Such an appropriation is perhaps the most serious form of invasion of an owner's property interests. To borrow a metaphor . . . the government does not simply take a single "strand" from the "bundle" of property rights: it chops through the bundle, taking a slice of every strand.

Id. at 435.

80. *Id.* at 435-36. The Court found that when the invasion is by a stranger, the owner suffers a "special kind of injury" because it requires the owner to suffer the exercise of dominion over her property, without any control over the timing or duration of the invasion, despite her interest, long protected by property law, in the undisturbed possession of the property. *Id.* at 436.

81. *Id.* at 437 n.15, 437-38.

82. *Id.* at 441 ("Our holding today is very narrow. We affirm the traditional rule that a permanent physical occupation of property is a taking.").

83. *See id.* at 434 (discussing PruneYard Shopping Center v. Robins, 447 U.S. 74, 84 (1980) and the owner's failure to establish an expectation of exclusive use of her property).

senting opinion.[84] He called the decision "curiously anachronistic," constructing a rigid *per se* takings rule that required the Court to erect "a strained and untenable distinction" between temporary physical invasions and permanent physical occupations, thereby reducing the takings issue to " 'a formalistic quibble' over whether property has been 'permanently occupied' or 'temporarily invaded.' "[85] In fact, the majority's only authorities for the rule were historical dicta, taken from nineteenth century decisions made in an agrarian context, authorities that have little relevance with the current rapid development in technology.[86] In his view, the *per se* rule was outmoded in light of modern governmental restrictions that do not touch property but still can vastly diminish its economic value.[87] Moreover, none of the Court's recent takings decisions had adopted an actual *per se* test.

Justice Blackmun also referred to Michelman's commentary on the physical occupation rule but gave more indication of its critical context than the majority.[88] In fact, Michelman criticized the arbitrary distinction the permanent occupation standard embodies, one that has virtually no capacity "to distinguish, even crudely, between significant and insignificant losses."[89]

In language with particular relevance to the *Bell II* decision, the *Loretto* dissent decried the *per se* rule for its disruptive effect on a carefully weighed state legislative determination; the intrusion of cable equipment on apartment buildings served the public interest with little or no harm to the building owner.[90] He criticized the majority for failing to recognize the power of legislatures to modify property interests if important policy considerations warrant such action:

> [T]his Court long ago recognized that new social circumstances can justify legislative modification of a property owner's common-law rights, without compensation, if the legislative action serves sufficiently important public interests. . . . 'A person has no property, no vested interest, in any rule of the common law. . . . Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and cir-

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84. *Id.* at 442 (Blackmun, J., dissenting).

85. *Id.* (quoting Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 37 (1964)). Blackmun believes that this "talismanic distinction . . . finds no basis in either economic logic or Takings Clause precedent." *Id.* at 450.

86. *Id.* at 446-47.

87. *Id.* at 447 ("Modern governmental regulation exudes intangible 'externalities' that may diminish the value of private property far more than minor physical touchings.").

88. *Id.*

89. *Id.* (quoting Michelman, *supra* note 32, at 1227).

90. *Id.* at 454.

cumstance (sic).'[91]

D. Summary: Implication of United States Supreme Court Takings Cases for Bell II

If the *Bell II* court had carefully reviewed these cases in its takings clause analysis, it would necessarily have concluded that a *per se* taking had not occurred. Instead of dismissing the legislative action with so little consideration, the court would have engaged in a balancing test: assessment of the reasonable expectations of the private property owners against the state's interests in (1) protecting public use rights in public resources[92] and (2) preventing conflict between private property owners and the public. The court would have needed to assess *how reasonable* the plaintiffs' expectations were in the *exclusive* recreational use of the foreshore. This would require greater thought about the effect the court's past decisions had had upon the common understanding of what ownership of the foreshore entailed. Because of the extensive restriction that public rights place on private use of the intertidal zone, the court would need to consider carefully the actual extent of the private property interest in the foreshore. Instead, its finding of a *per se* taking allowed the *Bell II* court to avoid quite neatly these considerations; it undertook neither a more critical evaluation of its case law nor any significant examination of its decision in *Bell I*. The *Bell II* court's superficial and uncritical analysis of the takings issue demonstrates a revealing reluctance to consider the substantive merits of the Intertidal Land Act.

IV. The Takings Analysis in *Nollan v. California Coastal Commission*

A. The Majority Opinion

The *Bell II* court used the United States Supreme Court's language in *Nollan v. California Coastal Commission*[93] to find that the Intertidal Land Act imposed a permanent physical invasion on the appellees' property, thus constituting a taking without just compensation. In *Nollan*, the Supreme Court's five-to-four decision invalidated a state agency permit requiring the owners to cede a lateral public easement along their beachfront property. Their replacement

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91. *Id.* (quoting Munn v. Illinois, 94 U.S. 113, 134 (1877)). The *Loretto* dissent also quoted United States v. Causby, 328 U.S. 256, 260-61 (1946): "In the modern world, '[c]ommon sense revolts at the idea' that legislatures cannot alter common-law ownership rights."

92. *See* Me. Rev. Stat. Ann. tit. 12, § 571, The Public Trust in Intertidal Land Act ("The Legislature further finds and declares that the protection of the public uses referred to in this chapter is of great public interest and grave concern to the State.").

93. 483 U.S. 825 (1987).

of a small seasonal structure with a larger year-round house was conditioned on their acceptance of the easement.[94] Justice Scalia, writing for the majority, upheld the property owners' claim that such a condition constituted an uncompensated taking.[95]

The majority opinion demonstrated both a high regard for the concept of private ownership and a distaste for private land-use restrictions through governmental regulation. To preserve the private property owner's 'essential' property right to exclude others, the majority crafted, from the physical occupation test articulated in *Loretto*, a particularly high standard of review for governmental actions that purportedly interfere with that right to exclude.[96]

Although the condition caused no actual permanent physical occupation of any portion of the Nollans' property, as had been the case with the cable television equipment in *Loretto*, the majority found a physical invasion.[97] However, the majority did not apply the *Loretto* standard to find the California Coastal Act a *per se* taking. Nor did the majority engage in a balancing of interests analysis to determine whether the state's interests outweighed the landowner's expectation. Instead, Justice Scalia used the fact of physical invasion to justify a searching and highly skeptical inquiry into the basis for the Commission's action. Because this was land-use regulation and not an outright appropriation, the central focus of this test was whether the condition in the permit "substantially advance[d]" a legitimate state interest.[98] In this novel use of the physical invasion standard, Justice Scalia made no effort to distinguish the holding in *PruneYard Shopping Center*. He also misapplied the Court's holding in *Kaiser Aetna*.[99]

The Court's opinion began by posing a hypothetical question whether it would have constituted a taking if the government had appropriated the easement outright, instead of imposing it as a condition for the development permit.[100] The majority answered the question affirmatively; such action would constitute a permanent physical occupation and thus a *per se* taking under the *Loretto* rule.[101] The easement met the permanent occupation test because

94. *Id.* at 828.
95. *Id.* at 841-42.
96. *Id.* at 831-32.
97. *Id.* at 832.
98. *Id.* at 834-37, 838.
99. *Id.* at 832 n.1.
100. *Id.* at 831.
101. *Id.* at 831-32. *See supra* notes 75-83 and accompanying text for discussion of the *Loretto* test. The Court found a taking despite significant differences in the nature of the intrusion. An easement for passage is less intrusive than the cable fixture law in *Loretto*. The degree to which the two invasions interfere with the sticks in the bundle of rights, using the *Loretto* Court's metaphor, is quite distinguishable.

the public was given a continuous right of passage.[102] The easement would not be characterized as a *per se* taking, however, because it was imposed as a condition on a permit for which the landowner had applied.[103] Nevertheless, because the easement did not substantially advance legitimate state interests,[104] its imposition through the permit condition was an invalid taking without compensation.[105]

The majority's requirement of a "close nexus" between project impact and permit condition was premised on the fact that the condition interfered with the owner's property right to exclude. Therefore, the majority had to counter the claim that California law does not afford oceanfront property owners the right of exclusive occupation within their bundle of rights. The dissenting justices attributed this preexisting public right to a California constitutional provision that prohibits landowners from interfering with the public's access to navigable waters for public purposes.[106] Indeed, the dissenters

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102. *Id.* at 832. *See supra* notes 33-34 and accompanying text for language from the majority opinion. The Court thus suggested an expansion of the *Loretto* rule to cases beyond those in which a facility or fixture is permanently installed on private property to ones in which transitory uses are imposed. This suggestion contrasts sharply with language in an early "permanent occupation" case, quoted in *Loretto*, where the Court found the company to have effected a taking of a public street through the placement of telegraph poles thereby entitling the city to compensation:

> The use which the [company] makes of the streets is an exclusive and permanent one, and not one temporary, shifting and in common with the general public. The ordinary traveler, whether on foot or in a vehicle, passes to and fro along the streets, and his use and occupation thereof are temporary and shifting. The space he occupies one moment he abandons the next to be occupied by any other traveler.

Loretto v. Manhattan Teleprompter CATV Corp., 458 U.S. at 428-29 (quoting St. Louis v. Western Union Telegraph Co., 148 U.S. 92, 98-99 (1893)).

103. *Id.* at 834.

104. *Id.* at 837 ("unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but 'an out-and-out plan of extortion' ") (quoting J.E.D. Associates, Inc. v. Atkinson, 121 N.H. 581, 584, 432 A.2d 12, 14 (1981)).

105. *Id.* Some question remains whether Justice Scalia intended that all takings clause analyses include the requirement that a regulation substantially advance a legitimate state interest or just those regulations whose application results in the physical invasion of a landowner's private property. In *Nollan*, he suggested that the peculiar kind of regulation in question, one that exacted in essence a public facility, warranted the heightened scrutiny. However, in his dissent in Pennell v. City of San Jose, 485 U.S. 1 (1988), Scalia argued that the municipal rent control law was a taking; he would have applied his "substantially advances state interests" test to require a "cause-and-effect relationship between the property use restricted by the regulation and the social evil that the regulation seeks to remedy." *Id.* at 20 (Scalia, J., dissenting). *See also* Kmiec, *The Original Understanding of the Taking Clause Is Neither Weak Nor Obtuse*, 88 COLUM. L. REV. 1630 (1988); Constonis, *Presumptive and Per Se Takings: A Decisional Model for the Taking Issue*, 58 N.Y.U. L. REV. 465 (1983).

106. Nollan v. California Coastal Comm'n, 483 U.S. at 847-48 (Brennan, J., dissenting). The California Constitution provides:

> No individual, partnership, or corporation, claiming or possessing the front-

found the Commission's easement condition to be a vindication of this preexisting public right, necessary to prevent disruption of the settled expectations of the public and entitled to deference by the courts. The dissent believed that "[t]he State's exercise of its police power for this purpose deserves no less deference than any other measure designed to further the welfare of state citizens."[107]

In a weak response to this argument, Justice Scalia first questioned whether the constitutional provision had any *prima facie* application to the facts of the case. The right of way sought was *along* the shore, not *to* the shore from the street. He suggested that California courts had never interpreted the provision in a manner similar to the dissent's interpretation.[108] He noted parenthetically that none of the cited California cases actually considered whether the constitutional provision allows passage *across* private property. If the provision in fact guaranteed public access in the manner suggested by the dissent, the majority believed such a constitutional argument would have been advanced and litigated below.[109]

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age or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water; and the Legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this State shall always be attainable for the people thereof.

CAL. CONST. art. X, § 4.

107. Nollan v. California Coastal Comm'n, 483 U.S. at 848 (Brennan, J., dissenting). The state constitutional guarantee of access is bolstered by a federal law provision in the Coastal Zone Management Act, 16 U.S.C. 1451(h) (1988), that calls on states to use their land use authority to regulate land and water uses in a manner that promotes public access. *Id.* at 848.

108. *Id.* at 832. Justice Scalia cited several California cases that suggested that the state must use eminent domain procedures to gain, on behalf of the public, access across private property to navigable waters.

109. *Id.* at 832-33. Justice Scalia also cited an opinion by the state Attorney General, 41 Op. Cal. Atty. Gen. 39, 41 (1963), concluding that California case law indicated that it is a trespass to cross private property to get to navigable waters, even for the purposes of fishing, commerce, or navigation. *Id.* at 833.

While suggesting an interpretation that made the constitutional provision inapplicable, Justice Scalia declined to rule directly that the provision was inapposite. He noted the impropriety of resolving a state constitutional law question in the first instance and the failure to preserve the preexisting public right issue for appeal. The Commission's majority apparently agreed with the argument made below by the landowners; the access right could only be enforced through a quiet title action. The Commission lacked standing to bring such a suit because it had no claim to the constitutional easement. *Id.* at 833 (citing CAL. CIV. PROC. CODE § 738 (West 1980)). By so asserting, Justice Scalia put forth (in dicta) a narrow interpretation of one aspect of California's public trust doctrine; he noted that the state agency charged by state law with protecting public access did not bear sufficient relationship to that public right to defend it in a quiet title action. This interpretation failed to recognize that the people of California had, through a popular initiative and legislative action, authorized the Coastal Commission to protect the public's rights in the tidelands through

The majority also rejected the dissent's argument that the Nollans had no reasonable expectation to exclude the public because they knew, when they bought their property, of the Commission's policy, requiring beachfront owners wishing to renovate their houses to dedicate lateral access easements to the public.[110] Justice Scalia rejected the notion that "a unilateral claim of entitlement by the government can alter property rights."[111] The right to build on one's property is not a "governmental benefit" that one can be required to exchange for the property right to exclude others to obtain.[112] Therefore, the majority noted, the landowner's prior knowledge of the condition could not defeat their expectations.

Having established a highly skeptical and deeply probing standard of review for the Commission's action, Justice Scalia ensured that the lateral beach easement would fail. He held that no sufficient nexus existed between the harm perceived by the Commission and the condition imposed to mitigate that harm.[113] The extent to which his analysis stretched the facts demonstrated an intense predisposition against this kind of regulatory action. He characterized the burden posed by the Nollans' project as one affecting "visual access" to the ocean.[114] He ignored considerable evidence in the record that the Commission was concerned with (1) the public's loss of physical access and (2) the increased pressure on access resulting from a higher density of residential use around the Nollans' prop-

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the development review process and other actions.

California's Coastal Initiative of 1972 created, by popular referendum, a coastal conservation commission whose tasks were to prepare a comprehensive coastal land use plan and to review development permits. Formerly CAL. PUBLIC CODE §§ 27000-27650 (Deering 1974) (current Act is at CAL. PUB. RES. CODE ANN. §§ 30000-30900 (West 1986)). *See* Comment, *Public Beach Access Exactions: Extending the Public Trust Doctrine to Vindicate Public Rights*, 28 U.C.L.A. L. REV. 1049, 1050 (1981). One of the 1972 Initiative's central goals was to implement the state constitutional guarantee of public access to tidelands and ocean waters. CAL. CONST. art. X, § 4. *See* Brief for Appellee at 2, Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) (No. 86-133). The state legislature enacted the California Coastal Act of 1976, CAL. PUB. RES. CODE ANN. §§ 30000-30900 (West 1986) to replace the 1972 Initiative and to create a permanent agency, the California Coastal Commission. The Commission's public access permit condition, issued pursuant to CAL. PUB. RES. CODE ANN. § 30212, was challenged in *Nollan*. *See* Nollan v. California Coastal Comm'n, 483 U.S. at 855 (Brennan, J., dissenting) ("the physical access to the perimeter of appellants' property at issue in this case thus results directly from the State's enforcement of the state constitution"). *See infra* notes 122-27 and accompanying text.

110. Nollan v. California Coastal Comm'n, 483 U.S. at 833 n.2. The Commission had required all owners in the Faria Family Tract where the Nollans' property was located to transfer such easements as a condition of rebuilding. *See id.* at 859-60 (Brennan, J., dissenting) (citing Ruckelshaus v. Monsanto, 467 U.S. 986 (1984)).

111. *Id.* at 833 n.2.

112. *Id.* at 834 n.2.

113. *Id.* at 837.

114. *Id.* at 838.

erty.[115] He concluded that the Commission could have required a public viewspot on the property in order to alleviate the burden on visual access, a conclusion that casts further doubt on his concept of the physical invasion rule of takings.[116]

B. The Dissent

Justice Brennan's dissent was faithful to both the Court's prior decisions on the takings clause analysis and to the facts in the record. He followed the three-part inquiry identified in the *Penn Central* decision, looking into (1) the character of the governmental action, (2) its economic impact on the value of the property, and (3) the extent to which it interfered with investment-backed expectations of the landowner.[117] The Commission's action created a minimal intrusion, affecting only a ten-foot-wide strip of the Nollans' land. The burden was even more *de minimus* when the effect of the tides was considered. Along this portion of the shore, the high tide line shifts throughout the year, with the ocean at times completely covering the sand area below the seawall.[118]

Applying, for the sake of argument, the majority's "close nexus" test, Justice Brennan found the regulation valid, accurately defining its aim as the creation of greater *overall* access to the shoreline,[119] instead of distinguishing among physical, visual and psychological access as the majority had done.[120] In Justice Brennan's view, the easement was the least intrusive measure the Commission could have imposed. He was critical of the majority's reliance on the *Loretto* rule and its failure to apply the multifactor takings analysis.[121]

Critical to Justice Brennan's characterization of the Commission's action was his finding that it was based upon explicit constitutional and statutory directives to the Coastal Commission.[122] In this vein, he found the decision in *PruneYard*[123] to be applicable. In

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115. *Id.* at 842, 845, 850 n.4 (Brennan, J., dissenting).

116. *Id.* at 836.

117. *Id.* at 853.

118. *Id.* at 854. In a brief *amicus curiae*, the Coastal States Organization and the South Carolina Coastal Council argued that these lands, covered periodically by the tides and extended to the seawall, are all included within the State's public trust. Brief *Amicus Curiae* for Coastal States Organization and South Carolina Coastal Council at 37-43, Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) (No. 86-133).

119. Nollan v. California Coastal Comm'n, 483 U.S. at 851-52, 863. ("[The restriction] would provide a formal declaration of the public's right of access, thereby ensuring that the shifting character of the tidelands, and the presence of private development immediately adjacent to it, would not jeopardize enjoyment of that right.").

120. *Id.* at 838-39.

121. *Id.* at 843-48.

122. *Id.* at 846-47.

123. *See supra* note 72-74 and accompanying text.

PruneYard, an express constitutional provision mandated public access for the purpose of free speech and petition. Similarly, California's Article X, section 4 provided not only a basis for the Coastal Act's public access provisions; it imposed an *affirmative duty* on the state to protect and promote public access.[124] The owners had no grounds to support a right to exclude the public from crossing their lot. The state legislature had specified that all new development would provide lateral and vertical access, if necessary.[125] The Commission had consistently applied this policy, requiring all forty-three surrounding properties to dedicate the same easement.[126] Even assuming that the Nollans had a property right to exclude the public, they were on actual notice that the condition would apply. In light of the constitutional provision guaranteeing access to navigable waters, the new landowners were the "interlopers," not the public; the public had an existing right that predated the new development along the coast.[127]

Moreover, Justice Brennan was impressed that the Commission's action was not unilateral; the Nollans had brought the condition on themselves by seeking to increase the intensity of their property's use.[128] Instead of there being an adverse economic impact on the Nollans' property value, Justice Brennan found that a "reciprocity of advantage" was obtained.[129] The Nollans tripled the square footage of their house and thereby greatly increased their property value.[130] In fact, the Nollans would benefit from the Commission's policy of imposing easement conditions because they would be able to walk beyond their own property along the seashore.[131]

C. *Bell II's Use of Nollan*

The above discussion makes clear that the *Bell II* court's reliance on the *Nollan* decision was misplaced. First, the *Nollan* Court did

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124. *Id.* at 855.

125. *Id.* at 857. The California Code provided that "[p]ublic access from the nearest public roadway to the shoreline and *along the coast* shall be provided in new development projects." CAL. PUB. RES. CODE ANN. § 30212 (West 1986) (emphasis added).

126. *Id.* at 857-58.

127. Justice Brennan also noted that the property in question may, in fact, be below the mean high tide line and thus publicly owned, or may be subject to a prescriptive public easement acquired through long usage. *Id.* at 862.

128. *Id.* at 855-56.

129. *Id.* at 856 (citing Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922)). *See also* Keystone Bituminous Coal Ass'n v. DeBenedictus, 480 U.S. 470, 491 (1987); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 134-35 (1978) (preservation of landmarks benefits all citizens both economically and generally).

130. Nollan v. California Coastal Comm'n, 483 U.S. at 856. No allegation of any diminution in the value of the lot through imposition of the permit condition had been made.

131. *Id.*

not apply the physical invasion rule to invalidate either the California agency's public access easement or its authorizing legislation was a *per se* taking. In the Court's view, the easement condition interfered with the owner's expectation of a right to exclude the public, considered a fundamental right in the bundle of property rights. This required not the automatic invalidation of the condition, but a searching judicial inquiry to ensure that the government was not extorting this property interest from the landowner. The Court therefore sought a close nexus between the condition's effect and the burden it sought to alleviate, a relief grounded in a legitimate public purpose. The Court required that the condition substantially advance this purpose; it did not strike it down peremptorily as a *per se* taking.

Contrary to the Massachusetts and Maine courts' conclusion that courts *never* deny compensation for physical takeovers[132] the Court indicated that a permanent occupation of private property *could* be constitutionally imposed if it directly alleviated a burden, caused by a private owner's patterns of use, on specific public interests.[133] Finally, the property in *Nollan* was above the high tide line[134] and therefore not subject to a clearly preexisting right of public passage, unlike Maine's intertidal lands.

V. The Legislature's Role and the Public Trust

A. *The Legislature's Role in Defining the Common Law*

In addition to its misapplication of takings clause jurisprudence, the *Bell II* court erred in another important respect. It implicitly misconceived the legislature's role in defining property rights, especially for property and natural resources with a special public character. First, concluding that the legislative declaration of a recreational easement went further than the easement reserved by the common law,[135] the Law Court assumed a static content of the common law, or at least one that had not changed since 1925.[136] More importantly, by not expressly rejecting the Superior Court's analysis of the Intertidal Land Act[137] the court implicitly rejected (without

132. *See supra* note 32 and accompanying text for discussion of Michelman's analysis.

133. *See supra* note 116 and accompanying text.

134. Nollan v. California Coastal Comm'n, 483 U.S. 825, 828 (1987).

135. *Bell II*, 557 A.2d 168, 176-77.

136. *But see id.* at 188 (Wathen, J., dissenting) (citing Andrews v. King, 124 Me. 361, 129 A. 298 (1925), the last case prior to *Bell II* to rule on the substantive content of the public right in the foreshore; that decision "expanded the right of navigation."). Justice Wathen believed that the Law Court had "erred in arresting further development in the law."

137. The trial court found the Act to violate the separation of powers clause of the Maine Constitution. Bell v. Town of Wells, No. CV-84-125 (Me. Super. Ct., York Cty., Sept. 14, 1987) slip op. at 35-38. *See infra* note 149 and accompanying text.

supporting analysis) any role by the Legislature in (1) defining common law property rights or (2) clarifying existing public rights through an explication of the common law. This view seriously misdefines the Legislature's powers. The Legislature redefines property rights with every environmental and land use law it enacts,[138] except those regulating common law nuisance. Unquestionably, its ability to affect property rights is always subject to the constitutional restrictions embodied in the just compensation clause.[139] Certainly, the existence of this lawmaking function must also be without question. On the other hand, the protections afforded private property under the constitution require a critical evaluation of the reasonable expectations and reliance interests of property owners in order to define precisely the dimensions of the protected sphere.[140] Such fifth amendment protection does not require wholesale judicial rejection of any legislative power to adjust the common law's definition of property rights, a definition founded on legitimate state interests. Instead, legislative action is traditionally afforded a degree of deference by the courts, in recognition of their shared power to define the law.[141]

The Law Court compounded this general error by completely ignoring the state's role as trustee of public rights in intertidal lands; this role has special implications when considering the legislative power to define the scope and reach of that trust. Protection of the public trust was the Legislature's clear intent in enacting the Intertidal Land Act. The Law Court only considered the Act in light of the plaintiffs' takings clause challenge. Accepting the claim that the Act was a *per se* violation of the clause, the *Bell II* court avoided any consideration of the legitimacy of the state's interests promoted by the Act.

B. Bell II's Retreat from the Underlying Premise of the Public Trust Doctrine

The deficiencies of the *Bell II* decision, in particular its takings clause analysis, can be better understood if one views *Bell II* as the last step in the Law Court's retreat from the public trust doctrine, and rejection of the doctrine's use by modern-day courts to promote equality in natural resource utilization. This retreat began in *Bell I*.[142] The question remains: why would the court want to distance

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138. *See, e.g.*, Hall v. Board of Envtl. Protection, 528 A.2d 453 (Me. 1987); Seven Islands Land Co. v. Maine Land Use Regulation Comm'n, 450 A.2d 475 (Me. 1982).

139. *Bell II*, 557 A.2d at 176 ("The judicial branch is bound, just as much as the legislative branch, by the constitutional prohibition . . . .").

140. *See infra* notes 207-26 and accompanying text.

141. *See Bell II*, 557 A.2d at 192 (Wathen, J., dissenting) (citing Ace Tire Co. v. Municipal Officers of Waterville, 302 A.2d 90, 95 (Me. 1973)).

142. 510 A.2d 509 (Me. 1986). *See infra* notes 173-91 and accompanying text for a

itself from the public trust doctrine and go against a trend[143] followed in many state courts? Perhaps the court reacted against what the modern doctrine represents: a shift away from the concept of private property as the principal means by which our society manages scarce resources toward a legal concept of land and natural resources that reflects their common property nature.[144]

The public trust doctrine has become one of the principal vehicles for the reformulation of American property law. It incorporates a recognition that many of our land and natural resources are, in effect, common property; their use must reflect a responsibility to other users both now and in future generations.[145] Changes in property law occur to reflect changes in both our technological and moral understanding.[146] We now know that the effects of land and resources use are not confined to the boundaries of one's property. Most natural resources, particularly land, are finite, yet the demands for them constantly increase. The new moral understanding reflects changes in society's perception of the justness of previously approved classes of entitlement, including property rights in water, wetlands, and shorelands. It changes society's conception of the requirements for this broader view of equality.[147]

The Law Court's *Bell* decisions evince a preference for a status quo conception of justice that emphasizes the stability of expectations with respect to private property.[148] Its rejection of the Inter-

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discussion of this doctrinal retreat.

143. *See generally*, Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631 n.1 (1986).

144. "Common" property in this context is not intended to mean commonly owned but to indicate the extent to which one person's use affects the ability of all others to enjoy or utilize the same resources.

145. *See generally* Sax, *supra* note 4; Stevens, *The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right*, 14 U.C. DAVIS L. REV. 195 (1980). For a discussion of the implications of this evolution in property law for just compensation jurisprudence, see Tideman, *Takings, Moral Evolution, and Justice*, 88 COLUM. L. REV. 1714 (1988). Other users must also include nonhuman species who depend on natural resources for their habitat and life cycles.

146. *See* Tideman, *supra* note 145. Professor Tideman identifies as one possible definition of justice the society's consensus about whose expectations should be disappointed when expectations are in conflict. As this consensus changes over time, so does the society's idea of justice. *Id.* at 1715.

147. *Id.* Professor Tideman describes a conception of justice founded upon four considerations: a recognition of *equality*, a commitment to *stability*, a quest for *efficiency*, and a choice about institutional *authority*. *Id.* at 1716-19. He applies these four components to the facts of Nollan v. California Coastal Comm'n, 483 U.S. 825. *Id.* at 1718-19, 1727.

148. *Id.* at 1716 (the stability commitment is reflected in the just compensation clause). The *Bell II* court's rejection of the Legislature's formulation of intertidal property rights also reflects a preference for judicial determinations concerning which conflicting expectations must give way. Tideman refers to this preference as a choice among several alternative views of the authority component of justice. *Id.* at 1718.

tidal Land Act also demonstrates a narrow view of who has power to select among conflicting expectations in our society. The court's preference for stability is legitimate but outmoded; its narrow conception of authority is faulty. While the courts play an essential role in defining and protecting reasonable expectations, the Legislature, as the direct expression of the emerging social consensus, must certainly play as important a role.

C. The Unconsidered Separation of Powers Issue

The *Bell II* court's desire to avoid consideration of the Legislature's role was evident in its neglect of the separation of powers issue. Although this issue appeared on the surface as a narrow technical issue, it actually represented an important jurisprudential question of who has the power to decide between conflicting expectations. The Superior Court had accepted the plaintiffs' claim that the Intertidal Land Act violated the separation of powers provision of the Maine Constitution, finding a more rigorous state constitutional mandate for separation than that implied under the United States Constitution.[149] The Act was an "interpret[ation of] existing law," which is strictly a judicial function.[150] The Legislature's findings on the pre-existence and scope of the common law public trust doctrine constituted an infringement of the judiciary's *exclusive* domain to make interpretations of the common law.[151]

The Superior Court held further that the Act's critical deficiency lay in the fact that the Law Court had never interpreted the common law to characterize the public intertidal zone rights as a "public trust." To the contrary, the *Bell I* court had "reaffirmed that whatever rights the public enjoys in the intertidal zone under the Colonial Ordinance exist as an easement, not a trust (or at least not yet a trust)."[152] The state is not responsible as trustee. It cannot include the right of general recreation in the public rights. The court believed it still possible that the Law Court could at some future

149. Bell v. Town of Wells, No. CV-84-125, slip op. at 35-36 (Me. Super. Ct., York Cty., Sept. 14, 1987) (citing State v. Hunter, 447 A.2d 797, 799 (Me. 1982)). The Maine Constitution provision reads: "No person or persons belonging to one of [the three] departments shall exercise any of the powers properly belonging to either of the others . . . ." ME. CONST. art. III, § 2.

150. Bell v. Town of Wells, No. CV-84-125, slip op. at 36 (Me. Super. Ct., York Cty., Sept. 14, 1987) (citing Atlantic Oceanic Kampgrounds v. Camden Nat'l Bank, 473 A.2d 884, 886 (Me. 1984)).

151. *Id.* at 36-37. The court cited the Statement of Facts accompanying L.D. 2380 and statements of the bill's co-sponsor that the bill did not create new rights but merely confirmed traditional rights. One can assume that these statements were made in part to preclude future claims that the bill "took" private property by making it subject to new public rights.

152. *Id.* at 37. The lower court was quite emphatic in making this point: "Only the judicial branch of government can make that kind of interpretation of existing common law." *Id.*

time "redefine or clarify" the public easement. Such action would reflect the adaptive quality of the common law and might be appropriate in light of the Law Court's prior recognition that the extent of common law public rights in intertidal lands "is not entirely clear."[153] However, because this redefinition would involve a reinterpretation of existing case law, legislative enactment was not effective. The Act's invalidity under the separation of powers doctrine made the takings clause challenge moot.[154]

On appeal, the *Bell II* majority declined to address the separation of powers violation that had so concerned the lower court. It limited the constitutional discussion to the takings clause. Only Justice Wathen, writing for the three-member minority, squarely considered the Act in light of the separation of powers doctrine. His dissent reflected implicit recognition of the shared nature of the judicial and legislative functions in defining rights existing at common law. Finding that recreational activities such as bathing, sunbathing, and walking, at a minimum, are included within the public's rights, Justice Wathen left for another day the precise delineation of the public rights, believing that "[a]ny further refinement should await common law development *or* legislative action."[155] The legislature has authority to redefine the scope of the public rights, subject always to judicial review.[156] Review of the substance of the legislative definition was unnecessary, however, in light of the narrowness of the requested declaratory relief.[157] In his view, the Act merely declared existing common law rights, seeking their preservation and regulation rather than their expansion.[158]

Justice Wathen approached, but did not fully address, the idea the majority went to such lengths to avoid: the state's trusteeship over foreshore public rights. In an interesting but limited discussion, he considered whether provisions of the Act declaring the state's trusteeship constituted an addition to existing common law that would violate the constitutional separation of powers.[159] Impor-

153. *Id.* (citing Blaney v. Rittall, 312 A.2d 522, 528 n.7 (Me. 1973)).

154. Recognizing the possibility that the Law Court might, however, disagree with its conclusion on separation of powers, the Superior Court made two "findings of fact" concerning the takings challenge: (1) the diminution in property value varied among the parcels on Moody Beach, within a range of 0% to 25%, depending on the lot's proximity to the public accessways and (2) the plaintiffs generally bought their property with a "reasonable expectation" that it was largely private. *Id.* at 38.

155. *Bell II*, 557 A.2d 168, 189 (Wathen, J., dissenting) (emphasis added).

156. *Id.* at 191. Justice Wathen gave as an example of a substantive provision potentially troubling to the court the Act's provision for local ordinances authorizing motor-vehicular use of the shore (ME. REV. STAT. ANN. tit. 12, § 573(2)(D)). *Id.* at 189 n.14.

157. *Id.* at 189 n.14.

158. *Id.* at 191 n.15.

159. *Id.* at 191.

tantly, he began with a presumption of the Act's constitutionality.[160] He then found no encroachment upon the essence of the judicial function to resolve disputes between particular litigants.[161] The Act's declarations were entirely within the Legislature's authority to codify and change the common law, forming as they did "a rule of general applicability designed to aid in the resolution of all potential disputes regarding the scope of the public's rights in the entire coast of Maine."[162] Because he had concluded that Maine's common law already recognized a public right of recreation, Justice Wathen did not pursue the issue of whether the Legislature could clarify the public's foreshore rights.

Why did the *Bell II* majority ignore the question of legislative authority over foreshore rights? The court may not have been anxious to consider the separation of powers issue because it then would have needed to confront the serious inconsistencies in its prior articulations of the public trust doctrine, particularly in its 1981 *Opinion of the Justices*[163] and *Bell I*.[164] Reexamination of these cases would have highlighted the difficulties these inconsistencies posed for the Superior Court in *Bell II*.

D. Maine's Public Trust Doctrine

In *Opinion of the Justices*, the five signing justices[165] clearly accepted the public trust doctrine, in fact, describing it in rather expansive language. The Governor had asked the justices to review a bill passed by the Legislature but awaiting his signature, to advise him on its constitutionality, and to adjudge its consistency with the state's responsibility as public trustee. The Filled Intertidal Land Act,[166] as the bill came to be known, aimed at releasing state interests in lands previously below the high tide line which had been filled as of October 1, 1975.[167] The opinion noted with approval language in the proposed bill finding that intertidal and submerged lands are impressed with the public trust.[168] The justices themselves

160. *Id.* at 192.

161. *Id.* at 191.

162. *Id.* at 192. Justice Wathen found that the Legislature had declared the existence of a public trust without regard to whether the trust existed at common law. *Id.* (citing Atlantic Oceanic Kampgrounds v. Camden Nat'l Bank, 473 A.2d 884, 886 (Me. 1984)).

163. 437 A.2d 597 (Me. 1981).

164. 510 A.2d 509 (Me. 1986).

165. Chief Justice McKusick and Justices Godfrey, Nichols, Roberts, and Carter signed the 1981 *Opinion*. Only Chief Justice McKusick and Justice Roberts were on the *Bell II* court, with Justice Roberts joining the dissent.

166. ME. REV. STAT. ANN. tit. 12, § 559 (1988).

167. *Id.* Opinion of the Justices, 437 A.2d at 599-600.

168. *Id.* at 606. The court held:

> [T]he Legislature was by no means blind to the public rights that would be released by L.D. 1594; on the contrary, the Legislature specifically articu-

found:

> In view of the common law principle that the intertidal *and* submerged lands are impressed with a public trust, *a principle that reflects the unique public value of those lands,* we believe that any legislation giving up any such public rights must satisfy a particularly demanding standard of reasonableness. Submerged and intertidal lands are not fungible with lands in the interior.[169]

As if anticipating the issues in the *Bell* litigation, the Law Court stated that other public uses beyond fishing, fowling and navigation have "grown up" in the common law, including recreational uses.[170] By upholding the validity of the Filled Intertidal Land Act, the justices clearly recognized the state's trusteeship over public rights in intertidal lands and the state's power as trustee to relinquish interests in former tidal lands in appropriate circumstances.[171]

Has the Law Court been consistent with its 1981 *Opinion* in the *Bell* decisions? If the Legislature as trustee has the power to extinguish public rights in filled intertidal lands, does it not have the same authority as trustee to take actions that protect and vindicate those same public rights? The *Bell II* court ought to have reviewed the Public Trust in Intertidal Land Act in the same manner as it had the Filled Intertidal Lands Act. Beginning with the assumption that such a trust exists, the *Bell II* court certainly would have found that the converse of its prior proposition was also true; that legislation *protective* of public rights was also entitled to deference by the courts and would be overturned only if it very clearly interfered with distinct, investment-backed expectations of property owners.[172]

> lated its recognition that the lands in question are "impressed with the public trust which gives the public's representatives an interest and responsibility in its development."

Id. (citing ME. REV. STAT. ANN. tit. 12, § 559(1)).

169. *Id.* at 607 (emphasis added).

170. *Id.* The court added:

> The press of an increasing population has led to heavy demands upon Maine's great ponds and seacoast for recreational uses. . . . The intertidal and submerged lands are finite public resources, the demand upon which steadily increases. In dealing with public trust properties, the standard of reasonableness must change as the needs of society change.

Id.

171. *Id.* at 608 (citing Illinois Cent. R.R. Co. v. Illinois, 146 U.S. 387, 452-53 (1892) (while invalidating a prior grant by Illinois of submerged land on Chicago waterfront, the Court held that in other circumstances, the grant might be valid, such as in cases where other public rights were undisturbed).

172. The Law Court held the Filled Intertidal Land Act to a particularly demanding standard of reasonableness in light of its extinguishing effect upon public intertidal rights. *Id.* at 610 ("Any release or limitation by the Legislature of the public trust rights in unfilled intertidal and submerged lands is and will be subject to judicial review of its reasonableness on the high and demanding standard" set forth above). *See generally* Comment, *The Public Trust Doctrine in Maine's Submerged Lands: Public Rights, State Obligation and the Role of the Courts,* 37 MAINE L. REV.

E. Bell I Decision's Retreat from the Public Trust

Much of the implicit error in *Bell II* regarding the Legislature's role has its roots in the Law Court's *Bell I*.[173] In a confusing discussion, the *Bell I* court retreated from its prior opinions embracing the common law principle of a state-held trust in public foreshore rights.[174] In sharp contrast to the trust-affirming language in *Opinion of the Justices*, a completely different, anti-public-trust tone pervaded the court's decision in *Bell I*.

The *Bell I* court took the opportunity, presented by the state's motion to dismiss on sovereign immunity grounds, to deal a sharp blow to the notion of the state as trustee. It vacated the trial court's dismissal of the Moody Beach plaintiffs' quiet title action.[175] Finding the trial court "misplaced" its reliance on the 1981 *Opinion of the Justices* by holding that the state "has an interest in Moody Beach and in that sense it has title,"[176] the Law Court took pains to distance itself from the public-trust-affirming language of that *Opinion*.

The *Bell I* court distinguished the *Opinion* on grounds that it involved legislation releasing or extinguishing state claims of *fee* ownership over lands for which fee ownership, either in the state or in private owners, could not conclusively be determined.[177] Title to this land was uncertain, first, because it had been filled and was therefore no longer either submerged or periodically covered by tidal waters. Second, no charts existed that accurately indicated the location of the historic low and high water marks.[178] Thus, by the Act, the state released its interests in previously intertidal lands only because it could not factually separate these lands from submerged lands that are, by definition, state-owned.[179]

The *Bell I* court characterized its 1981 *Opinion* as silent regarding the public trust, contending that "[t]he justices declined to answer questions posed as to the existence of a trust responsibility on the part of the state in intertidal land, the rights of the beneficiaries and the responsibilities of the trustees."[180]

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105 (1985).

173. 510 A.2d 509, 515-19 (Me. 1986).

174. *See, e.g.*, James v. Inhabitants of Town of West 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 . . . ."). The *James* court cited the Opinion of the Justices, 437 A.2d 597 (Me. 1981) as having affirmed the "continued vitality of the public trust doctrine." *Id.* at 865 n.5.

175. *Bell I*, 510 A.2d at 519.

176. *Id.* at 516 n.14.

177. *Id.*

178. *Id.*

179. *Id.* at 516 n.14.

180. *Id.* (citing Opinion of the Justices, 437 A.2d 597, 599-600, 610-11 (1981)).

The disingenuity of the Law Court's treatment of its 1981 *Opinion* is apparent when one considers the *Opinion*'s extensive references to the state's trusteeship over public rights in *both* intertidal and submerged lands.[181] In direct contradiction to these references, the *Bell I* court boldly asserted that it had never decided that the state or any other entity "other than the public at large 'owns' or 'holds' th[e] public easement and [there was] . . . no need to do so in the instant case."[182] The state simply could not be the trustee of the foreshore public easement because ownership of the fee is the *sine qua non* of trusteeship and the plaintiffs held fee simple title.

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. This formulation provides that the foreshore consists of two property interests: (1) the title or *jus privatum*, which can be owned by private parties, and (2) the public rights or *jus publicum*, which cannot.[183] In an earlier part of the *Bell I* opinion, Justice Glassman rejected the relevance of English common law, which embodies the *jus privatum/jus publicum* distinction. She found that Maine common law developed from the Massachusetts Colonial Ordinance of 1641-47, rather than directly from English common law.[184] Justice Glassman noted the academic controversy arising over the crown's presumptive title to intertidal lands in sixteenth and seventeenth century England.[185] She also expressed considerable skepticism toward the *jus privatum/jus publicum* distinction that has been the heart of the "settled American judicial construction" of property rights in the foreshore.[186] This skepticism foreshadows the otherwise unprecedented statement at the opinion's conclusion that "because the plaintiffs and not the State hold the fee simple title, the trustees, *if any*, of Moody Beach, would be the plaintiffs."[187] This startling dictum ignores the fundamental principle that has long characterized American law of intertidal property rights.[188] Chief Justice Taney wrote in *Martin v.*

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181. *See supra* notes 165-72 for discussion of *Opinion*.

182. *Bell I*, 510 A.2d at 517.

183. *See, e.g.*, Boston Waterfront Dev. Corp. v. Commonwealth, 378 Mass. 629, 633-34, 393 N.E.2d 356, 359 (1979).

184. *Bell I*, 510 A.2d at 511-12.

185. *Id.* at 511-12 n.5.

186. *Id.*

187. *Id.* at 517 (emphasis added).

188. 41 U.S. (16 Pet.) 367 (1842). *See also* Shively v. Bowlby, 152 U.S. 1 (1894); Illinois Cent. R.R. v. Illinois, 146 U.S. 387, 435 (1892) ("It is the settled law of this country that the ownership of and sovereignty over lands covered by tide waters . . . belong to the respective States . . . ."); *Bell II*, 557 A.2d 168, 181 (Wathen, J., dissenting); Boston Waterfront Dev. Corp. v. Commonwealth, 378 Mass. 629, 633-34, 393 N.E.2d 356, 359 (1979) ("The jus privatum/jus publicum distinction in regard to shoreland property was carried over to the new world, so that the [Massachusetts

Lessee of Waddell:

> [t]he men who first formed the English settlements, could not have been expected to encounter the many hardships that unavoidably attended their emigration to the new world, and to people the banks of its bays and rivers if the land under the water at their very doors was liable to immediate appropriation by another as private property.[189]

Moreover, Justice Glassman completely ignored the recent Supreme Court decision, *Phillips Petroleum Co. v. Mississippi*,[190] which reaffirmed the dual property interest in the foreshore, especially the public interests that state property law is required to protect.[191]

F. The Overlooked Significance of Phillips Petroleum Co. v. Mississippi

If the Law Court had reassessed its implication in *Bell I* that the state does *not* hold the public rights in trust (and its baffling suggestion that the upland owners may in fact be the trustees), it might have found *Bell I* inconsistent with the United States Supreme Court's discussion of the public trust in its 1988 decision in *Phillips Petroleum Co. v. Mississippi*. The Supreme Court reaffirmed the rule that, by virtue of the common law and the equal footing doctrine, states hold title (unless relinquished) to "the soil beneath the waters affected by the tides."[192] Whatever interest a state has retained in lands beneath tidal waters are held in trust for the public.[193]

Bay] company's ownership was understood to consist of a jus privatum which could be 'parceled out to corporations and individuals . . . as private property' and a jus publicum 'in trust for public use of all those who shold become inhabitants of said territory . . . .' ") (quoting Commonwealth v. City of Roxbury, 75 Mass. (1 Gray) 451, 483-84 (1857)).

189. Martin v. Lessee of Waddell, 41 U.S. (16 Pet.) at 414.

190. 484 U.S. 469 (1988).

191. The *Bell II* court indirectly acknowledged that prior cases had continued to recognize the presence of the *jus publicum*, or public rights, in the intertidal lands. *Bell II*, 557 A.2d at 173 (citing Marshall v. Walker, 45 A. 497, 498 (Me. 1900) ("the proprietor of the main holds the shore . . . in fee, like other lands, subject, however, to the jus publicum . . . .")).

192. Phillips Petroleum Co. v. Mississippi, 484 U.S. at 478 (prior cases recognizing state ownership were "an accurate description of the governing law.").

193. *Id.* at 481, 484. *See also* City of Berkeley v. Superior Court of Alameda County, 26 Cal. 3d 515, 521, 606 P.2d 362, 365, 162 Cal. Rptr. 327, 330 (1980), *cert. denied*, 449 U.S. 840 (1980) (privately owned tidelands in San Francisco Bay remain subject to the public trust); Boston Waterfront Dev. Corp. v. Commonwealth, 378 Mass. 629, 648-49, 393 N.E.2d 356, 366-67 (1979) (nineteenth century wharfing statutes granted title to foreshore subject to condition subsequent that parcel's use promotes public purpose for which the grant was made); Orion Corp. v. State, 109 Wash. 2d 621, 638-42, 747 P.2d 1062, 1071-73 (1987) (privately owned tidelands in Padilla Bay still subject to a public trust). *See generally* Stevens, *supra* note 145, at 214-20 (private foreshore grantee receives a naked fee subject to public trust).

The *Phillips* decision marked the first time since its early cases of *Illinois Central Railroad Co. v. Illinois*[194] and *Shively v. Bowlby*[195] that the Court had an opportunity to explore the public trust doctrine and to comment on its development in state courts. The Court drew upon these early cases to formulate a test to determine to which lands the states gained title upon entering the Union. The majority concluded that the test was tidal influence rather than navigability.[196] The petitioners argued the extent of state ownership was measured by navigability, because the rationale for public ownership was the overlying water's utility for fishing, commerce, and navigation. Those waters subject to the tides but unnavigable could not be used for these three purposes; under the petitioners' theory of the public trust, they could not be the subject of state ownership.[197] The Court rejected this argument, finding that the states took title to all tidally influenced lands upon admission to the Union.[198] Subsequent changes, if any, in the geographic scope of state tidelands ownership were entirely a matter of state law.[199] Noting that some of the original states had altered the scope of public ownership,[200] the Court affirmed the primacy of state law post-statehood in defining the boundaries of state ownership.[201]

The *Bell II* majority's only interest in *Phillips Petroleum* was in this last remark concerning changes in public ownership by state law. The Law Court latched on to the Supreme Court's reference to *Shively*[202] and its observation that the law in Massachusetts and Maine had altered the common law of tidelands ownership in favor of the upland owner.[203] The court all but ignored other aspects of *Phillips Petroleum*. It did not mention the *Phillips* Court's significant finding that commerce and navigation are not the sole purposes for which the trust in these lands are held. Navigability is an inappropriate measure of the trust's geographic reach because recreation

194. 146 U.S. 387 (1892).

195. 152 U.S. 1 (1894).

196. Phillips Petroleum Co. v. Mississippi, 484 U.S. at 478-80.

197. *Id.* at 478.

198. *Id.* at 481.

199. *Id.* at 482, 484.

200. *Id.* at 475.

201. *Id.* at 484.

202. *Id.* at 475 n.4 (citing Shively v. Bowlby, 152 U.S. 1, 18-19 (1894) (Massachusetts abrogated this common law of ownership and "[t]he rule or principle of the Massachusetts [colonial] ordinance has been adopted and practised . . . in . . . Maine . . . .")).

203. *Bell II*, 557 A.2d 168, 172-73 (Me. 1989) ("The *Phillips Petroleum* decision in 1988 in no way contradicts the plain and carefully explained decision in 1893 in *Shively v. Bowlby* . . . that Massachusetts and Maine had much earlier exercised their statehood powers over their intertidal lands and had adopted rules of real property law very different from those prevailing in many other states.") (citation omitted).

and a variety of other public uses are included within its purposes.[204] The Law Court rejected the claim of appellant and amicus, based on *Phillips*, that Maine acquired title in trust to all intertidal lands when it was admitted to the Union in 1820.[205] The *Phillips Petroleum* decision had overwhelmingly rejected the stability of expectations in property rights in favor of state definitions concerning the expanding range of public expectations for the use and enjoyment of tidelands.[206] On this significant aspect of *Phillips*, the *Bell II* court was again selectively silent.

VI. Just Compensation Clause Challenges in Recognition of the Public Trust

If the *Bell II* court had been more faithful to its previous decisions concerning the public trust, had undertaken an independent assessment of federal takings clause case law, and had considered the full import of *Phillips Petroleum*, its analysis of the just compensation claim by the Moody Beach property owners would have been very different. First, the court would have recognized the role of the Legislature in defining the substantive scope, if not the geographic reach, of the public trust. The court would have combined the basic analytical steps explicated in *Penn Central*[207] and subsequent Supreme Court decisions[208] with a recognition of the special character of public-trust-affected land. The court's inquiry would have focused on the character of the governmental action that the Intertidal Land Act represented and the small, if any, degree to which the Act interfered with the investment-backed expectations of the Moody Beach property owners. The court would necessarily have endorsed the Public Trust in Intertidal Land Act and the Legislature's role in setting guidelines for the use and management of the intertidal lands of Maine.

What is the character of the Legislature's enactment that is relevant to a takings clause analysis? Rather than view the Act as a *per se* taking of private property,[209] the Act could simply be characterized as an abatement of a public harm or nuisance. The targeted harm resulted from the increasing conflict over public rights to use

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204. Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 476 (1988).

205. *Bell II*, 557 A.2d at 172. The court dismissingly referred to this argument as a "revisionist view of history" that was "too late by at least 157 years." *Id.*

206. Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 481-84 (1988). The *Phillips* Court acknowledged the importance of recognizing "reasonable expectations in property interests" but such expectations could not be deemed reasonable where Mississippi law had "consistently" proclaimed the public trust in tidelands. This decision, therefore, only "confirm[ed] the prevailing understanding."

207. 438 U.S. 104 (1978).

208. *See supra* notes 57-83.

209. *See supra* notes 75-91 and accompanying text for discussion of error in finding the Act to be a *per se* taking.

the foreshore which has accompanied the tremendous growth in development along the Maine coast. Justice Harlan stated this public harm standard long ago in *Mugler v. Kansas*.[210] Justice Brandeis built upon the standard in his dissent in *Pennsylvania Coal Co. v. Mahon*.[211] The United States Supreme Court later reaffirmed the notion in *Keystone Bituminous Coal Association v. DeBenedictus*.[212]

Apart from this particular characterization of the Intertidal Land Act, the *Bell II* court could also have applied the converse of the "demanding standard of reasonableness" the court found applicable to the Filled Intertidal Land Act in the 1981 *Opinion of the Justices*.[213] Although courts usually grant legislative actions a presumption of constitutionality,[214] the court could have fashioned a *special* standard of deference for legislation that promotes public trust interests in trust-affected property.[215] This special standard could employ a presumption against a *per se* taking finding where actions promote public access to public trust resources.[216] This standard is incorporated, for example, in the Rhode Island Constitution, which by 1986 amendment, establishes a liberal rule of taking for actions promoting public use and enjoyment of the "privileges of the shoreline."[217]

The second major consideration in a just compensation clause analysis, whether it involves a regulatory takings challenge or an alleged physical or *per se* taking, is the legitimacy and reasonableness of the expectations of the private property owners. No definition of

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210. 123 U.S. 623 (1887). Harlan explained the public harm standard as follows:

> A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. . . . The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use . . . . In one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner.

Id. at 668-69.

211. 260 U.S. 393, 417 (1922) (Brandeis, J., dissenting). *See generally*, Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964).

212. 480 U.S. 470, 492 (1987) ("[T]he public interest in preventing activities similar to public nuisances is a substantial one . . . .").

213. *See supra* notes 165-71 and accompanying text.

214. *See Bell II*, 557 A.2d at 192 (Wathen, J., dissenting).

215. *See generally* Comment, *supra* note 109.

216. Such a standard would also be the converse of the standard of judicial skepticism that Professor Sax suggested as the basis for the *Illinois Central* test for alienations of public trust property. Sax, *supra* note 4, at 490.

217. R.I. CONST., art. I, §§ 16-17 (1988) (amended by constitutional convention in January, 1986). *See* Resolution No. 86-00003, as amended, entitled "A Resolution Relating to Shoreline Privileges."

private property is absolute. No definition of the "sticks" or "strands" that make up the bundle that is property is universally accepted. In recognition of this, the United States Supreme Court has adopted an *ad hoc* approach to takings clause challenges, one that looks at the specific governmental action and the impact on the particular piece of property.[218]

Public-trust-affected property is different from other property. The reasonableness of the private owner's expectations depends upon what public expectations are recognized as held within the trust.[219] Many state courts believe these public use rights expand with the growing recognition of other public values, particularly the ecological interrelatedness of all land and natural resources.[220] Trust-affected property includes privately owned tidelands; the land is impressed with public rights or a public easement. The owner is limited in her uses of the property because of these preexisting rights. Land that is not itself held in trust but is immediately adjacent to public trust land is also included in this category of "trust-affected" property. This principle of adjacency to public trust land was used by the New Jersey Supreme Court to find that public use rights extend to the privately owned dry sand beach.[221]

In a takings clause analysis evaluating the landowner's reasonable expectations, the inquiry should be whether the owner was on notice, at the time she acquired the property, of the change in the public trust's scope. The focus should be on whether the legislature, courts, administrative agencies, and the public sent a signal to the private owners that a broader definition of public interests was being recognized and vindicated through regulation or by their acts.[222]

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218. *See, e.g.*, Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).

219. *See, e.g.*, Orion Corp. v. State, 109 Wash. 2d 621, 747 P.2d 1062 (1987) (whether owners of private tidelands were deprived of all beneficial use by government action depends on what uses could have been made consistent with the public trust before the regulations were enacted; case remanded for additional factual findings).

220. *See, e.g.*, Marks v. Whitney, 6 Cal. 3d 251, 259-60, 491 P.2d 374, 380, 98 Cal. Rptr. 790, 796 (1971). This has troubled at least one commentator who describes the public trust doctrine as a way of reading the takings clause out of the Constitution, a "shell game," favored by state legislators and administrators because it allows them to circumvent their nemesis, the takings clause, under the rationale that the state is "merely acting as a trustee to protect public rights that have existed" at least since the Revolution and founding of the United States. *See, e.g.*, Huffman, *Avoiding the Takings Clause Through the Myth of Public Rights: The Public Trust and the Reserved Rights Doctrines at Work*, 3 J. LAND USE & ENV. L. 171, 192 (1987); Huffman, *Phillips Petroleum Co. v. Mississippi: Hidden Victory for Private Property?*, 19 ELR 10051, 10052-53 (1989).

221. Matthews v. Bay Head Improvement Ass'n, 95 N.J. 306, 322-26, 471 A.2d 355, 363-66 (1984).

222. *See* Comment, *The Fifth Amendment as a Limitation on the Public Trust Doctrine in Water Law*, 15 PAC. L.J. 1291, 1307-13 (1984) (a change in vested water use rights related to an expanding definition of public trust rights is compensable

As noted, such takings clause analysis should include recognition of the trust-protecting character of the governmental action and apply a special deferential standard of judicial review for actions that vindicate public trust interests.[223]

The *Bell II* court should have applied the two considerations to the Public Trust in Intertidal Land Act: (1) the nature of the governmental action and (2) the reasonableness of the private owner's expectations. The Act may have caused a temporary physical invasion by the public, although even this is hard to envision. The public already has the right to be physically present in the intertidal zone, so that the Act did not interfere with the essential property rights of the owners. Their power to make use of and possess the intertidal zone was not changed by the Act; the owners could still transfer or sell the property, subject as it always had been to an easement for public uses. That easement relates to the land's adjacency to ocean waters. Nor did the Act require the owner to "permit another to exercise complete dominion"[224] over the property in question, as in the case of the permanently affixed cable box in the *Loretto* case. Finally, the Act helped to prevent conflict among private owners and public users of the lands, preventing a "public trust nuisance" by removing the cloud of doubt that hung over the public's use of the foreshore. Such a legislative goal should have insulated the Act from invalidation under the takings clause, in view of the legislature's power to alter and clarify the common law of property, to "adapt it to the changes of time"[225] in recognition of "new social circumstances."[226] The changes of our times have created a heavy demand for the very limited opportunity to enjoy the shoreline and the power of the ocean to refresh and restore the human spirit. The common law, with the help of the Maine Legislature, must surely adapt to these changes.

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unless the owner has prior notice of change in public expectations).

223. *See supra* note 214-17 and accompanying text.

224. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 436 (1982).

225. *Id.* at 454 (Blackmun, J., dissenting) (quoting Munn v. Illinois, 94 U.S. 113, 134 (1877)).

226. *Id.*