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## The Low Water Mark for Beach Access: Defending Government Protection of Intertidal Recreation as a Lawful Exercise of State Power

Alexander Gazikas

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Alexander Gazikas

## The Low Water Mark for Beach Access: Defending Government Protection of Intertidal Recreation as a Lawful Exercise of State Power

17 U.N.H. L. REV. 287 (2019)

**ABSTRACT.** Beaches are a natural resource ideally suited for public recreation. The public generally has a right to access this intertidal land, but the purpose and scope of public access vary greatly between states. Consistent with national trends toward greater public access, the legislatures of Massachusetts and Maine have attempted to expand public beach access rights to include the right to engage in general recreation below the mean high tide line. However, the Supreme Judicial Courts of both states have declared that such legislation would be an unconstitutional taking of property requiring compensation to the abutting landowners and held that public rights of access are limited to the traditional purposes of fishing, fowling, and navigation. In doing so, the high courts of both states stymied a natural progression toward greater public intertidal rights based on a colonial city ordinance enacted in 1641. I argue that legislative determinations about the most socially valuable uses of intertidal land should be given significant weight, particularly in light of the inherent flexibility of public access rights and a national trend expanding beach access. Thus, in this Article, I argue that the state legislatures can broaden the public's right to beach access without constituting a taking. In doing so, the Article provides a roadmap for how legislatures, including those in Massachusetts and Maine, can draft legislation broadening beach access rights that can withstand constitutional scrutiny.

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**INTRODUCTION**

The public has long enjoyed an inherent right to access and use the intertidal zone, the land between the low and high tides. However, the public’s beach access needs have evolved in the hundreds of years since these rights were initially established. Modern courts and legislatures have responded by expanding the purposes for which the public may access the beach and the area of beach to which it has access. Despite this national trend, the courts of Massachusetts and Maine have drastically limited the public’s beach access rights. There, the public may only access the intertidal land for the traditional purposes of fishing, fowling, and navigation.

The Massachusetts and Maine legislatures have both attempted to broaden the public’s rights to include general recreation, but the Supreme Judicial Courts of both states have declared that such legislation would be an unconstitutional taking of property requiring compensation to the abutting landowners. I argue that courts should defer to legislative determinations about the most socially valuable uses of intertidal land, particularly in light of the inherent flexibility of public access rights and a national trend expanding beach access. Thus, in this Article, I argue that the state legislatures could grant this recreational right of access without constituting a taking.

## I. MAINE, MASSACHUSETTS, AND THE COLONIAL ORDINANCE

At English common law, the land between the high and low tide lines was held by the Crown for the benefit of the public.<sup>1</sup> This land was held as two associated classes of rights: the *jus privatum*, the private right, and the *jus publicum*, the public right.<sup>2</sup> The *jus publicum* provided the citizens the right to access the seashore for socially valuable purposes such as fishing and navigation.<sup>3</sup> While the private right in the property was alienable, the public right remained impressed upon the land even after it had been transferred.<sup>4</sup>

Following the American Revolution, the intertidal land passed from the Crown to the colonies, and then to the states, still encumbered by these public rights.<sup>5</sup> The states therefore possessed all land below the high tide line and held it subject to an inalienable requirement that it be used for the benefit of the public.<sup>6</sup>

Today, the public's right of access to the shoreline varies across states. Hawaii allows for the public use of land above the high tide line, extending to all dry sand.<sup>7</sup> New Jersey requires that the public be given reasonable access to the shoreline, which could include allowing access over private property.<sup>8</sup> Most coastal states recognize a right to engage in recreation on whatever land is available.<sup>9</sup>

Despite the general trend in favor of broad recreational beach access, two states

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<sup>1</sup> Timothy M. Mulvaney & Brian Weeks, "Waterlocked": Public Access to New Jersey's Coastline, 34 *ECOLOGY L.Q.* 579, 582–84 (2007) (citing JUSTINIAN I, *THE INSTITUTES OF JUSTINIAN WITH ENGLISH INTRODUCTION, TRANSLATION, AND NOTES* 91 (Thomas Collett Sandars trans., 7th ed. 1941)). For a detailed account of the public trust doctrine, see Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 *MICH. L. REV.* 471 (1970).

<sup>2</sup> Jose L. Fernandez, *Untwisting the Common Law: Public Trust and the Massachusetts Colonial Ordinance*, 62 *ALB. L. REV.* 623, 627 (1998).

<sup>3</sup> Mulvaney & Weeks, *supra* note 1, at 582.

<sup>4</sup> *Id.* at 583–84.

<sup>5</sup> Fernandez, *supra* note 2, at 629; see also *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 473 (1988) (citing *Shively v. Bowlby*, 152 U.S. 1, 57 (1894)) ("Upon the American Revolution, these rights, charged with a like trust, were vested in the original States within their respective borders . . .").

<sup>6</sup> Fernandez, *supra* note 2, at 624.

<sup>7</sup> *In re Ashford*, 440 P.2d 76, 77 (Haw. 1968).

<sup>8</sup> *Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355, 365 (N.J. 1984).

<sup>9</sup> *Nat'l Audubon Soc'y v. Super. Ct.*, 658 P.2d 709, 719 (Cal. 1983); *Maunalua Bay Beach Ohana 28 v. State*, 222 P.3d 441, 451 (Haw. Ct. App. 2009); *Glass v. Goeckel*, 703 N.W.2d 58, 73 (Mich. 2005); *Neptune City v. Avon-by-the-Sea*, 294 A.2d 47, 55 (N.J. 1972); *Nies v. Town of Emerald Isle*, 780 S.E.2d 187, 194 (N.C. Ct. App. 2015); *Cavanaugh v. Town of Narragansett*, 1997 WL 1098081, at \*9 (R.I. Super. Ct. Oct. 10, 1997); *Movrich v. Lobermeier*, 889 N.W.2d 454, 465 (Wis. Ct. App. 2016).

have retained unusually restrictive approaches to public access.<sup>10</sup> Massachusetts and Maine have extended private ownership to include the intertidal land and allow public access only for the purposes of fishing, fowling, and navigation.<sup>11</sup> This anomaly has historical roots in Massachusetts that predate the creation of the United States.<sup>12</sup>

Following the English tradition, private land ownership in colonial Massachusetts originally extended only to the high tide line while everything below that line was owned by the colony for the benefit of the public.<sup>13</sup> The public's right to use this land was codified by a Massachusetts Bay Colony city ordinance in 1641, which granted the public the right to "free fishing and fowling in any great ponds, bays, coves, and rivers, so far as the sea ebbs and flows . . ."<sup>14</sup>

However, the colony needed shipping wharves and could not afford to build them with public funds.<sup>15</sup> In order to incentivize private wharf construction, the ordinance was amended in 1647<sup>16</sup> to grant the intertidal land to abutting landowners, with the hopes that they would build wharves themselves on their newly acquired land.<sup>17</sup> The 1647 amendment thus extended private ownership from the average high tide line to the average low tide line while retaining the public's access rights for fishing, fowling, and navigation.<sup>18</sup>

That ordinance was soon annulled, but it resurfaced 150 years later in *Storer v. Freeman*.<sup>19</sup> Chief Justice Parsons stated that although the ordinance was no longer in effect, "a usage has prevailed, which now has force as our common law, that the owner of lands bounded on the sea . . . shall hold [title] to [the] low water mark . . .

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<sup>10</sup> See *Bell v. Town of Wells*, 557 A.2d 168, 172 (Me. 1989); *Storer v. Freeman*, 6 Mass. 435, 438 (1810).

<sup>11</sup> See *Bell*, 557 A.2d at 172; *Storer*, 6 Mass. at 438.

<sup>12</sup> See *Bell*, 557 A.2d at 172; *Storer*, 6 Mass. at 438.

<sup>13</sup> *Home for Aged Women v. Commonwealth*, 89 N.E. 124, 124 (Mass. 1909); *Commonwealth v. Alger*, 61 Mass. 53, 66 (1851); *Storer*, 6 Mass. at 438.

<sup>14</sup> *Alger*, 61 Mass. at 67.

<sup>15</sup> *Storer*, 6 Mass. at 438.

<sup>16</sup> See *Alger*, 61 Mass. at 67–68 (noting new provisions were "probably passed" in 1647); see also *Opinion of the Justices*, 313 N.E.2d 561, 565 (Mass. 1974) ("This was accomplished by what has become known as the colonial ordinance of 1641–47, which is found in the 1649 codification."). See generally *Storer*, 6 Mass. at 438.

<sup>17</sup> See *Opinion of the Justices*, 313 N.E.2d at 565; *Alger*, 61 Mass. at 68.

<sup>18</sup> *Alger*, 61 Mass. at 67–70.

<sup>19</sup> *Storer*, 6 Mass. at 438.

.<sup>20</sup> Further, “[a]lthough strictly the ordinance was limited to the area of Massachusetts Bay Colony, it has long been interpreted as effecting a grant of the tidal land to all coastal owners in the Commonwealth.”<sup>21</sup> Therefore, private owners along the entire coast of Massachusetts possessed title to the intertidal land.<sup>22</sup>

This ordinance has since become the final word on Massachusetts beach access.<sup>23</sup> In 1974, in an attempt to bring Massachusetts into conformity with the general trend of other coastal states, the Massachusetts House of Representatives proposed legislation expanding public access.<sup>24</sup> The proposed act would have granted a “public on-foot free right-of-passage up to the mean high water line,” subject to certain restrictions.<sup>25</sup> It therefore expanded the uses of the public trust property beyond the traditional categories of fishing, fowling, and navigation.

The House requested an advisory opinion from the Supreme Judicial Court (SJC)<sup>26</sup> as to whether the proposed bill would be an unconstitutional taking of private property without just compensation.<sup>27</sup> The SJC framed its inquiry around the 1647 ordinance amendment.<sup>28</sup> The court stated that to satisfy the Constitution, the right-of-way had to be a “natural derivative” of the public’s existing access rights.<sup>29</sup> The court found that an on-foot right-of-passage was not “reasonably related” to the exercise of the rights granted in the ordinance.<sup>30</sup> The court therefore held that the proposed Act would be a taking of private property requiring just compensation as a categorical “permanent physical intrusion.”<sup>31</sup>

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<sup>20</sup> *Id.*

<sup>21</sup> *Opinion of the Justices*, 313 N.E.2d at 566 (citing *Weston v. Sampson*, 8 Cush. 347, 353–54 (1851)).

<sup>22</sup> *Id.*

<sup>23</sup> *Alger*, 61 Mass. at 69–70; *Barker v. Bates*, 30 Mass. (13 Pick.) 255, 258 (1832); see *Opinion of the Justices*, 313 N.E.2d at 566 (citing *Weston*, 8 Cush. at 353–54).

<sup>24</sup> See *Opinion of the Justices*, 313 N.E.2d at 563.

<sup>25</sup> *Id.* at 564. The right-of-way was not available before sunrise or after sunset, in areas protected by the Department of Natural Resources, or where there was a structure, enclosure, or other improvement. *Id.*

<sup>26</sup> Both Maine and Massachusetts refer to their highest court as “Supreme Judicial Court.” *Bell v. Town of Wells*, 557 A.2d 168 (Me. 1989); *Storer v. Freeman*, 6 Mass. 435 (1810).

<sup>27</sup> *Opinion of the Justices*, 313 N.E.2d at 565, 568.

<sup>28</sup> See *id.* at 566.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 566, 568.

<sup>31</sup> *Id.* at 568.

The 1647 ordinance has similar controlling authority in Maine.<sup>32</sup> In 1986, Maine's legislature passed The Public Trust in Intertidal Land Act.<sup>33</sup> The Act provided a right of access to "use intertidal land for recreation" and granted "any other trust rights to use intertidal land recognized by the Maine common law . . ."<sup>34</sup> In a holding that scholars have found anomalous,<sup>35</sup> the Maine SJC invalidated the statute and upheld a private owner's quiet title action to an area of beachfront.<sup>36</sup> The court analyzed the statute in light of the 1647 ordinance and heavily relied upon the Massachusetts SJC advisory opinion.<sup>37</sup>

Both states' legislatures have thus attempted to expand public beach access rights to allow uses beyond fishing, fowling, and navigation.<sup>38</sup> At the same time, most coastal states had already broadened public access rights beyond the traditional categories.<sup>39</sup> Some states went further and expanded the public's access rights to land above the high tide line.<sup>40</sup> Despite this trend across the West Coast,<sup>41</sup>

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<sup>32</sup> Maine was once part of Massachusetts but separated in 1820. *Bell v. Town of Wells*, 557 A.2d 168, 172 (Me. 1989). The Massachusetts Act of Separation stated: "[a]ll Grants of land . . . which have been . . . made by the said Commonwealth [of Massachusetts], before the separation of said District [of Maine] shall take place, and having . . . effect within the said district, shall continue in full force . . ." *Id.* (citing Massachusetts Act of Separation, Mass. Laws 1819, ch. 161, § 1 *Seventh*). The Supreme Judicial Court of Maine thus incorporated the ordinance into Maine common law. *Lapish v. President of the Bangor Bank*, 8 Me. 85, 93 (1831).

<sup>33</sup> 1985 Me. Laws 782 (codified as amended at ME. REV. STAT. ANN. 12, § 573 (2018)); *Bell*, 557 A.2d at 176.

<sup>34</sup> 1985 Me. Laws 782 (codified as amended at ME. REV. STAT. ANN. 12, § 573).

<sup>35</sup> Hope M. Babcock, *Has the U.S. Supreme Court Finally Drained the Swamp of Takings Jurisprudence?: The Impact of Lucas v. South Carolina Coastal Council on Wetlands and Coastal Barrier Beaches*, 19 HARV. ENVTL. L. REV. 1, 55–56 (1995) (describing the case as the "only . . . instance in which an assertion of public trust authority has been declared unconstitutional").

<sup>36</sup> *Bell*, 557 A.2d at 169, 190–91.

<sup>37</sup> *Id.* at 174.

<sup>38</sup> See 1985 Me. Laws 782 (codified as amended at ME. REV. STAT. ANN. 12, § 573); Opinion of the Justices, 313 N.E.2d 561, 563 (Mass. 1974).

<sup>39</sup> See cases cited *supra* note 9.

<sup>40</sup> *Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355 (N.J. 1984). The court did not address the extent of this reasonable access over private property. *Id.* at 369 ("All we decide here is that private land is not immune from a possible right of access to the foreshore for swimming or bathing purposes, nor is it immune from the possibility that some of the dry sand may be used by the public incidental to the right of bathing and swimming."); *Nies v. Town of Emerald Isle*, 780 S.E.2d 187, 195 (N.C. Ct. App. 2015); *State ex rel. Thornton v. Hay*, 462 P.2d 671, 678 (Or. 1969).

<sup>41</sup> *Nat'l Audubon Soc'y v. Super. Ct.*, 658 P.2d 709, 719 (Cal. 1983); *Thornton*, 462 P.2d at 673.

Hawaii,<sup>42</sup> and much of the East Coast,<sup>43</sup> Massachusetts and Maine remain trapped by a city ordinance passed prior to the ratification of the Constitution.<sup>44</sup>

I argue that state legislatures in Massachusetts, Maine, and other coastal states may expand the public's beach access rights without constituting a taking. Specifically, this Article shows that legislation granting the public the right to use the land below the mean high tide line for general recreation would not be an unconstitutional taking because it reflects a background principle of state law.<sup>45</sup>

## II. LEGISLATION PERMITTING PUBLIC ACCESS FOR GENERAL RECREATION BELOW THE MEAN HIGH TIDE LINE WOULD NOT CONSTITUTE A TAKING

The Fifth Amendment prohibits the government from forcing “some people alone to bear public burdens, which, in all fairness and justice, should be borne by

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<sup>42</sup> *In re Ashford*, 440 P.2d 76 (Haw. 1968).

<sup>43</sup> *Matthews*, 471 A.2d at 369; *Nies*, 780 S.E.2d at 195; *Cavanaugh v. Town of Narragansett*, 1997 WL 1098081, at \*9 (R.I. Super. Ct. Oct. 10, 1997).

<sup>44</sup> *See* Opinion of the Justices, 313 N.E.2d 561, 566 (Mass. 1974).

<sup>45</sup> This Article only addresses the question of whether expansion of public beach access should be precluded from takings inquiry altogether because it falls within a background principle of state law. This Article does not consider whether such legislation would constitute a categorical physical invasion taking or whether it should instead be analyzed under the more lenient *Penn Central* test. *See generally* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 123–25 (1978). Many scholars and jurists believe that the application of *per se* rules in takings jurisprudence is unhelpful and counterproductive. Andrea Peterson has argued that courts should not, and in fact have not, actually treated cases involving physical invasion as *per se* takings without considering the purpose of the government's actions. Andrea L. Peterson, *The False Dichotomy Between Physical and Regulatory Takings Analysis: A Critique of Tahoe-Sierra's Distinction Between Physical and Regulatory Takings*, 34 *ECOLOGY L.Q.* 381 (2007); *see also* Joseph William Singer, *Justifying Regulatory Takings*, 41 *OHIO N.U. L. REV.* 601, 633 (2015) (“[T]he so-called categorical or *per se* takings are merely applications of the three [*Penn Central*] factors); *id.* at 661 (arguing that courts should and do consider the justifications for the government's action when determining whether compensation is required). For examples of justices applying ad hoc balancing rather than *per se* treatment, see *Palazzolo v. Rhode Island*, 533 U.S. 606, 632 (2001) (O'Connor, J., concurring) (reiterating her view that *Penn Central* is the appropriate method of analyzing takings claims rather than adoption of *per se* rules); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1034 (1992) (Kennedy, J., concurring) (discussing *Penn Central*). For analysis of the Massachusetts and Maine legislation under the traditional takings rubric, see Sharon M. P. Nicholls, Note, *Public Right of Passage Along the Massachusetts Coast: An Argument for Implementation Without Compensation*, 4 *B.U. PUB. INT. L.J.* 113, 114, 128–29 (1994) (arguing that the legislation should not be considered a *per se* taking because it is not a “new” physical invasion).

the public as a whole.”<sup>46</sup> The United States Supreme Court has “resist[ed] the temptation to adopt *per se* rules”<sup>47</sup> in this area, and has instead considered a holistic, multifactor approach to determine whether a regulation “goes too far.”<sup>48</sup> Under the test announced in *Penn Central Transportation Co. v. New York City*,<sup>49</sup> a court should consider the economic impact of the regulation, the regulation’s interference with investment-backed expectations, and the character of the government action.<sup>50</sup> In some cases, a single factor can reach such an “extreme form” that it is not only important, but determinative.<sup>51</sup> Such “categorical takings” are limited to instances in which a regulation imposes a “permanent physical occupation,”<sup>52</sup> or “denies all economically beneficial . . . use of land.”<sup>53</sup>

In holding that the denial of all economic use is a categorical taking, the Court also acknowledged a limitation to such claims. The Court in *Lucas v. South Carolina Coastal Council*<sup>54</sup> recognized that a regulation is not an unconstitutional taking if it prohibits a use that is already proscribable by “background principles of the State’s law of property . . . .”<sup>55</sup>

Thus, “the *Lucas* decision fundamentally revised all takings analysis by making the nature of the landowner’s property rights a threshold issue in every case.”<sup>56</sup> The “background principles of state law” question has therefore developed into a categorical rule, which can bar otherwise valid takings claims.<sup>57</sup>

Based on this “background principles” defense, legislation expanding the

<sup>46</sup> *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

<sup>47</sup> *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 326 (2002).

<sup>48</sup> *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

<sup>49</sup> 438 U.S. 104, 123–25 (1978).

<sup>50</sup> *Id.* at 124; *see, e.g., Palazzolo*, 533 U.S. at 633–34 (O’Connor, J., concurring) (discussing the *Penn Central* test).

<sup>51</sup> *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982).

<sup>52</sup> *Id.*

<sup>53</sup> *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015, 1019 (1992); Michael C. Blumm & Lucas Ritchie, *Lucas’s Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses*, 29 HARV. ENVTL. L. REV. 321, 321 (2005) (“Justice Scalia’s opinion [in *Lucas*] . . . declared that a regulation depriving a landowner of all economic value was a categorical constitutional taking of private property for public use requiring government compensation regardless of the public purpose served by the regulation.”).

<sup>54</sup> 505 U.S. 1003 (1992).

<sup>55</sup> *Id.* at 1029.

<sup>56</sup> Blumm & Ritchie, *supra* note 53, at 322.

<sup>57</sup> *See id.* at 327–28.

public's rights to include recreation would not be a taking requiring compensation. First, section A introduces the concept of background principles that can serve as a defense to a takings claim and demonstrate that the public trust doctrine is an example of such a background principle. Second, section B argues that legislation may reflect a background principle even if it announces a rule not yet adopted as a matter of state common law. Finally, section C argues that legislative expansion of the public rights to include recreational use below the mean high tide line is a valid application of the public trust doctrine as a background principle. In doing so, I provide methods by which a future legislature could craft a law that will comport with reasonable applications of relevant precedent and also create broad public access rights.

### **A. The Public Trust Doctrine Is a Background Principle of State Law**

The State regulation is not a taking if it reflects a preexisting limitation that merely duplicates the result that could have been achieved by the courts pursuant to a background principle of state law.<sup>58</sup> Legislation that reflects a background principle cannot be a taking of property because the prohibited use was never a stick in the owner's bundle of rights in the first place.<sup>59</sup> Instead, such a limitation is merely one that "inhere[s] in the title itself."<sup>60</sup>

While the background principles formulation first appeared in *Lucas*, it is not a new concept in takings jurisprudence.<sup>61</sup> Rather, it is rooted in the "noxious use doctrine," or "nuisance exception," which has existed as long as regulatory takings themselves.<sup>62</sup> In 1887, the Court in *Mugler v. Kansas*<sup>63</sup> upheld regulations prohibiting alcohol production, holding that state action does not constitute a taking when it imposes 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 . . ."<sup>64</sup> Thus, the nuisance exception ensured that states would be able to exercise their police powers without being required to compensate any

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<sup>58</sup> *Lucas*, 505 U.S. at 1029.

<sup>59</sup> Blumm & Ritchie, *supra* note 53, at 325.

<sup>60</sup> *Lucas*, 505 U.S. at 1029.

<sup>61</sup> See *id.* at 1047–50 (Blackmun, J., dissenting) (discussing history of "noxious use" doctrine and collecting cases).

<sup>62</sup> *Pa. Coal Co. v. Mahon*, 260 U.S. 393 (1922), is recognized as the birth of regulatory takings; see also *Lucas*, 505 U.S. at 1047–50 (Blackmun, J., dissenting); Blumm & Ritchie, *supra* note 53, at 325 n.24.

<sup>63</sup> 123 U.S. 623 (1887).

<sup>64</sup> *Id.* at 668.

landowner whose interests were adversely affected.<sup>65</sup>

The Court in *Lucas* did not accept South Carolina's application of the "noxious use" doctrine, but affirmed the doctrine's theoretical underpinnings with the background principles exception.<sup>66</sup> Thus, the long-recognized concept that the regulatory takings doctrine "does not immunize owners from the rule of law or democratic governance"<sup>67</sup> was reaffirmed in *Lucas*, not rejected. If anything, *Lucas* arguably broadened the concept because background principles, unlike the nuisance exception, apply to government action that is benefit-conferring as well as harm-preventing.<sup>68</sup>

State courts have recognized a variety of property law concepts as background principles that preclude regulatory takings claims, including the natural use doctrine,<sup>69</sup> custom,<sup>70</sup> water rights,<sup>71</sup> and the wildlife trust.<sup>72</sup> The public trust doctrine has been applied as a background principle by courts in Massachusetts,<sup>73</sup> the Supreme Court of South Carolina,<sup>74</sup> the Ninth Circuit,<sup>75</sup> and the Wisconsin Supreme Court.<sup>76</sup>

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<sup>65</sup> *Id.* at 667–68.

<sup>66</sup> See Blumm & Ritchie, *supra* note 53, at 333 (arguing that the "background principles" defense is actually more protective of governmental action because it is (1) analyzed prior to the merits of the takings claim and (2) "not limited to harm-preventing . . . restrictions"); Richard J. Lazarus, *Putting the Correct "Spin" on Lucas*, 45 STAN. L. REV. 1411, 1426 (1993) ("The Court engaged in a shell game by pointedly rejecting a 'noxious' or 'harmful use' exception to the Takings Clause, only to adopt its analytical equivalent dubbed 'background principles of nuisance and property law.'").

<sup>67</sup> Singer, *supra* note 45, at 608.

<sup>68</sup> See Carol Necole Brown, *The Categorical Lucas Rule and the Nuisance and Background Principles Exception*, 30 TAURO L. REV. 349, 359 (2014); Blumm & Ritchie, *supra* note 53, at 333; Lazarus, *supra* note 66, at 1426.

<sup>69</sup> See *Just v. Marinette County*, 201 N.W.2d 761, 767 (Wis. 1972); Blumm & Ritchie, *supra* note 53, at 344.

<sup>70</sup> See *Stevens v. City of Cannon Beach*, 854 P.2d 449, 456–57 (Or. 1993); Blumm & Ritchie, *supra* note 53, at 347.

<sup>71</sup> See *W. Maricopa Combine, Inc. v. Ariz. Dep't of Water Res.*, 26 P.3d 1171, 1180 (Ariz. Ct. App. 2001); Blumm & Ritchie, *supra* note 53, at 350.

<sup>72</sup> See *State v. Sour Mountain Realty, Inc.*, 714 N.Y.S.2d 28, 84 (N.Y. App. Div. 2000); Blumm & Ritchie, *supra* note 53, at 352.

<sup>73</sup> See *Wilson v. Commonwealth*, 583 N.E.2d 894, 901 (Mass. App. Ct. 1992).

<sup>74</sup> See *McQueen v. S.C. Coastal Council*, 580 S.E.2d 116, 119 (S.C. 2003).

<sup>75</sup> See *Esplanade Props., LLC v. City of Seattle*, 307 F.3d 978, 985 (9th Cir. 2002) (applying Washington law).

<sup>76</sup> See *R.W. Docks & Slips v. State*, 628 N.W.2d 781, 784 (Wis. 2001).

The public trust doctrine is a quintessential background principle of state law.<sup>77</sup> Conveyance of trust property is made “subject to the right of the public.”<sup>78</sup> The *jus publicum* cannot be alienated from public trust property, and title to such property is therefore “different in character [than ordinary land].”<sup>79</sup> The foundational premise of the public trust doctrine is that the right to exclude the public from using the property for its benefit was never a stick in the owner’s bundle of rights.<sup>80</sup> Thus, it is a quality that “inhere[s] in the title itself.”<sup>81</sup>

Further, states have been given great latitude in defining background principles.<sup>82</sup> While federal courts could theoretically limit what may serve as a background principle as a matter of federal constitutional law, the inquiry is so intertwined with quintessential state law issues that close scrutiny would offend our notions of federalism.<sup>83</sup> Moreover, given the pronouncement that “states have the power to define the limits of the land held in public trust,”<sup>84</sup> it is unlikely that the Court would review and reject a state’s interpretation of the public trust doctrine as a background principle of state law.<sup>85</sup>

### **B. Background Principles Can Evolve Over Time**

The background principles defense protects legislation prohibiting conduct that “was *always* unlawful.”<sup>86</sup> Laws that proscribe uses already prohibited by state

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<sup>77</sup> See, e.g., Blumm & Ritchie, *supra* note 53, at 341–42.

<sup>78</sup> Neptune City v. Avon-by-the-Sea, 294 A.2d 47, 54 (N.J. 1972).

<sup>79</sup> Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 452 (1892).

<sup>80</sup> See *id.*; Blumm & Ritchie, *supra* note 53, at 341–42.

<sup>81</sup> Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029 (1992).

<sup>82</sup> See Blumm & Ritchie, *supra* note 53, at 364–65.

<sup>83</sup> See *id.* at 364–65 (discussing federalism concerns relating to federal resolution of “background principles”); see also Lazarus, *supra* note 66, at 1430 (noting that the background principles’ focus on state property and tort law could lead federal courts to abstain from considering the issue).

<sup>84</sup> Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 475 (1988).

<sup>85</sup> The Court has repeatedly refused to grant certiorari to review the “background principles” issue. Over Justice Scalia’s dissent, the Court refused to review Oregon’s application of custom as a “background principle” to reject a takings claim. See *Stevens v. City of Cannon Beach*, 510 U.S. 1207, 1209–14 (1994) (Scalia, J., dissenting from denial of certiorari). The Oregon Supreme Court had rejected a takings challenge to the state’s denial of a building permit that would have interfered with the public’s customary right to access the beach. See *Stevens v. City of Cannon Beach*, 854 P.2d 449, 450–51 (Or. 1993), *cert. denied*, 510 U.S. 1207; see also Blumm & Ritchie, *supra* note 53, at 347–49 (discussing the Oregon Supreme Court’s decision in *Stevens*).

<sup>86</sup> Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1030 (1992).

law cannot be takings because, simply put, nothing was taken; the legislature is merely “duplicat[ing] the result that could have been achieved in the courts—by adjacent landowners (or other uniquely affected persons) under the State’s law of private nuisance, or by the State under its complementary power to abate [public] nuisances . . . .”<sup>87</sup>

However, this does not mean that the legislature can pass laws based in background principles only in ways that have been explicitly resolved by the common law.<sup>88</sup> Rather, making “implications of those background principles . . . explicit”<sup>89</sup> necessarily involves a level of interpretation by the legislature of what those background principles entail. Thus, in *Lucas*, the Court held that a state is free to apply a background principle to meet contemporary needs as long as the application is “objectively reasonable.”<sup>90</sup>

Giving guidance in this area, Justice Scalia explained that background principles include instances in which “changed circumstances or new knowledge . . . make what was previously permissible no longer so.”<sup>91</sup> As an example, he explained that “the corporate owner of a nuclear generating plant, when it is directed to remove all improvements from its land upon discovery that the plant sits astride an earthquake fault,” would not be entitled to compensation.<sup>92</sup> Thus, “new knowledge” about a fault line would allow the government to physically invade the property, to deprive the owner of all economically beneficial use, to condemn the plant, or to do anything else it may choose to do to prevent the harm.<sup>93</sup> Clearly, background principles of state law are not static, but can be adapted to suit modern needs.

Again, this is not a new concept in takings jurisprudence. In finding zoning restrictions constitutional, the U.S. Supreme Court in 1926 consulted the law of nuisance “not for the purpose of controlling, but for the helpful aid of its analogies.”<sup>94</sup> As Professor Humbach has stated:

Indeed, no such narrow reading of state legislatures’ land-use powers, limiting them to re-enacting the common law of nuisance, is supported by precedent. . . . The

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<sup>87</sup> *Id.* at 1029; *see, e.g.,* *M & J Coal Co. v. United States*, 47 F.3d 1148, 1154 (Fed. Cir. 1995) (holding that prohibition on plaintiff’s mining rights was not a taking because plaintiffs “never acquired the right to mine in such a way as to endanger the public health and safety”).

<sup>88</sup> *See Lucas*, 505 U.S. at 1030–31; Blumm & Ritchie, *supra* note 53, at 343.

<sup>89</sup> *Lucas*, 505 U.S. at 1030.

<sup>90</sup> *Id.* at 1032 n.18.

<sup>91</sup> *Id.* at 1031.

<sup>92</sup> *Id.* at 1029.

<sup>93</sup> *See id.* at 1029, 1031.

<sup>94</sup> *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387–88 (1926).

Court has plainly acknowledged that legislatures have greater power by using language such as “akin to a public nuisance” and “nuisance-like” to describe [the] kinds of land uses a legislature may restrict . . . . Even more to the point, the Court has consistently upheld legislatures’ power to restrict a wide variety of undesirable uses and activities not considered nuisances at common law . . . .<sup>95</sup>

Thus, legislatures may draw on common law principles to regulate a wide range of conduct pursuant to their police powers.<sup>96</sup> The development of nuisance law has been described as a “functional dialogue” between the legislature and judiciary.<sup>97</sup> Because “property law has always been functional, encouraging behavior compatible with contemporary goals of the economy,”<sup>98</sup> it is logical that property law has developed through similar “interplay”<sup>99</sup> between legislative and judicial action.

Just as courts have recognized that legislatures are empowered to prohibit “nuisance-like”<sup>100</sup> conduct, courts also have recognized that states may exercise their police powers by drawing upon public trust principles.<sup>101</sup> For example, the New Jersey legislature expanded and codified the holdings of the New Jersey Supreme Court in a series of regulations granting expansive public access to the shoreline.<sup>102</sup> Similarly, North Carolina has stated that the legislature may “modify any prior common law understanding of the geographic limits of the[] public trust

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<sup>95</sup> John A. Humbach, *Evolving Thresholds of Nuisance and the Takings Clause*, 18 COLUM. J. ENVTL. L. 1, 8–9 (1993) (footnotes omitted).

<sup>96</sup> See *id.* at 17–18 (discussing history of statutory nuisances and their ability to meet changing conditions).

<sup>97</sup> Babcock, *supra* note 35, at 22 n.113 (citing Memorandum from Professor Zygmunt Plater, Boston College Law School, to Cotton Harness, General Counsel, South Carolina Coastal Council (Nov. 14, 1992) (on file with the *Harvard Environmental Law Review*)).

<sup>98</sup> Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council*, 45 STAN. L. REV. 1433, 1447 (1993). See generally Joseph William Singer, *The Rule of Reason in Property Law*, 46 U.C. DAVIS L. REV. 1369, 1425 (2013).

<sup>99</sup> Babcock, *supra* note 35, at 22 n.113.

<sup>100</sup> *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 491 n.20 (1987).

<sup>101</sup> *Mulvaney & Weeks*, *supra* note 1, at 595–96.

<sup>102</sup> *Id.* at 594. The Public Access to Waterfront rule requires that coastal owners “provide permanent perpendicular and linear access to the waterfront to the maximum event practical, including both visual and physical access.” N.J. ADMIN. CODE § 7:7E-8.11(b) (2006). The Hudson Waterfront Walkway rule requires paved paths and walkways to provide access to the shore. N.J. ADMIN. CODE § 7:7E-4.38 (2006).

rights.”<sup>103</sup> Such legislative expansion has been upheld against takings challenges.<sup>104</sup>

Further, the U.S. Supreme Court has indicated that there is more leeway in expansive applications of background principles in areas that have been traditionally subject to regulation by the state.<sup>105</sup> “When takings plaintiffs bring challenges based on property uses that have traditionally been subject to regulation, those claims can be summarily rejected at the threshold level, albeit with recognition . . . that ‘a law does not become a background principle . . . by enactment itself.’”<sup>106</sup>

**C. *Legislation Granting the Public the Right to Use the Intertidal Land for General Recreation Is a Valid Application of the Evolving Background Principles of the Public Trust Doctrine***

Legislation expanding the public’s right to use the land below the high tide line for general recreation is a valid application of a background principle of state law. First, the legislature should be given deference in determining the best uses to which the public may put the land it unquestionably has a right to access. In the following section, I provide recommendations about how a legislature may formulate such a law. Second, such legislation can be a background principle, despite contrary holdings by the state courts. Finally, owners of land abutting the ocean do not have reasonable, investment-backed expectations of an unfettered right to exclude the public.

1. **Courts Should Defer to the Legislature’s Application of the Public Trust Doctrine**

Title to public trust land is held by the owner while beneficial ownership over the land is held by the public.<sup>107</sup> As the representative of the public, the legislature’s determinations about the best uses of trust property are entitled to deference. A legislative finding that public beach recreation is beneficial should not be

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<sup>103</sup> *Nies v. Town of Emerald Isle*, 780 S.E.2d 187, 195 (N.C. Ct. App. 2015) (holding that legislation authorizing the public to drive over privately owned beaches did not constitute a taking, noting that some public access to privately owned beaches was customary in North Carolina).

<sup>104</sup> See *Nat’l Ass’n of Home Builders v. N.J. Dep’t of Env’tl. Prot.*, 64 F. Supp. 2d 354, 358 (D.N.J. 1999). *But see Galt v. Montana*, 731 P.2d 912, 916 (Mont. 1987) (finding unconstitutional legislation that expanded the state’s common law rule by requiring property owners to build structures to facilitate use of public trust lands).

<sup>105</sup> *Blumm & Ritchie*, *supra* note 53, at 357.

<sup>106</sup> *Id.* at 357 (quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 630 (2001)).

<sup>107</sup> See *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 452 (1892).

contravened by judicial activism or reliance on a centuries-old ordinance.<sup>108</sup>

Many states have identified public recreation as a valid public trust use.<sup>109</sup> The New Jersey Supreme Court had “no difficulty finding that, in this latter half of the twentieth century, the public rights in tidal lands are not limited to the ancient prerogatives of navigation and fishing, but extend as well to recreational uses.”<sup>110</sup> Neither have the courts of California,<sup>111</sup> North Carolina,<sup>112</sup> Washington,<sup>113</sup> Rhode Island,<sup>114</sup> Wisconsin,<sup>115</sup> Michigan,<sup>116</sup> or Hawaii.<sup>117</sup>

Beach recreation has social value in the modern era that makes it worthy of protecting with the public trust doctrine. In colonial times, fishing, fowling, and navigation were vital for sustenance and commerce.<sup>118</sup> Today, the primary social value of the beach is recreation.<sup>119</sup> The New Jersey Supreme Court acknowledged the value of recreation, noting that the “popularity for recreational uses [of the beach] and open space are much heavier [than in the past], and their importance to the public welfare has become much more apparent.”<sup>120</sup>

Precluding recreational use of the beach deprives a state of the profits of its natural resources. Tourism and recreation are more commercially valuable today

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<sup>108</sup> See *Lazarus*, *supra* note 66, at 1427 (discussing Justice O’Connor’s concern with judges intruding on legislative functions of factfinding and policymaking).

<sup>109</sup> See *District of Columbia v. Air Fla., Inc.*, 750 F.2d 1077, 1083 n.29 (D.C. Cir. 1984) (noting national trend expanding the doctrine to include recreation and collecting cases).

<sup>110</sup> *Neptune City v. Avon-by-the-Sea*, 294 A.2d 47, 54 (N.J. 1972).

<sup>111</sup> *Nat’l Audubon Soc’y v. Super. Ct.*, 658 P.2d 709, 719 (Cal. 1983) (including “general recreation” as valid use of trust and noting that the “public uses to which tidelands are subject are sufficiently flexible to encompass changing public needs” (citations omitted)).

<sup>112</sup> *Nies v. Town of Emerald Isle*, 780 S.E.2d 187, 191 (N.C. Ct. App. 2015).

<sup>113</sup> *Citizens for Responsible Wildlife Mgmt. v. State*, 103 P.3d 203, 205–06 (Wash. Ct. App. 2004).

<sup>114</sup> *Cavanaugh v. Town of Narragansett*, No. WC 91-0496, 1997 WL 1098081, at \*11–12 (R.I. Super. Ct. Oct. 10, 1997) (citing R.I. CONST. art. I. § 17).

<sup>115</sup> *Movrich v. Lobermeier*, 889 N.W.2d 454, 465 (Wis. Ct. App. 2016).

<sup>116</sup> *Glass v. Goeckel*, 703 N.W.2d 58, 62, 74 (Mich. 2005) (including “pleasure” and “walking along the lakeshore” as valid uses of trust property).

<sup>117</sup> *Maunalua Bay Beach Ohana 28 v. State*, 222 P.3d 441, 451 (Haw. Ct. App. 2009).

<sup>118</sup> See *Fernandez*, *supra* note 2, at 628–29.

<sup>119</sup> See, e.g., *id.* at 625–26 (noting that “maritime commerce no longer reigns as the most valuable or common use of the coast”); *Mulvaney & Weeks*, *supra* note 1, at 589. See generally Catherine Robinson Hall, *Dockominiums: In Conflict with the Public Trust Doctrine*, 24 *SUFFOLK U. L. REV.* 331, 331 (1990) (discussing the increase in recreational boating in the United States).

<sup>120</sup> *Neptune City v. Avon-by-the-Sea*, 294 A.2d 47, 53 (N.J. 1972).

than are near-shore fishing and hunting.<sup>121</sup> As one commenter noted, “the modern economic equivalent of the fishing net may be the beach blanket.”<sup>122</sup>

Other than its instrumental value as a driver of commercial business, beach recreation also has independent social value. Scholars have argued that historically, commerce was a valuable activity not only because it led to prosperity, but also because it fostered empathy and multicultural socialization.<sup>123</sup> Professor Rose asserts that in the modern age, public recreation serves a similar socializing function.<sup>124</sup> “Insofar as recreation educates and socializes us, it acts as a ‘social glue’ for everyone, not just those immediately engaged . . . . Like commerce, then, recreation has social and political overtones.”<sup>125</sup>

The equalizing function of beach recreation is best served if the state provides public access and prevents monopolization of the communal resource.<sup>126</sup> Beachfront property is in high demand, and its rising value could lead to increased commodification.<sup>127</sup> The New Jersey Supreme Court has stated: “[t]he public demand for beaches has increased with the growth of population and improvement of transportation facilities. Furthermore, the projected demand for salt water swimming will not be met ‘unless the existing swimming capacities . . . are expanded.’”<sup>128</sup>

The rule announced by the Massachusetts and Maine courts would allow these states to sell their public beaches, and their citizens would be left with no right to

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<sup>121</sup> Mulvaney & Weeks, *supra* note 1, at 589.

<sup>122</sup> *Id.*

<sup>123</sup> Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 775 (1986). Professor Sax has similarly argued that a conceptual underpinning of the public trust doctrine is that some interests are so “intrinsically important to every citizen that their free availability tends to mark the society as one of citizens rather than of serfs.” Sax, *supra* note 1, at 484.

<sup>124</sup> Rose, *supra* note 123, at 775.

<sup>125</sup> *Id.* at 778, 779–80.

<sup>126</sup> *Id.* at 774 (defining “inherently public” property as property that is (1) “physically capable of monopolization” and (2) “most valuable when used by . . . the public at large”).

<sup>127</sup> See *Neptune City v. Avon-by-the-Sea*, 294 A.2d 47, 53 (N.J. 1972) (“Remaining tidal water resources still in the ownership of the State are becoming very scarce, demands upon them by reason of increased population, industrial development and their popularity for recreational uses and open spaces are much heavier, and their importance to the public welfare has become more apparent.”); Lazarus, *supra* note 66, at 1424 (discussing the rapid and significant increase in price of beach property and noting that this illustrates the “increasingly commercial nature of real property”).

<sup>128</sup> *Matthews v. Bay Head Improvement Ass’n*, 471 A.2d 355, 364 (N.J. 1984).

engage in beach recreation.<sup>129</sup> It is a bleak prospect if a state legislature may divest the entire seashore to private developers and transform public trust property into a high-priced resort.<sup>130</sup> The public would likely find little solace in its remaining right to engage in “fowling.”

Professor Sax has argued that certain property interests are “the gifts of nature’s bounty” and therefore ought to be reserved for the public.<sup>131</sup> Sandy beach is a scarce resource, available in only a limited number of states.<sup>132</sup> It is the gateway between the land and sea, where our ancestors once emerged from the oceans onto the land.<sup>133</sup> And it is particularly well suited to recreation.<sup>134</sup> While citizens in the past may have appreciated this natural resource by fishing and boating, the modern beach user simply wishes to walk on the beach, sit in the sand, and look over the ocean.

To achieve the social benefits of beach recreation, the public must be guaranteed the reasonable use of some land above the low tide line.<sup>135</sup> If the “modern . . . equivalent of the fishing net [is] the beach blanket,”<sup>136</sup> the public should be given a place to put the blanket down. Just as legislatures can regulate “nuisance-like”<sup>137</sup> conduct, so too should they be able to grant “fishing-like” benefits.

As indicated, states are given more leeway applying background principles in areas that have been traditionally subject to regulation by the state.<sup>138</sup> The public trust doctrine has imposed limits on private ownership of this land since colonial times.<sup>139</sup> The legislatures in Maine and Massachusetts could use these existing restrictions to expand public access.

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<sup>129</sup> Opinion of the Justices, 313 N.E.2d 568 (Mass. 1974).

<sup>130</sup> *Matthews*, 471 A.2d at 364.

<sup>131</sup> Sax, *supra* note 1, at 484.

<sup>132</sup> *Matthews*, 471 A.2d at 364.

<sup>133</sup> Many scientists believe that life began in the ocean. See, e.g., J.B. CORLISS ET AL., An Hypothesis Concerning the Relationship Between Submarine Hot Springs and the Origin of Life on Earth, OCEANOLOGICA ACTA 59 (1981); Leslie E. Orgel, *The Origin of Life on Earth*, 271 SCI. AM. 76 (1994).

<sup>134</sup> *Matthews*, 471 A.2d at 364 (“Oceanfront property is uniquely suitable for bathing and other recreational activities.” (quoting *Lusardi v. Curtis Point Prop. Owners Ass’n*, 430 A.2d 881, 886 (N.J. 1981))).

<sup>135</sup> *Id.*

<sup>136</sup> *Mulvaney & Weeks*, *supra* note 1, at 589.

<sup>137</sup> *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 491 n.20 (1987).

<sup>138</sup> See *Blumm & Ritchie*, *supra* note 53, at 357.

<sup>139</sup> See *Storer v. Freeman*, 5 Mass. 435, 438 (1810). See generally *Fernandez*, *supra* note 2.

First, legislation could grant a right to recreational access and base that right explicitly in public trust principles. The proposed Act in Massachusetts provided only for an “on-foot right-of-way,” which was not tethered specifically to the existing public access rights.<sup>140</sup> A future legislature could explicitly draw upon the public trust principles, explain its understanding of the needs of the public, and create substantive rules applying those principles to those needs.

Second, legislation could grant recreational access rights grounded in a broad interpretation of the traditional uses. For example, legislation could provide a public right to use the intertidal land for “aesthetic enjoyment of fish, fowl, and all other manner of wildlife, as well as the natural environment in which they inhabit.” Legislation could similarly provide a right of access for “navigation, including recreational on-foot navigation of the intertidal land itself, and all uses of the intertidal land ancillary to this navigation.” The Maine SJC’s recent expansive reading of “navigation”<sup>141</sup> indicates that this approach has potential to provide the desired public rights while satisfying concerns about past precedent and unfairness to property owners.

To survive a takings challenge, the legislature should be explicit about the correlation between the modern right of recreation and the past rights of fishing, fowling, and navigation. The legislature should conduct legislative factfinding about the most valuable modern use of the trust property. More importantly, the legislature should conduct a historical inquiry into the traditional trust uses and explain how these public recreational rights derive from the same underlying principles.

Armed with these doctrinal hooks, judges considering the constitutionality of such legislation should feel confident deferring to legislative findings. By demonstrating that the right to access this land derives from the existing rights of the public, courts could comfortably hold that this reflects a background principle of state law and is thus immune from further takings inquiry.

## 2. Recreational Use Is a Valid Application of Background Principles Despite Contrary Precedent

Expanding trust uses to include recreation is a valid application of background

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<sup>140</sup> Opinion of the Justices, 313 N.E.2d 561, 566 (Mass. 1974).

<sup>141</sup> See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1031 (1992); *McGarvey v. Whittredge*, 28 A.3d 620, 636 (Me. 2011) (Saufley, C.J., concurring); *Neptune City v. Avon-by-the-Sea*, 294 A.2d 47, 54 (N.J. 1972).

principles of state law despite the rulings in the *Opinion of the Justices*<sup>142</sup> and *Bell*.<sup>143</sup> While the Maine SJC in *Bell* held that there is no general recreational easement to the intertidal land as a matter of common law,<sup>144</sup> such an easement can still be a background principle.

As a threshold matter, neither court analyzed the public right in light of the public trust doctrine.<sup>145</sup> The courts analyzed the question by interpreting the ordinance and therefore failed to recognize that the public had preexisting common law rights.<sup>146</sup> To the extent that the rights and limits on intertidal ownership are creatures of legislation, the legislature should be permitted to clarify or correct any judicial interpretation.<sup>147</sup>

More importantly, the courts' rejection of the argument that the public had a general recreational easement forty years ago does not foreclose future development of the background principle. Background principles may expand in the face of changed circumstances and new knowledge.<sup>148</sup> "The public trust doctrine, like all common law principles, should not be considered fixed or static, but should be molded and extended to meet . . . the needs of the public it was created to benefit."<sup>149</sup>

The Maine SJC has, in fact, continued to interpret and expand upon the public's

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<sup>142</sup> 313 N.E.2d 561 (Mass. 1974).

<sup>143</sup> 557 A.2d 168 (Me. 1989).

<sup>144</sup> *Id.* at 174. The Advisory Opinion did not separately address whether there was a common law public easement.

<sup>145</sup> *See id.*; *Opinion of the Justices*, 313 N.E.2d 561.

<sup>146</sup> *See Bell*, 557 A.2d at 174 ("[A]ll the cases in Massachusetts and Maine recognizing the common law principles of intertidal property interests read the Colonial Ordinance as having restricted the reserved public easement to fishing, fowling, and navigation and related uses.").

<sup>147</sup> *Commonwealth v. Alger*, 61 Mass. 53, 71 (1851). Massachusetts courts have generally not interpreted the rights as legislative. The SJC has stated that the ordinance created "a legal right and vested interest in the soil, and not a mere permissive indulgence, or gratuitous license, given without consideration, and to be revoked and annulled at the pleasure of those who gave it." *Id.*

<sup>148</sup> *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1031 (1992). Although Justice Scalia's examples of "changed circumstances" are impending disasters, "background principles" can apply to laws that are benefit-conferring as well as harm-preventing. *See Blumm & Ritchie, supra* note 53, at 332–33; *Lazarus, supra* note 66, at 1428. The most obvious "changed circumstance" relating to a benefit-conferring law would likely be a change in the needs of the beneficiaries.

<sup>149</sup> *Neptune City v. Avon-by-the-Sea*, 294 A.2d 47, 54 (N.J. 1972). As Blumm and Ritchie point out, "[t]he public trust is surely no exception to [*Lucas's*] acknowledgment" that "background principles may have the potential to evolve beyond their historical scope." Blumm & Ritchie, *supra* note 53, at 343.

access rights since *Bell*. In *McGarvey v. Whittredge*,<sup>150</sup> the court held that the public has the right to cross the intertidal land for the purposes of scuba diving.<sup>151</sup> In a split opinion, three justices would have held that the public trust doctrine in fact does grant the public the right to access the intertidal land for uses beyond fishing, fowling, and navigation.<sup>152</sup> Chief Justice Saufley acknowledged the need for ongoing development of this area of law:

The common law, with “its flexibility and capacity for growth and adaptation,” has continually evolved to reflect the realities of a changing world. As this unique body of common law has developed, generations of jurists have searched for a basic set of principles to govern the ownership and use of the intertidal land.<sup>153</sup>

The remainder of the panel concurred in the result, but maintained that the public rights were limited to the traditional categories.<sup>154</sup> However, those justices held that scuba diving fell within a broad reading of “navigation.”<sup>155</sup> Either way, the holding in *McGarvey* demonstrates that public access rights in Maine are not static, and seriously undercuts the precedential value of *Bell*.

Legislatures and courts should be permitted to fix doctrinal imperfections in the common law. The New Jersey legislature has “codified and expanded” the holdings of the New Jersey Supreme Court by codifying public right-of-ways to provide beach access.<sup>156</sup> A North Carolina court has recently held that the legislature may “modify any prior common law understanding of the geographic limits of the[] public trust rights.”<sup>157</sup>

Further, there are reasons that these state courts should reexamine the reasoning of some past opinions delineating the rights of the public. As a matter of statutory interpretation, the Massachusetts SJC ordinarily applies a presumption against alienation of trust property in a manner that lessens public uses.<sup>158</sup> Instead,

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<sup>150</sup> 28 A.3d 620 (Me. 2011).

<sup>151</sup> *Id.* at 636 (Saufley, C.J., concurring).

<sup>152</sup> *Id.* at 635.

<sup>153</sup> *Id.* at 624 (citation omitted) (quoting *Pendexter v. Pendexter*, 363 A.2d 743, 749 (Me. 1976)).

<sup>154</sup> *Id.* at 642 (Levy, J., concurring).

<sup>155</sup> *Id.*

<sup>156</sup> *Mulvaney & Weeks*, *supra* note 1, at 594.

<sup>157</sup> *Nies v. Town of Emerald Isle*, 780 S.E.2d 187, 195 (N.C. Ct. App. 2015).

<sup>158</sup> See *Gould v. Greylock Reservation Comm’n*, 215 N.E.2d 114, 126 (Mass. 1966) (narrowly construing a grant of public land to private entity that “seem[ed], in part at least, a commercial venture for private profit” and inconsistent with public uses); see also *Sax*, *supra* note 1, at 494 (discussing *Gould* and the SJC’s skepticism towards questionable diversions of trust property into private hands).

courts have repeatedly construed the ordinance narrowly against the state, first by finding the express public rights to be exhaustive,<sup>159</sup> and in Massachusetts, by interpreting those rights narrowly.<sup>160</sup> This interpretation is particularly unusual because grants from the government to private individuals should be construed against the grantee.<sup>161</sup>

Courts should apply a corollary presumption in favor of legislation, like the Public Trust in Intertidal Land Act and the proposed Massachusetts law, which *further*s the purpose of the trust property.<sup>162</sup> Instead, the courts gave no deference to the legislatures' determinations about the best uses of public trust property.<sup>163</sup>

The attempt to constitutionalize a colonial ordinance forty years ago should not dissuade the Massachusetts and Maine legislatures from enacting laws to bring the public's access rights into conformity with modern needs. The holding in *Bell* has already been significantly undercut by judicial expansion of public access rights in *McGarvey*. The Massachusetts opinion is a mere advisory opinion, and the legislature is in no way restrained from passing the law and giving the SJC a more adequate basis for the legislation.<sup>164</sup>

Many of the cases cited in the *Opinion of the Justices*<sup>165</sup> are more than one hundred

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<sup>159</sup> See, e.g., *Bell v. Town of Wells*, 557 A.2d 168, 174 (Me. 1989); *Wellfleet v. Glaze*, 525 N.E.2d 1298, 1302–05 (Mass. 1988); *Opinion of the Justices*, 313 N.E.2d 561, 566 (Mass. 1974).

<sup>160</sup> See *Wellfleet*, 525 N.E.2d at 1302–05 (O'Connor, J., concurring) (finding that “[a]quaculture is not fishing, nor can it legitimately be considered a ‘natural derivative’ of the right to fish”).

<sup>161</sup> See, e.g., *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 36 U.S. (11 Pet.) 420, 548–49 (1837) (applying canon that grants made by the government to individuals be construed against the grantee); *Bos. Elevated Ry. Co. v. Commonwealth*, 39 N.E.2d 87, 113 (Mass. 1942) (holding that when the government makes a grant to a citizen, it will be construed against the grantee). The ordinance is the type of grant that the SJC would usually review with suspicion as one that effectuates a handout of public property to private landowners in contravention of public purposes. See *Sax*, *supra* note 1, at 494.

<sup>162</sup> See *Martin v. Waddell's Lessee*, 41 U.S. (16 Pet.) 367, 406 (1842) (requiring clear statement for state divestment of trust property); *Kiawah Dev. Partners, II v. S.C. Dep't. of Health and Envtl. Control*, 766 S.E.2d 707, 721–23 (S.C. 2014) (considering public trust principles in interpreting regulations); Michael C. Blumm, *Public Property and the Democratization of Western Water Law: A Modern View of the Public Trust Doctrine*, 19 ENVTL. L. 573, 578–79 (1989) (identifying “rule of construction” as a proper use of the public trust doctrine).

<sup>163</sup> *Opinion of the Justices*, 313 N.E.2d at 565–68.

<sup>164</sup> See *Opinion of the Justices*, 424 N.E.2d 1092, 1106 (Mass. 1981) (“[A]nything we say as to the construction of the statute would in no way affect the power of the Legislature to pass any bill it sees fit to pass, or to declare the bill's intended meaning, within the limits of the Constitution.”).

<sup>165</sup> *Opinion of the Justices*, 313 N.E.2d at 566.

years old.<sup>166</sup> Fishing, fowling, and navigation may have been an appropriate, exhaustive list at the time.<sup>167</sup> These older opinions were also interpreting the ordinance without clarification from the modern legislature. Future legislation could make explicit findings regarding the value of public recreation, concerns about commodification of beachfront property, and the conceptual similarity between recreation and the traditional trust uses.<sup>168</sup>

That the state law has put its imprimatur on an opposite interpretation does not preclude it from becoming a background principle.<sup>169</sup> Courts can distinguish and interpret these past cases in ways that are “objectively reasonable”<sup>170</sup> in light of social change and new legislation. Thus, future legislation expanding permissible trust uses to include recreation could reflect a “background principle of state law” even in the face of contrary precedent.

### 3. Beachfront Property Owners Do Not Have a Reasonable Expectation to Unilaterally Exclude the Public

Beachfront property owners do not have a reasonable expectation to exclude the public from the intertidal land.<sup>171</sup> The public unquestionably has the right to access this land for certain uses.<sup>172</sup> Landowners purchased this land subject to a preexisting public trust. They cannot have a reasonable expectation that this amorphous, pre-constitutional public right of access will become frozen in time at

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<sup>166</sup> See, e.g., *Home for Aged Women v. Commonwealth*, 202 Mass. 422 (1909); *Butler v. Attorney Gen.*, 80 N.E. 688 (Mass. 1907); *Commonwealth v. Alger*, 61 Mass. 53, 66 (1851).

<sup>167</sup> While a long common law tradition could ordinarily make it more difficult to justify a change in the law, many of these cases were decided before the rise in beach recreation as its predominant use. See *Mulvaney & Weeks*, *supra* note 1, at 587–88.

<sup>168</sup> See *supra* notes 110–30 and accompanying text.

<sup>169</sup> See *Casitas Mun. Water Dist. v. United States*, 102 Fed. Cl. 443, 456 (2011) (holding that owner of water rights could not rely on an “absence of contrary finding” by the state courts to claim its use was lawful, and noting that the “public trust and reasonable use doctrines are self-executing, as well as evolving, and do not therefore lend themselves to such a static interpretation”).

<sup>170</sup> *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1032 n.18 (1992).

<sup>171</sup> While “reasonable, investment-backed expectations” are traditionally analyzed as a factor in the *Penn Central* test, the inquiry is similarly appropriate while considering whether legislation is a “background principle” of state law. The Court recently addressed the “denominator question,” in which a court considering a takings challenge must first identify the proper “unit of property against which to assess the effect of the challenged governmental action.” *Murr v. Wisconsin*, 137 S. Ct. 1933, 1943 (2017). To determine the “denominator,” courts must consider, among other things, the “reasonable expectations of an acquirer of land.” *Id.* at 1945–46.

<sup>172</sup> See *Bell v. Town of Wells*, 557 A.2d 168, 172–73 (Me. 1989); *Storer v. Freeman*, 6 Mass. 435, 438 (1810).

the instant that they acquire title to the property.<sup>173</sup> This is particularly true in light of the general trend expanding beach access rights in Maine and across the country.<sup>174</sup>

It would certainly be improper for a legislature to grant a public recreational easement over private property without providing compensation as a matter of course. Landowners have reasonable expectations that the legislature will not do so. But this is not ordinary property.

First, the public already has the right to use the property for certain purposes. Therefore, any concern that allowing public recreation would give legislators *carte blanche* to designate public easements is misplaced; such a rule would be limited to the incredibly narrow situation in which the public has broad, preexisting access rights.

Second, the land in question is unique. Sandy intertidal land abutting the ocean is a limited resource well suited to public recreation.<sup>175</sup> States are entitled greater latitude in the regulation of natural resource-land than other similar property, and homeowners are aware of this latitude.<sup>176</sup>

Third, the existing public rights demonstrate that recreational uses will not contravene landowners' reasonable expectations. General recreation is not materially different than fishing, fowling, or navigation from the perspective of the landowner. It is hardly defensible to say that a homeowner invests with the "reasonable expectation" that she will look from her window and see someone

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<sup>173</sup> *S. W. Sand & Gravel, Inc. v. Cent. Ariz. Water Conservation Dist.*, 212 P.3d 1, 7 (Ariz. Ct. App. 2008) ("Landowners whose property adjoins a natural watercourse assume the burden of the location they have chosen.").

<sup>174</sup> It is true that not all states are expanding beach access rights. However, the debate usually involves whether the public may access the dry sand, not whether it may engage in certain activities in the wet sand. See generally Erika Kranz, *Sand for the People: The Continuing Controversy Over Public Access to Florida's Beaches*, 83 FLA. B.J. 11 (2009).

<sup>175</sup> *Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355, 364 (N.J. 1984) ("Oceanfront property is uniquely suitable for bathing and other recreational activities." (quoting *Lusardi v. Curtis Point Prop. Owners Ass'n*, 430 A.2d 881 (N.J. 1981))).

<sup>176</sup> *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1035 (1992) (Kennedy, J., concurring) ("Coastal property may present such unique concerns for a fragile land system that the State can go further in regulating its development and use than the common law of nuisance might otherwise permit."); see *Murr v. Wisconsin*, 137 S. Ct. 1933, 1945–46 (2017) ("[I]t may be relevant that the property is located in an area that is subject to, or likely be subject to, environmental or other regulation."); Lazarus, *supra* note 66, at 1422 ("[T]he fragile, ever-shifting ground near the shoreline is not like most places.").

walking with a fishing pole and a cooler, but not a book and a blanket.<sup>177</sup> It is unlikely that Maine homeowners invest with the expectation that they will allow access to beachgoers in scuba suits, but not bathing suits.<sup>178</sup>

Fourth, public rights such as the public trust doctrine are flexible. These public rights may be expanded to meet modern needs,<sup>179</sup> and the rights of individual owners are subject to limitations in the face of such changes.<sup>180</sup> For example, the public has always had rights related to commerce and navigation, but these were extended to apply to navigable airspace.<sup>181</sup> The U.S. Supreme Court stated that, “[t]o recognize such private claims to the airspace would clog these highways, seriously interfere with their control and development in the public interest, and transfer into private ownership that to which only the public has a claim.”<sup>182</sup>

Fifth, there is a legal trend toward the expansion of recreational beach access. In *Good v. United States*,<sup>183</sup> the Federal Circuit rejected a takings claim brought by a developer who had been denied a permit to build on wetlands.<sup>184</sup> Because “rising environmental awareness translated into ever-tightening land use restrictions,” and because the owner “was not oblivious to this trend,” the court found that he had no reasonable investment-backed expectations to be able to build.<sup>185</sup> Thus, his takings claim was denied despite the fact that he was unable to pursue any economically viable development project.<sup>186</sup>

Similarly, it is hard to imagine that Massachusetts and Maine shoreline-

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<sup>177</sup> See Fernandez, *supra* note 2, at 636 n.84 (“[A] hiker that carries a fishing rod could proceed unto the same property that would be closed to her if the fishing rod were missing.”).

<sup>178</sup> See *McGarvey v. Whittredge*, 28 A.3d 620, 635–37 (Me. 2011) (finding a right to use intertidal land for purposes of scuba diving).

<sup>179</sup> *U.S. v. Causby*, 328 U.S. 256, 260–61 (1946).

<sup>180</sup> Opinion of the Justices, 313 N.E.2d 561, 566 (Mass. 1974) (“It has been held proper to interfere with the private property rights of coastal owners in the tidal area for purposes reasonably related to the protection or promotion of fishing or navigation without paying compensation.”).

<sup>181</sup> See *Causby*, 328 U.S. at 264 (“We have said that the airspace is a public highway.”).

<sup>182</sup> *Id.* at 261; *Air Pegasus of D.C., Inc. v. United States*, 424 F.3d 1206, 1218 (Fed. Cir. 2005) (“[B]ackground principles’ of long-standing federal property law indicate that there is no private property right in the navigable airspace of the United States.”).

<sup>183</sup> 189 F.3d 1355 (Fed. Cir. 1999).

<sup>184</sup> *Id.* at 1357–58, 1363.

<sup>185</sup> *Id.* at 1362.

<sup>186</sup> *Id.* at 1362–63.

property holders are “oblivious”<sup>187</sup> to the anomalous nature of their state laws. As indicated, coastal states have generally expanded the rights of the public to include recreation.<sup>188</sup> Many states retain the traditional high tide line,<sup>189</sup> but others have gone further and increased the physical scope of the publicly available land. New Jersey has used the public trust doctrine to expand the scope of the trust to include all municipally owned dry sand beach.<sup>190</sup> That right was later extended to apply to privately owned dry sand beach whenever it is necessary to provide “reasonable access” to the wet sand.<sup>191</sup> Other states, such as North Carolina<sup>192</sup> and Oregon,<sup>193</sup> have similarly extended public access to include dry sand beaches using the doctrine of custom. Hawaii, relying on traditional Hawaiian principles, extends public rights to the brush line.<sup>194</sup>

While knowledge of a legal trend is not itself determinative,<sup>195</sup> social awareness of national trends is relevant in determining a party’s reasonable expectations.<sup>196</sup> The fact that Maine law has in fact continued to evolve in this area emphasizes the landowners’ lack of expectations that the public’s rights are static.<sup>197</sup>

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<sup>187</sup> Cf. *id.* at 1362 (suggesting that defendant must have been aware of trend toward stricter land use laws).

<sup>188</sup> See *supra* notes 102–09 and accompanying text.

<sup>189</sup> See, e.g., *Leydon v. Town of Greenwich*, 777 A.2d 552, 564 n.17 (Conn. 2001) (noting that public trust allows the public to access land between the mean high tide line and the water); *McQueen v. S.C. Coastal Council*, 580 S.E.2d 116, 119–20 (S.C. 2003) (“The State has the exclusive right to control land below the high water mark for the public benefit.”).

<sup>190</sup> See *Matthews v. Bay Head Improvement Ass’n*, 471 A.2d 355, 358 (N.J. 1984) (citing *Neptune City v. Avon-by-the-Sea*, 294 A.2d 47, 54 (N.J. 1972)) (“In Avon we held that the public trust applied to the municipally owned dry sand beach immediately landward of the high water mark.”).

<sup>191</sup> *Matthews*, 471 A.2d at 365–66. The court did not address the extent of this reasonable access over private property. *Id.* at 369 (“All we decide here is that private land is not immune from a possible right of access to the foreshore for swimming or bathing purposes, nor is it immune from the possibility that some of the dry sand may be used by the public incidental to the right of bathing and swimming.”).

<sup>192</sup> *Nies v. Town of Emerald Isle*, 780 S.E.2d 187, 195–96 (N.C. Ct. App. 2015).

<sup>193</sup> *State ex rel. Thornton v. Hay*, 462 P.2d 671, 677–78 (Or. 1969).

<sup>194</sup> *In re Ashford*, 440 P.2d 76, 77 (Haw. 1968).

<sup>195</sup> See *Palazzolo v. Rhode Island*, 533 U.S. 606, 629–30 (2001).

<sup>196</sup> See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1034–35 (1992) (Kennedy, J., concurring) (“Property is bought and sold, investments are made, subject to the State’s power to regulate . . . . The expectations protected by the Constitution are based on objective rules and customs that can be understood as reasonable by all parties involved.”).

<sup>197</sup> See *McGarvey v. Whittredge*, 28 A.3d 260, 624 (Me. 2011).

Finally, the owners' expectations should be considered against the backdrop of a property interest that is in constant flux even without the public trust doctrine. The natural high tide and low tide lines regularly shift as a function of natural erosion, intentional human intervention, and a combination thereof.<sup>198</sup> Title to previously dry land that becomes submerged or intertidal transfers automatically to the state if it is the result of certain forms of natural erosion.<sup>199</sup> Generally, new sandy beachfront that is created by a rapid process belongs to the state, whether it occurs by natural causes or a state-funded sand nourishment project.<sup>200</sup> Regardless of the strict approach taken as to this issue in Massachusetts,<sup>201</sup> beachfront owners acquire property with the knowledge that the exact scope of their property interest is subject to change.

Given the broad national trend toward recreational beach access, the ephemeral nature of beach property itself, and Maine's continued expansion of public rights, intertidal land owners do not have a reasonable expectation in the unfettered right to exclude the public from the beach.

## CONCLUSION

The courts and legislatures of Maine and Massachusetts should not be bound by their predecessors in determining the scope of public rights. The land between the high and low tide lines is held by the landowners for the benefit of the public. As

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<sup>198</sup> *Nies v. Town of Emerald Isle*, 780 S.E.2d 187, 191 (N.C. Ct. App. 2015) ("None of these natural lines of demarcation are static, as the beaches are continually changing due to erosion or accretion of sand, whether through the forces of nature or through human intervention."); *Lazarus*, *supra* note 66, at 1422.

<sup>199</sup> *Nies*, 780 S.E.2d at 191 (noting that the State acquires ownership of public trust in dry sand beaches if they are created through public-funded beach nourishment projects); *see Coburg Dairy, Inc. v. Lesser*, 458 S.E.2d 547 (S.C. 1995) (holding that wetlands created by the encroachment of navigable tidal water belong to the State); *TH Investments, Inc. v. Kirby Inland Marine, L.P.*, 217 S.W.3d 173, 196 (Tex. App. 2007) (holding that submersion of land transferred title from private to state ownership, and that this transfer did not constitute a taking).

<sup>200</sup> *See Stop the Beach Renourishment v. Fla. Dep't. of Env'tl. Prot.*, 560 U.S. 702, 709 (2010) ("[F]ormerly submerged land that has become dry land by avulsion continues to belong to the owner of the seabed (usually the State)."). The Massachusetts SJC has applied the opposite rule and held that title to previously submerged land that was converted into a sandy beach by the state for purposes of creating a public beach vested in the abutting landowner. *Michaelson v. Silver Beach Improvement Ass'n*, 173 N.E.2d 273, 277-78 (Mass. 1961). That holding is anomalous and represents clear judicial activism that transferred land that was literally created by the state for the benefit of the public into private ownership.

<sup>201</sup> *Michaelson*, 173 N.E.2d at 277-78.

the representative of public will, the legislature is entitled to deference as to the best uses of the public's trust property.

Aside from democratic principles, practical considerations of modern life counsel toward expanding the permissible public uses of intertidal land. To meet the changed circumstances of modern life, the legislature should be permitted to codify the background public trust principles into clearly defined substantive rules. The area between land and sea is of historic significance, which is why it has always been treated as special by the common law. Modern society should be empowered to use this unique and beneficial property in ways that are best suited to its needs.

These goals are not merely aspirational, but achievable. By explicitly basing legislation on the analogy to the public's preexisting access rights, by defining recreational rights in terms of the traditional trust uses, and by engaging in legislative factfinding about the need for this modification, a legislature could present courts with a fuller understanding of why the right is necessary. Armed with such legislation, the Maine and Massachusetts courts could find that, in fact, the public has the right to enjoy the beach after all.