

1996

Intertidal Zone Aquaculture And The Public Trust Doctrine

Julia Underwood

University of Maine School of Law

Follow this and additional works at: <http://digitalcommons.maine.law.maine.edu/oclj>

Recommended Citation

Julia Underwood, *Intertidal Zone Aquaculture And The Public Trust Doctrine*, 2 Ocean & Coastal L.J. (1996).

Available at: <http://digitalcommons.maine.law.maine.edu/oclj/vol2/iss2/10>

This Comment is brought to you for free and open access by the Journals at University of Maine School of Law Digital Commons. It has been accepted for inclusion in Ocean and Coastal Law Journal by an authorized administrator of University of Maine School of Law Digital Commons. For more information, please contact mdecrow@maine.edu.

INTERTIDAL ZONE AQUACULTURE AND THE PUBLIC TRUST DOCTRINE

*Julia M. Underwood**

I. INTRODUCTION

As interest in the potential of shellfish aquaculture increases nationwide in the next several years, conflicts over access to and use of the intertidal zone undoubtedly will increase as well. In Massachusetts and Maine these conflicts are likely to be more pronounced because of an atypical division of public and private rights and responsibilities in that zone. In contrast to most other areas of the country, where the state owns title to land between the high and low water marks, Massachusetts and Maine riparian property owners hold title in fee down to the low water mark. That grant of title, however, originally conveyed under the Colonial Ordinance of 1641-47,¹ is subject to public rights of fishing,

* University of Maine School of Law, Class of 1996. The University of Maine School of Law Environmental Law Society supported the research for this Comment with a grant in the Summer of 1995. This Comment was originally written to fulfill the requirements of the Coastal Zone Law course at the University of Maine School of Law in the Fall of 1995.

1. THE BOOK OF THE GENERAL LAUUES AND LIBERTYES CONCERNING THE INHABITANTS OF THE MASSACHUSETS, *Liberties Common*, 35 (1648), reprinted in THE BOOK OF THE GENERAL LAWES AND LIBERTYES CONCERNING THE INHABITANTS OF THE OF THE MASSACHUSETS 51 (intro. by Thomas G. Barnes, 1975) [hereinafter BOOK OF THE GENERAL LAUUES]. The ordinance read in pertinent part:

Everie Inhabitant who is an hous-holder shall have free fishing and fowling, in any great Ponds, Bayes, Coves and Rivers so far as the Sea ebs and flows, within the precincts of the town where they dwell, unless the Free-men of the same town, or the General Court have otherwise appropriated them [I]t is declared that in all creeks, coves and other places, about and upon salt water where the Sea ebs and flows, the Proprietor of the land adjoyning shall have proprietic to the low water mark where the Sea doth no ebb above a hundred rods, and not more wheresoever it ebs farther. Provided that such Proprietor shall not by this libertie have power to stop or hinder the passage of

fowling, and navigation. As a result, clam aquaculture, which must be conducted within the intertidal zone, will test the boundaries of public rights as they are currently understood in those states.

In two recent cases, the Massachusetts Supreme Judicial Court addressed the issue of private and public rights in the intertidal zone as related to clam aquaculture. In *Town of Wellfleet v. Glaze*,² the court held that the superior court lacked the authority to enjoin a defendant littoral property owner from mooring his boats on an aquaculture site. Although the majority did not address the issue of whether aquaculture should be construed as within the public right of fishing, a concurring justice wrote: "[T]he right to fish cannot reasonably be construed to include the right to plant, cultivate, and propagate fish on the defendant's tidal flats."³ This pronouncement was given the force of law eight years later in *Pazolt v. Director of the Division of Marine Fisheries*,⁴ when the court held that aquaculture could not be conducted on the plaintiff's intertidal property without her permission. These cases raise important questions about the decision-making authority of state legislatures in Massachusetts and Maine and the role that aquaculture can play in the conservation of the clamming industry in these states.

boats or other vessels in, or through any sea, creeks, or coves to other mens houses or lands.

Id.

The ordinance originally pertained to residents in Massachusetts Bay Colony only. Massachusetts Bay Colony, however, acquired the District of Maine and Plymouth Colony in 1692. As a result of this shared history the courts have extended the rule of the Colonial Ordinance to areas which were not within the jurisdiction of Massachusetts Bay Colony when the ordinance was enacted. *Bell v. Town of Wells*, 557 A.2d 168, 183 (Me. 1989) (Wathen, J., dissenting).

In *Storer v. Freeman*, 6 Mass. (6 Tyng) 435 (1810), the Massachusetts Supreme Judicial Court stated that the division of public and private interests in the intertidal zone was part of the common law of Massachusetts. *Id.* at 438. Eleven years after Maine separated from Massachusetts, the Maine Supreme Judicial Court, sitting as the Law Court, held that the Massachusetts rule applied in Maine, citing *Storer*. *Lapish v. Bangor Bank*, 8 Me. 66, 70 (1831). Similarly, in *Barker v. Bates*, 30 Mass. (13 Pick.) 255 (1832), the Massachusetts Supreme Judicial Court held that rule of the Colonial Ordinance applied to what was Plymouth Colony. Finally, in *Barrows v. McDermott*, 73 Me. 441 (1882), the Law Court held that the rule extended to ancient Acadia, although that territory was not within the District of Maine when it was acquired by Massachusetts Bay Colony.

2. 525 N.E.2d 1298 (Mass. 1988).

3. *Id.* at 1304.

4. 631 N.E.2d 547 (Mass. 1994).

This Comment will address three topics. It will begin with a discussion of the *Pazolt* decision in detail, examining three problems in the analysis the court employed. It will then review the respective roles the legislatures and judiciary have played in defining public rights in the intertidal zone in both states. Finally, it will consider the potential for conflict over tidal lands in Maine and suggest a means of mitigating that concern. In the process, this Comment will argue that the legal framework pertaining to aquaculture in Maine is distinguishable from that of Massachusetts, making the holding of *Pazolt* inapplicable in this state.

II. PAZOLT V. DIRECTOR OF THE DIVISION OF MARINE FISHERIES

In *Pazolt*, the plaintiff, a motel owner on Cape Cod, brought suit against the Director of the Division of Marine Fisheries, the Town of Truro, and John LaForte, an aquaculturist licensee, in order to prevent LaForte from conducting aquaculture⁵ on her flats.⁶ On cross motions for

5. John LaForte obtained a "shellfish aquaculture grant" to grow quahogs and oysters from the Town of Truro under MASS. GEN. LAWS ch. 130, § 57 (1992), which reads in pertinent part:

PRIVATE SHELLFISH GRANTS

§ 57. Licenses granted by cities and towns . . .

The city council of a city or the selectmen of any town may, upon written application therefor and after public notice and hearing thereon as provided in section sixty, grant to any person a license for a period not exceeding ten years to plant, grow, and take shellfish . . . in such city or town at all times of the year, in, upon or from a specific portion of flats or land under coastal waters Licenses . . . shall be issued . . . upon such terms and conditions and subject to such regulations as the city council or selectmen issuing the same shall deem proper, but not so as to impair the private rights of any person or to materially obstruct navigable waters

Id. LaForte also had a separate "shellfish aquaculture grant" under MASS. GEN. LAWS ch. 130, § 68A (1992). This grant allowed him to "grow shellfish by means of racks, rafts, or floats in waters of the commonwealth below the line of extreme low water." *Id.*

LaForte's activities involved a three-stage cultivation process. First, shellfish seeds were planted in four-by-eight foot nursery trays, covered with sand, and placed on "spacer blocks" in the area. Second, when the shellfish were grown sufficiently, they were planted directly in the sea bottom in twelve-by-100 foot beds and covered with netting (to protect them against natural predators), which was held down with steel bars. Finally, when they were large enough to be harvested, they were dug up with tools such as rakes and shovels. Brief of Defendant-Appellee John LaForte at 8, *Pazolt v. Director of Div. of Marine Fisheries*, 631 N.E.2d 547 (Mass. 1994) (No. SJC-06293).

6. The issue of whether *Pazolt* actually owned the area between the high and low water marks in front of her motel was raised before the superior court and on appeal.

summary judgment,⁷ the Superior Court held, *inter alia*, that: (1) LaForte was enjoined from engaging in "aquaculture" between the high water mark and the extreme low water mark; and, (2) with the exception of permission to construct structures on Pazolt's land, the aquaculturist could "plant, grow and take shellfish" in the intertidal zone within the grant area.⁸ Pazolt, LaForte and the members of the Truro Board of Selectmen appealed.⁹ In addition, an amicus curiae brief was submitted by National Audubon Society.¹⁰

Pazolt v. Director of Div. of Marine Fisheries, 631 N.E.2d at 548-49. That issue, however, is of no concern here. This Comment addresses the relative rights of private landowners and the public in the intertidal zone, as defined in the Colonial Ordinance of 1641-47. For the purposes of this discussion, it is assumed that Pazolt holds good title to the flats.

7. Pazolt originally sought relief from the director of the Division of Marine Fisheries under MASS. GEN. LAWS ch. 130, § 68A (1992). Pazolt v. Director of Div. of Marine Fisheries, 631 N.E.2d at 549. Under the terms of that section, however, the director may review a license only to determine "whether such license or operation thereunder will cause any adverse effect on the shellfish or other natural resources of the city or town." MASS. GEN. LAWS ch. 130, § 68A (1992). The director denied relief. Brief for Plaintiff-Appellant at 3, Pazolt v. Director of Div. of Marine Fisheries, 631 N.E.2d 547 (Mass. 1994) (No. SJC-06293).

Section 68A, however, allows "[a]ny person aggrieved by the determination of the division of marine fisheries under this section [to] appeal under the provisions of chapter thirty A. Such right of appeal shall be exclusive." MASS. GEN. LAWS ch. 130, § 68A (1992). Chapter 30A is the Massachusetts Administrative Procedure Act, which provides for judicial review of agency decisions. Consequently, Pazolt brought a claim against the Director of the Division of Marine Fisheries in Superior Court. Pazolt v. Director of Div. of Marine Fisheries, 631 N.E.2d at 549. The superior court dismissed the claim against the director of the Division of Marine Fisheries because the case did not involve questions of environmental impact. *Id.*

After the dismissal of the chapter 30A claim, another superior court judge treated the case as a declaratory judgment action under MASS. GEN. LAWS ch. 231A, § 1 (1992). Pazolt v. Director of Div. of Marine Fisheries, 631 N.E.2d at 549. The declaratory judgment constituted the basis of the appeal to the Massachusetts Supreme Judicial Court. All other claims and counterclaims, which actually constituted separate actions, were dismissed as per the parties' stipulation. Brief for Plaintiff-Appellant at 4, Pazolt v. Director of Div. of Marine Fisheries, 631 N.E.2d 547 (Mass. 1994) (No. SJC-06293).

8. Pazolt v. Director of Div. of Marine Fisheries, 631 N.E.2d at 548.

9. See Brief for Plaintiff-Appellant; Brief of Defendant-Appellee John LaForte; Brief of Cross-Appellant, the Board of Selectmen of Town of Truro, Pazolt v. Director of Div. of Marine Fisheries, 631 N.E.2d 547 (Mass. 1994) (No. SJC-06293).

10. Amicus curiae briefs were submitted also by the Town of Wellfleet; John Glaze, Dr. David Baker and Sylvia Harrison; the Commonwealth of Massachusetts; and Conservation Law Foundation and Massachusetts Audubon Society (jointly). Pazolt v. Director of Div. of Marine Fisheries, 631 N.E.2d at 548, n.4.

The success of Pazolt's argument before the Massachusetts Supreme Judicial Court hinged on a characterization of aquaculture as outside the parameters of the reserved public right of fishing. The first component of that argument was to attack the exclusivity of LaForte's license. Pazolt asserted that the fact that the license allowed LaForte to "have the exclusive rights to take all shellfish"¹¹ was counter to the letter and spirit of the reservation of free fishing in the intertidal zone. Quoting dictum in *Commonwealth v. Alger*,¹² Pazolt argued:

The great purpose of the Sixteenth Article of the 'body of liberties' . . . was to declare a great principle of public right, to abolish the forest laws, the game laws, and the laws designed to secure several and exclusive fisheries, and to make them all free. It expressly extended this right to places in which the tide ebbs and flows¹³

It is interesting to note that National Audubon Society and the Massachusetts Audubon Society held different opinions of the case. National Audubon Society supported LaForte, arguing that aquaculture was within the reserved public right of fishing. Brief of Amicus Curiae National Audubon Society, *Pazolt v. Director of Div. of Marine Fisheries*, 631 N.E.2d 547 (1994) (No. SJC-06293). Massachusetts Audubon Society and Conservation Law Foundation argued against LaForte's license on the narrow point that the license authorized LaForte to use an off-road vehicle to gain access to the flats. Brief of Amici Curiae Conservation Law Foundation and Massachusetts Audubon Society, *Pazolt v. Director of Div. of Marine Fisheries*, 631 N.E.2d 547 (1994) (No. SJC-06293). Pazolt, of course, agreed with that view. Brief for Plaintiff-Appellant at 39, *Pazolt v. Director of Div. of Marine Fisheries*, 631 N.E.2d 547 (1994) (No. SJC-06293). LaForte, however, maintained that the use of an off-road vehicle was not raised before the superior court; therefore, it was not a proper subject to address on appeal. Brief of Defendant-Appellee John LaForte at 23, *Pazolt v. Director of Div. of Marine Fisheries*, 631 N.E.2d 547 (1994) (No. SJC-06293). The court did not address that point. *Pazolt v. Director of Div. of Marine Fisheries*, 631 N.E.2d at 549 n.6.

11. MASS. GEN. LAWS ch. 130, § 63 (1992). The pertinent language reads:

§ 63. Exclusive rights of licensees . . .

The licensee . . . shall . . . have during the term of the license . . . exclusive use of waters, flats or creeks described in the license, and the exclusive right to take shellfish therefrom during the time therein specified . . . ; provided, that this section shall not be construed to authorize any taking prohibited by law.

Id.

12. 61 Mass. (7 Cush.) 53, 68 (1851).

13. Brief for Plaintiff-Appellant at 17, *Pazolt v. Director of Div. of Marine Fisheries*, 631 N.E.2d 547 (Mass. 1994) (No. SJC-06293). In a footnote, however, Pazolt maintained she was not attacking the validity of the statute on its face. Focusing on

Pazolt thus maintained that an exclusive fishery is "contrary to long-established property law when applied to privately held flats."¹⁴

language specifying that the provision for exclusive licenses "shall not be construed to authorize any taking prohibited by law," MASS. GEN. LAWS ch. 130, § 63 (1992), she stated:

[T]he permits granted to LaForte work a taking of [Pazolt's] land because under common law principles she owns the fee subject only to the public's right to *free fishing*, fowling and navigation. LaForte cannot exercise an exclusive right of shellfish farming on [Pazolt's] property without directly impinging upon [Pazolt's] rights and the public rights.

Brief for Plaintiff-Appellant at 18 n.2, *Pazolt v. Director of Div. of Marine Fisheries*, 631 N.E.2d 547 (Mass. 1994) (No. SJC-06293). It is unclear what Pazolt was attempting to argue with these assertions. If the permits "work a taking" of her "land," as she asserts, she appears to make a Fifth and Fourteenth Amendment argument, which is clearly a challenge to the statute on its face. On the other hand, if she is asserting that LaForte's exclusive license prevents her from exercising her right, as a member of the public, to free fishing on the flats, there is no "taking" of her land.

Pazolt renewed this "takings" argument later in her brief. In a subsequent footnote she stated:

No license under sec. 57 is permitted "to impair the private rights of any person"; nor may any license result in a "taking prohibited by law" The legislature went to great lengths to avoid conflicts between aquaculture and private ownership of flats and attempts to avoid the situation of divesting property rights with the saving language referred to above. The Truro Board of Selectmen and DMF, by granting the aquaculture operation to LaForte in its location of Pazolt's private flats regrettably did not follow the statute and have in effect, taken Pazolt's property.

Brief for Plaintiff-Appellant at 29, n.6, *Pazolt v. Director of Div. of Marine Fisheries*, 631 N.E.2d 547 (Mass. 1994) (No. SJC-06293) (citations omitted). If Pazolt was making a constitutional argument under the Fifth and Fourteenth Amendments (albeit in footnotes), it seems she misread the statute. Section 63, pertaining to the exclusive rights of the licensee, does state that the section "shall not be construed to authorize any taking prohibited by law." Such a "taking," however, would appear on the basis of the context of the statement to refer to a taking of shellfish, not a taking of property for the purposes of a constitutional analysis. By this reading, while the statute permits an exclusive use of the grant area under section 57, it would prohibit a town from authorizing that "taking" of shellfish, for example, if the flats were in a grant area closed by the Division of Marine Fisheries because of contamination.

It is possible Pazolt was misled in this matter by the court in *Glaze*. There, the court quotes the language of section 57: "Licenses under this section shall be issued . . . so as [not] to impair the private rights of any person" It then inaccurately summarizes the import of that language by stating: "Thus, the statute only authorizes the town to issue a license upon privately held flats, so long as no taking or other impairment of private rights results." *Town of Wellfleet v. Glaze*, 525 N.E.2d at 1301. In any case, the court in *Pazolt* did not address the issue.

14. Brief for Plaintiff-Appellant at 19, *Pazolt v. Director of Div. of Marine*

The second component of the argument focused on the nature of LaForte's activities. Contrasting the verb "to fish," defined in the Massachusetts statute as "to take or to attempt to take fish by any method or means, whether or not such method or means results in their capture,"¹⁵ with the term "culture," defined in Webster's Dictionary as "the raising, improvement, or development, of some plant, animal, or product," Pazolt wrote:

[S]hellfishing (i.e. the taking of shellfish) and shellfish farming are diametrically opposed to each other. The act of fishing is the same or similar to hunting, whereas, aquaculture is akin to and the same as cultivating crops and performing animal husbandry. Put another way, to fish is to *take* or capture wild animals; aquaculture is to *plant* shellfish in the soil and grow them for profit.¹⁶

Pazolt then bolstered this assertion with dicta from a concurring opinion in *Town of Wellfleet v. Glaze*,¹⁷ which stated:

Aquaculture is not fishing, nor can it legitimately be considered a "natural derivative" of the right to fish, any more than breeding game animals on someone else's land could properly be construed a natural derivative of the right to hunt there. Thus, whatever rights the public has to interfere with the private property rights of coastal owners for purposes "reasonably

Fisheries, 631 N.E.2d at 547 (Mass. 1994) (No. SJC-06293).

15. MASS. GEN. LAWS ch. 130, § 1 (1992). Arguably, aquaculture should be construed as included in the definition because of the phrase "by any method or means."

16. Brief for Plaintiff-Appellant at 25, Pazolt v. Director of Div. of Marine Fisheries, 631 N.E.2d 547 (Mass. 1994) (No. SJC-06293) (quoting WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY, 2nd ed.). Massachusetts has no statutory definition of the term "aquaculture."

17. 525 N.E.2d 1298 (Mass. 1988). In *Glaze*, the defendant, the owner of tidal flats on which aquaculture was being conducted, moored his boats at that site. When the tide was out, the boats rested on the netting covering the shellfish, injuring or killing the animals and tearing the mesh. The town's shellfish constable noticed the problem and requested that the defendant move the boats. The defendant refused. The Town of Wellfleet brought an action against the defendant, seeking an injunction. The Superior Court granted it, under the authority of MASS. GEN. LAWS ch. 214, § 7A (1986), which permits the court to intervene if damage is occurring to the environment and that damage results from a violation of a statute the major purpose of which is to prevent such damage. *Town of Wellfleet v. Glaze*, 525 N.E.2d at 1299.

related" to the promotion of fishing as well as navigation . . . turning the tidal flats in which this defendant apparently owns the fee into a shellfishing farm is too great an extension of the public's right of "free fishing" to be "reasonably related" to that right¹⁸

Pazolt, however, did not directly address either the "natural derivative" standard or the requirement that an activity be "reasonably related" the promotion of fishing. She did maintain that LaForte's placement of "structures" on Pazolt's flats violated the rule of *Locke v. Motley*,¹⁹ in which the Massachusetts Supreme Judicial Court held that the right of free fishing does not include the right "to fix stakes in the flats of a riparian owner, for the purpose of fastening a seine across the river."²⁰ In addition, she argued that LaForte was not entitled to use soil from her flats for use in his nursery trays.²¹

LaForte countered Pazolt's argument by invoking the public trust doctrine.²² Under that doctrine, derived from English common law, the resources of the sea and submersible lands are a special form of property; the state, as trustee for the people, has the responsibility of preserving those resources, and managing them in a manner that makes them available to all.²³ LaForte argued that the Colonial Ordinance codified the

18. Brief for Plaintiff-Appellant at 38, *Pazolt v. Director of Div. of Marine Fisheries*, 631 N.E.2d 547 (Mass. 1994) (No. SJC-06293) (quoting *Town of Wellfleet v. Glaze*, 525 N.E.2d at 1304 (O'Connor, J. concurring) (alteration in original)).

19. 68 Mass. (2 Gray) 265 (1854).

20. Brief for Plaintiff-Appellant at 35, *Pazolt v. Director of Div. of Marine Fisheries*, 631 N.E.2d 547 (Mass. 1994) (No. SJC-06293) (quoting *Locke v. Motley*, 68 Mass. (2 Gray) at 267 (1854)). See also *Duncan v. Sylvester*, 24 Me. 482 (1844) (member of the public may not attach fish weirs on privately owned flats); *Matthews v. Treat*, 75 Me. 594 (1884) (riparian owners have the exclusive right to wharf out or to attach fish weirs to flats, provided the structure does not interfere with the public right of navigation).

21. Brief for Plaintiff-Appellant at 33, *Pazolt v. Director of Div. of Marine Fisheries*, 631 N.E.2d 547 (Mass. 1994) (No. SJC-06293) (citing *Porter v. Sheehan*, 73 Mass. (7 Gray) 435, 437 (1856)).

22. See generally Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970); *The Public Trust in Tidal Areas: A Sometime Submerged Traditional Doctrine*, 79 YALE L.J. 762 (1970); Mitchell M. Tannebaum, Comment, *The Public Trust Doctrine in Maine's Submerged Lands: Public Rights, State Obligation and the Role of the Courts*, 37 ME. L. REV. 105 (1985).

23. The public trust doctrine is defined as a doctrine that: "Provides that submerged and submersible lands are preserved for public use in navigation, fishing and recreation and [the] state, as trustee for the people, bears [the] responsibility of preserving and protecting

public trust doctrine at the same time that it expanded the rights of riparian owners.²⁴ He maintained that because his grant area was barren of shellfish, his activities would improve the resource in the town of Truro.²⁵ In this way, his license was consistent with a proper exercise of the state's public trust responsibility.

National Audubon argued that shellfish propagation was within the reserved right of fishing, also complemented the argument of LaForte by noting that the nursery trays and netting LaForte used were, at a minimum, "incidental to" the propagation activities.²⁶ Seeking to distinguish the use of these materials from the stakes in *Locke v. Motley*,²⁷ National Audubon wrote that the case would not "bear the weight [Pazolt] places on it."²⁸ National Audubon argued that the court in that case was interpreting a regulation pertaining to the Mystic River, not the Colonial Ordinance.²⁹ In addition, it pointed out that the court in *Locke* stated that a public right to fasten stakes in the flats would exist in the event of "a necessity for doing so in order to . . . exercise . . . the right of fishery."³⁰

The Massachusetts Supreme Judicial Court concluded that "the portion of the judge's order which permit[ted] LaForte to plant and grow shellfish on the plaintiff's tidal flats above the line of extreme low water

the right of the public to the use of the waters for those purposes." BLACK'S LAW DICTIONARY 1232 (6th ed. 1990) (citing *Oregon Shores Conservation Coalition v. Oregon Fish and Wildlife Comm'n*, 662 P.2d 356, 364 (Or. App. 1983)). See also *Boston Waterfront Development Corp. v. Commonwealth*, 393 N.E.2d 356, 358 (Mass. 1979) ("Throughout history, the shores of the sea have been recognized as a special form of property of unusual value; and therefore subject to different legal rules from those which apply to inland property.").

24. Brief of Defendant-Appellee John LaForte at 15, *Pazolt v. Director of Div. of Marine Fisheries*, 631 N.E.2d 547 (Mass. 1994) (No. SJ-06293).

25. *Id.* at 16. LaForte could have extended that argument further. Instead of arguing that he would improve the resource in Truro by planting on barren flats, he should have argued that the reproductive biology of the clam acts to propagate the species well beyond the flats in which they are planted. See *infra* Part III.B.

26. Brief of Amicus Curiae National Audubon Society at 12-13, *Pazolt v. Director of Div. of Marine Fisheries*, 631 N.E.2d 547 (Mass. 1994) (No. SJ-06293).

27. 68 Mass. (2 Gray) 265 (1854).

28. Brief of Amicus Curiae National Audubon Society at 14, *Pazolt v. Director of Div. of Marine Fisheries*, 631 N.E.2d 547 (Mass. 1994) (No. SJ-06293).

29. *Id.* at 14-15.

30. *Id.* (quoting *Locke v. Motley*, 68 Mass. (2 Gray) at 267 (alteration in original)). See also Brief of Defendant-Appellee John LaForte at 20, *Pazolt v. Director of Div. of Marine Fisheries*, 631 N.E.2d 547 (Mass. 1994) (No. SJ-06293).

[wa]s in error."³¹ It reached that determination by employing the following line of reasoning. The court noted that "the private property rights of coastal owners in the tidal area may be subordinate to the public's right if the public purposes are reasonably related to the protection or promotion of fishing or navigation."³² It then examined the statutory definition of the verb "to fish"³³ and compared it to the common definition of the verb "to farm,"³⁴ employing the distinction between capture and cultivation that *Pazolt* emphasized. Finally, it described the means of classifying activities reasonably related to the public's right to fish as those that are "necessary or incidental to the right to fish."³⁵ It then concluded that: "Aquaculture is a contemporary method of farming shellfish [I]t is not incidental to or reasonably related to or a natural derivative of the public's right to fish."³⁶

There are three problems with the court's analysis. First, the court refused to address a critical issue to LaForte's position: whether or not the public's reserved right to fish in the intertidal zone, guaranteed by the common law and the public trust doctrine, embraces aquaculture. Second, the court created a categorical rule concerning aquaculture in an imprecise fashion. Third, and most problematic, the court's convoluted reasoning obscures a fundamental flaw in the way the court has applied the "tests" of what activities are within the scope of the public's right to fish. These problems suggest that the court was predisposed to construe the public right of fishing very narrowly.

31. *Pazolt v. Director of Div. of Marine Fisheries*, 631 N.E.2d at 548.

32. *Id.* at 551.

33. *See supra* text accompanying note 15.

34. The verb "to farm" is defined as: "[T]o grow or cultivate in quantity < ~ shellfish>." *Pazolt v. Director of Div. of Marine Fisheries*, 631 N.E.2d at 551 (quoting WEBSTER'S NEW COLLEGIATE DICTIONARY 450 (9th ed. 1991)). In addition, the court noted the noun "farm" is defined as: "[A] tract of water reserved for the artificial cultivation of some aquatic food; as an oyster farm." *Id.* (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 824 (1961)).

35. *Id.* In a footnote, the court states that the test for determining whether an activity is protected by the Colonial Ordinance has been "variously described." *Id.* at n.9 (citing Opinion of the Justices, 313 N.E.2d 561 (1974) (public has reserved right to fish and any "natural derivative" thereof)); *Crocker v. Champlin*, 89 N.E. 129 (1909) (public right extends so far as is "reasonably necessary" in the interests of navigation); *Town of Wellfleet v. Glaze*, 525 N.E.2d 1298, 1304 (1988) (O'Connor, J., concurring) (public right may interfere with private rights if it is "reasonably related" to or a "natural derivative" of the right to fish).

36. *Pazolt v. Director of Div. of Marine Fisheries*, 631 N.E.2d at 551.

In failing to address the argument LaForte raised concerning the public trust doctrine, if even to dismiss it, the court side-stepped a major principle in the law of property affecting intertidal lands. Despite frequent descriptions in prior cases of the nature of the state's responsibility as a "trust" with respect to the public's rights,³⁷ the court did not use the term even once. By this omission, the court effectively reduced the issue to a question of applying ancient notions of public rights to a "contemporary" activity.³⁸ In the process, it ignored the commonwealth's contemporary responsibility to manage the people's shellfish resource effectively. It also overlooked the possibility that the Massachusetts Legislature, in deciding not to condition aquaculture on the permission of the riparian owner, implicitly assumed that aquaculture is within the scope of the public right of fishing. By excluding an analysis of the public trust doctrine, the court also compounded the other two problems in its decision.

37. See, e.g., *Commonwealth v. Alger*, 61 Mass. (7 Cush.) 53, 83 (1851) ("[W]hether this power [to regulate] be traced to the right of property or right of sovereignty as its principal source, it must be regarded as held in trust for the best interest of the public . . .").

38. *Pazolt v. Director of Div. of Marine Fisheries*, 631 N.E.2d at 551. The court tacitly rejected two arguments that the term "aquaculture" is merely a new name for an old activity. LaForte presented evidence before the superior court that planting and raising oysters in the tidelands dated to the early eighteenth century in Massachusetts. Brief of Defendant-Appellee John LaForte at 6-7, *Pazolt v. Director of Div. of Marine Fisheries*, 631 N.E.2d 547 (Mass. 1994) (No. SJC-06293) (citing an affidavit in the record from Professor David T. Konig, a professor of history at Washington University in St. Louis, Missouri). In addition, National Audubon Society argued that language in *Howes v. Town of Barnstable*, 189 N.E. 34 (Mass. 1934), though dicta, was:

The issue in that case was whether the holder of an expired shellfish grant had the right to interfere with the general public right to collect shellfish. The court ruled the plaintiff had no such right because his exclusive grant had expired. However, the decision goes on to describe how the plaintiff worked his former exclusive shellfish grant, including the fact that he "brought from the mainland several loads of marsh turf and mud to provide a rough surface on his grant and on adjoining grant," that he "also planted several patches of thatch to form islands and break up tidal currents," and he "planted in long furrows, which he made with a handplow, many bushels of clams."

Brief of amicus curiae National Audubon Society at 15-16, *Pazolt v. Director of Div. of Marine Fisheries*, 631 N.E.2d 547 (Mass. 1994) (No. SJC-06293) (quoting *Howes v. Town of Barnstable*, 189 N.E. at 34).

In borrowing dicta from *Town of Wellfleet v. Glaze*³⁹ to create a categorical rule in *Pazolt*, the court failed to consider the fact that the legal issues presented in those cases are distinguishable. In *Glaze*, the Town of Wellfleet sought an injunction to prevent a littoral property owner from mooring his boats on a town-approved aquaculture site. The superior court ultimately granted the injunction,⁴⁰ a decision that apparently spurred the Massachusetts Supreme Judicial Court to pick up the case *sua sponte*. The Town argued on appeal that the superior court had the statutory authority to issue the injunction if the court found that damage to the environment was occurring or about to occur, and that the damage resulted from a violation of a statute the major purpose of which was to prevent or minimize damage to the environment.⁴¹ The Massachusetts Supreme Judicial Court ruled for Glaze, however, concluding that the major purpose of the statute pertaining to the prevention of damage to shellfish in aquaculture sites⁴² was not to prevent "damage to the environment" within the meaning of the statute authorizing injunctions.⁴³

39. 525 N.E.2d at 1304. See *supra* text accompanying notes 17-18 for Justice O'Connor's comments.

40. The Town of Wellfleet initially sought a temporary restraining order against Glaze, which the superior court granted. The Town then applied for a preliminary injunction, which the court denied. Several months later the Town moved for summary judgment on its claim for injunctive relief. The superior court granted the motion, permanently enjoining Glaze from mooring his boats at the site. Glaze appealed, apparently to an intermediate-level court. *Id.* at 1299.

41. *Id.* at 1300. The statutory basis for the injunction reads in pertinent part: The superior court for the county in which damage to the environment is occurring or is about to occur may, upon a civil action in which equitable or declaratory relief is sought . . . by any political subdivision of the commonwealth, determine whether such damage is occurring or is about to occur and may, before the final determination of the action, restrain the person causing or about to cause such damage; provided . . . that the damage . . . constitutes a violation of a statute, ordinance, by-law or regulation the major purpose of which is to prevent or minimize damage to the environment.

MASS. GEN. LAWS ch. 214, § 7A (1986).

42. MASS. GEN. LAWS, ch. 130, § 67 (1986) reads in pertinent part: Whoever works a dredge, oyster tongs or rakes, or any other implement for the taking of shellfish of any description upon any shellfish grounds or beds covered by a license granted under section fifty-seven . . . or in any way disturbs the growth of shellfish thereon . . . without the consent of the licensee . . . shall for the first offense be punished by a fine

See *supra* note 5 for the text of MASS. GEN. LAWS ch. 130, § 57 (1992), authorizing licenses for shellfish aquaculture.

43. *Town of Wellfleet v. Glaze*, 525 N.E.2d at 1300-01. The court wrote:

It is against this backdrop of facts and issues, which did not involve the question of whether aquaculture is within the scope of the reserved public rights in the intertidal zone, that Justice O'Connor wrote in a concurring opinion that "[a]quaculture is not fishing."⁴⁴ Under the circumstances presented in the case, his comments are *obiter dicta* of the most gratuitous sort.

While *Pazolt* ultimately did turn on the question of whether aquaculture should be construed as within the public right of fishing,⁴⁵ it need not have. In its hasty application of Justice O'Connor's statements in *Glaze*, the *Pazolt* court overlooked the other aspect of the *Glaze* decision. Quoting Chief Justice Shaw, the *Glaze* court summarized the balance between public and private rights in the intertidal zone:

Looking at the terms of [the Colonial Ordinance], and the purposes for which it was intended, the object seems to have been, to secure to riparian proprietors in general, without special grant, a property in the land . . . subordinate only to a *reasonable* use of the same by other individual riparian proprietors and the public⁴⁶

The town has not demonstrated that the major purpose of [section 67] is to prevent or minimize damage to the environment. Although protection of shellfishing undoubtedly provided some motivation for the enactment of the statute . . . it cannot be that the major purpose behind § 67 is the protection of the environment because it is the consent of the licensee that determines whether the conduct described is within the statutory sanction. If the Legislature in enacting § 67 was primarily motivated by a desire to protect the natural resources of the Commonwealth, it surely would not have limited the statutory sanction to acts done without the licensee's permission.

Id. There is at least an argument that the purpose of § 67 is to prevent damage to the environment in that aquaculture can function as a conservation measure. *But see id.* at 1302 (Wilkins, J., concurring) (stating that "damage to the environment" for the purposes of section 7A involves adverse effects on the air, water or land, not animals).

44. *Id.* Justice O'Connor would have held that the superior court had the authority to issue the injunction under its general equity powers, but that the town did not demonstrate the right to an injunction on the merits. *Id.* at 1302.

45. Pazolt asserted, despite her argument that aquaculture should not be construed as within the public right of fishing, that she was not "attacking the validity of the statutory scheme on its face" Brief for Plaintiff-Appellant at 18 n.2, *Pazolt v. Director of Div. of Marine Fisheries*, 631 N.E.2d 547 (Mass. 1994) (No. SJC-06293). This curious statement appears to contradict the premise of her argument. *See supra* note 13 and accompanying text.

46. *Town of Wellfleet v. Glaze*, 525 N.E.2d at 1302 (quoting *Commonwealth v. Alger*, 61 Mass. (7 Cush. 53, 89 (1851) (emphasis added)).

The court, then, could have concluded simply that LaForte's activities were not reasonable in light of Pazolt's commercial expectations. Instead, it created a rule of law that has negative consequences for the future of aquaculture.

The most egregious problem, however, is the court's application of the "tests" to determine if an activity falls within the reserved right of fishing. These tests, according to the court, determine if an activity is "reasonably related" to fishing, a "natural derivative" of fishing, or "incidental to" the right of fishing.⁴⁷ What the court in *Pazolt* ignores is the way these issues have been addressed in the past. Although never stated expressly, the tests have not been used interchangeably. In particular, the "reasonably related" test, or an approximation thereof, has been reserved for judicial evaluation of statutes affecting the public right in the intertidal zone.⁴⁸ For example, in *Commonwealth v. Alger*,⁴⁹ perhaps the greatest exposition of the relationship between public and private right in the intertidal zone, the court ruled that the Massachusetts Legislature had the authority to establish a line in Boston Harbor beyond which riparian owners could not extend their wharves because the law was a "reasonable regulation" related to the public right of navigation.⁵⁰ On the other hand, the "incidental to" test, such as it is,⁵¹ seems to reflect the courts' efforts to determine if an activity is necessary in order to engage in the public right to fish where no statute has explicitly authorized the

47. *Pazolt v. Director of Div. of Marine Fisheries*, 631 N.E.2d at 551.

48. Evaluation of whether a statute is "reasonably related" to the promotion of fishing or navigation echoes the substantive due process test to determine if a police power action is constitutional. It also echoes the takings test to determine if a regulation goes "too far." See *Orion Corp. v. State*, 747 P.2d 1062 (Wash. 1987). The *Orion* court notes that the tests seem analytically identical. *Id.* at 1076-1077.

49. 61 Mass. (7 Cush.) 53 (1851).

50. *Id.* at 104.

51. There is good reason to conclude that no such "test" exists. The court in *Pazolt*, in fact, cites no authority for the test. There have been references to "incidental" rights in the case law, however. See, e.g., *Weston v. Sampson*, 62 Mass. (8 Cush.) 347, 353 (1851) ("[B]y the charters of Charles I. and James I. . . . all the rights to the sea and sea-shores, with the incidental rights of fishing, were granted to the colonists."); *Butler v. Attorney General*, 80 N.E. 688, 689 (Mass. 1907) ("In the seashore the entire property, under the colonial ordinance, is in the individual, subject to the public rights. . . . Among these is, of course, the right of navigation, with such incidental rights as pertain thereto.") (citations omitted). Because the *Pazolt* court appears to apply an "incidental to" test, it is treated as such.

activity.⁵² Thus, in *Barry v. Grela*,⁵³ the court concluded that the public has the right to cross private tidal flats to reach a public jetty in order to fish from that jetty, presumably because in the absence of such an incidental right, the public right is meaningless. Similarly, in *Weston v. Sampson*,⁵⁴ in ruling that the right to fish included the right to take shellfish, the court did not bar the defendants from landing a boat on the flats, presumably because without the incidental right of landing on the flats, the defendants would have no access to exercise their right to take shellfish.

In contrast to the other two "tests," which at least have some ancient language to support their application, it is clear that the "natural derivative" test is a recent invention. That language is used first in the 1974 *Opinion of the Justices*,⁵⁵ in which the Massachusetts Supreme Judicial Court evaluated a pending bill before the legislature that would have guaranteed the public a right of passage by foot in the intertidal zone. After noting that previous cases affirmed the rule that riparian property owners hold the tidelands in fee, the *Opinion of the Justices* court stated: "If, therefore, the right of passage authorized by the bill is, as it declares, merely an exercise of existing public rights, and not a taking of private property, it must be a natural derivative of the rights preserved by the colonial ordinance."⁵⁶ The court then concluded that the bill would constitute a taking under the Massachusetts and U.S. constitutions.⁵⁷ Justice O'Connor, writing his concurring opinion in *Glaze*, cited the

52. "Incidental" is defined as: "Depending upon or appertaining to something else as primary; something necessary, appertaining to, or depending upon another which is termed the principal" BLACK'S LAW DICTIONARY 762 (6th ed. 1990). "Rights," according to the same text, "may . . . be described as either *primary* or *secondary*. *Primary* rights are those which can be created without reference to rights already existing. *Secondary* rights can only arise for the purpose of protecting or enforcing primary rights." *Id.* at 1324.

53. 361 N.E.2d 1251 (Mass. 1977).

54. 62 Mass. (8 Cush.) at 355.

55. 313 N.E.2d 561, 566 (Mass. 1974). Advisory opinions of the Massachusetts Supreme Judicial Court reflect the opinions of the individual justices. They are not binding for *stare decisis* purposes. See *Opinion of the Justices*, 366 N.E.2d 733 (Mass. 1977); *Mayor of Somerville v. District Court of Somerville*, 57 N.E.2d 1 (Mass. 1944); *Woods v. City of Woburn*, 107 N.E. 985 (Mass. 1915).

56. *Opinion of the Justices*, 313 N.E.2d at 566.

57. *Id.* at 568-71.

"natural derivative" language as though it were a binding standard.⁵⁸ The *Pazolt* court then uncritically adopted it.⁵⁹

In its application of these tests, the *Pazolt* court in effect subjected LaForte's activities to two separate tests, one of which should not have been applied at all. To be consistent with Chief Justice Shaw's opinion in *Commonwealth v. Alger*,⁶⁰ the court should have decided whether aquaculture, which was authorized by statute, was reasonably related to the promotion of fishing or a reasonable regulation of fishing; it should not have considered whether it was "reasonably related to the public's right to fish."⁶¹ If the court found that aquaculture was reasonably related to the promotion of fishing or a reasonable regulation of fishing, the inquiry should have ended there.⁶² Furthermore, had the court given any consideration to LaForte's public trust argument, it may have been forced to the conclusion that aquaculture licensing is within the state's authority as an exercise of its public trust responsibility. Instead, the court subjected LaForte's activities to an additional test: whether aquaculture was "necessary or incidental to the right to fish."⁶³ Because aquaculture is not "incidental to" the right to fish, in that theoretically shellfishing could occur without aquaculture,⁶⁴ the court was not obliged to hold that aquaculture passed the test.

The irony of the *Pazolt* court's analysis is that had it scrutinized Justice O'Connor's opinion in *Glaze*, it would have found an internal inconsistency. Despite his pronouncement that aquaculture is not fishing, Justice O'Connor concluded that: "[A]lthough the general public's

58. *Town of Wellfleet v. Glaze*, 525 N.E.2d at 1304.

59. *Pazolt v. Director of Div. of Marine Fisheries*, 631 N.E.2d 547, 551 (Mass. 1994).

60. 61 Mass. (7 Cush.) 53 (1851).

61. *Pazolt v. Director of Div. of Marine Fisheries*, 631 N.E.2d at 551.

62. In conducting that inquiry, the court might have considered the following dictum from *Commonwealth v. Alger* for its persuasive authority.

Whether any restraint upon the use of land is necessary to the preservation of common rights and the public security, must depend upon circumstances, to be judged of by those to whom all legislative power is intrusted by the sovereign authority of the state, so to declare and regulate as to secure and preserve all public rights.

Commonwealth v. Alger, 61 Mass. (7 Cush.) at 88.

63. *Pazolt v. Director of Div. of Marine Fisheries*, 631 N.E.2d at 551.

64. *But see supra* note 25 and accompanying text for LaForte's argument that the flats in question were barren of shellfish prior to his shellfish grant. *See also* Part III.B for the argument that aquaculture is an effective conservation measure.

shellfishing rights in the defendant's tidal flats are presently exercised exclusively by a private party, the licensee, . . . his license is granted *to serve the public interest in replenishing the shellfisheries, not for the private benefit of the licensee.*"⁶⁵ Thus, Justice O'Connor conceded that the aquaculturist's activities would protect and promote fishing, which is enough to pass the "reasonably related" test. To avoid the inherent contradictions in the Massachusetts court's analysis of clam aquaculture, Maine courts, if faced with a similar situation, should reject the *Pazolt* analysis and formulate a distinguishable legal theory concerning the relationship between shellfish aquaculture and the public right of fishing.

III. DISTINGUISHING SHELLFISH AQUACULTURE IN MAINE

Underlying the discussion in the previous section is the question of which branch of the government should decide the scope of public rights in the intertidal zone. Historically, the courts have been deferential to the legislatures in this area. For example, in the great case of *Commonwealth v. Alger*,⁶⁶ in which the court considered whether the Massachusetts Legislature could limit the length of wharves extending into Boston harbor, Chief Justice Shaw wrote:

[C]onsidering that sea-shore estate, though held in fee by the riparian proprietor, both on account of the qualified reservation under which the grant was made, and the peculiar nature and character, position and relations of the estate, and the great public interests associated with it, . . . the court are of opinion that the legislature has power . . . to make reasonable regulations, declaring the public right, and providing for its preservation by reasonable restraints, and to enforce these restraints by suitable penalties.⁶⁷

65. *Town of Wellfleet v. Glaze*, 525 N.E.2d 1298, 1303 (Mass. 1988) (O'Connor, J., concurring) (citation omitted) (emphasis added). Justice O'Connor also cited dictum from *Commonwealth v. Hilton*: "[I]t is not to be assumed that the Legislature would grant exclusive fishing rights except to promote the public interest." *Id.* (citing *Commonwealth v. Hilton*, 54 N.E. 362, 364 (Mass. 1899). *Accord* *Orion Corp. v. State*, 747 P.2d 1062 (Wash. 1987). The *Orion* court noted that Washington regulations identified aquaculture as "a preferred, water-dependent use" deserving of protection from other activities which when "[p]roperly managed . . . can result in *long term over short term* benefit' 'of *state-wide and national interest.*" *Id.* at 1066 n.4 (citation omitted) (alteration in original).

66. 61 Mass. (7 Cush.) 53 (1851).

67. *Id.* at 95.

The *Pazolt* court, however, ignored the Legislature's historic prerogative as it pertains to the public right of fishing. Given the Massachusetts court's unwillingness to consider the implications of legislative responsibility under the public trust doctrine, an analysis of both the statutes and prior cases is necessary to outline how Maine courts, ordinarily inclined to follow Massachusetts decisions,⁶⁸ can distinguish the role aquaculture can play in the preservation of the shellfish industry and the public right of fishing in this state.

A. *The Leasing Statutes*

The Maine statutes pertaining to aquaculture are fundamentally different from the Massachusetts statute. First, in contrast to Massachusetts, Maine has a statutory definition of aquaculture: "Aquaculture" means the culture or husbandry of marine organisms by any person."⁶⁹ While this definition does not refer to fishing,⁷⁰ it does suggest that the Maine Legislature has developed a cogent policy with respect to aquaculture. Should, for example, a *Pazolt* issue be raised before the Maine Supreme Judicial Court, the justices would not be consulting a common dictionary to glean what the Legislature contemplated with respect to that activity.⁷¹ Second, unlike Massachusetts, Maine municipalities cannot authorize aquaculture⁷² until they have enacted municipal shellfish

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

69. ME. REV. STAT. ANN. tit. 12, § 6001(1) (West 1994).

70. "The verb 'fish' means to take or attempt to take any marine organism by any method or means." *Id.* § 6001(17). Arguably, aquaculture is contained within the scope of the verb "fish" by the use of the phrase "by any method or means."

71. In *Pazolt*, the Massachusetts Supreme Judicial Court relied on Webster's New Collegiate Dictionary to define the word "farm." See *supra* notes 15-18, 33-34 and accompanying text.

72. The municipal leasing statute reads in pertinent part:

A municipality, which has established a shellfish conservation program as provided under section 6671, may lease areas in the intertidal zone to the extreme low water mark, within the municipality for the purpose of shellfish aquaculture.

...

2. Department procedure for review and approval. The commissioner shall use the same procedure and the same grounds for approval as required for aquaculture leases under section 6072 [leasing through the Department of Marine Resources], except:

A. Preference shall be given to municipal leases;

...

conservation programs.⁷³ In effect, the Maine Legislature has decided that aquaculture, which can only be conducted as part of a conservation program, is a viable conservation measure.

Maine defines the term "conservation" as "providing for the development and wise utilization of the state's marine resources, protecting the ultimate supply for present and future generations, preventing waste and implementing sound management programs."⁷⁴ Although it is not stated explicitly, this is a codification of the public trust doctrine as related to marine resources; it outlines the state's responsibilities in a manner that is consistent with that doctrine. While the existence of that doctrine has never been questioned judicially, and has in fact been construed explicitly

C. The municipality may establish conditions and limits on the lease

ME. REV. STAT. ANN. tit. 12, § 6673 (West 1994).

Section 6072 authorizes the commissioner of the Department of Marine Resources to lease areas of the intertidal zone for scientific research or for aquaculture of marine organisms. Leases are conditioned on the permission of the littoral property owner. *Id.* § 6072(4)(F) (requiring written permission of "every riparian owner whose land to the low water mark will be actually used"). Because section 6673 requires the commissioner, in evaluating municipal leases, to use "the same grounds for approval as required for aquaculture leases under section 6072," municipal leasing is also conditioned on the permission of the littoral owner.

73. ME. REV. STAT. ANN. tit. 12, § 6671 (West 1994) provides:

1. Municipal funds. Any municipality may, by vote of its legislative body, raise and appropriate money for the implementation of a shellfish conservation program.

. . .

3. Shellfish conservation ordinance. Within any area of the municipality, a shellfish conservation ordinance may regulate or prohibit the possession of shellfish; may fix the amount of shellfish that may be taken; . . . and may authorize the municipal officers to open and close flats under specified conditions

. . .

4. Adoption requirements. Shellfish conservation ordinances may be adopted under this section by municipalities or unorganized townships.

. . .

B. Any ordinance proposed by a municipality or unorganized territory under this section must be approved in writing by the commissioner prior to its adoption.

. . .

Id.

74. *Id.* § 6001(9). Massachusetts does not define the word "conservation" in MASS. GEN. LAWS, ch. 130 (1994).

as applying to marine resources,⁷⁵ the language of the statutes implies that aquaculture should be construed as within the public right of fishing. In fact, the history of the Maine Legislature's actions with respect to conservation of marine resources bears out this interpretation.

B. Legislative Efforts to Conserve the Fisheries.

In acting to conserve marine resources, the Massachusetts and Maine Legislatures have defined the scope of public rights in the intertidal zone also. (In fact, the Colonial Ordinance, the subject of much analysis and interpretation since its enactment in 1641, is an example of the authority of the legislative body to designate private and public rights in tidal areas.) Maine's statute authorizing municipal leasing of tidal flats for aquaculture is consistent with both the authority of the legislature to conserve the resource under the public trust doctrine and with legislative authority to define the scope of public rights in that zone.

Prior to Maine becoming a separate state in 1820, statutes enacted in Massachusetts applied to the District of Maine. As early as 1765, the province of Massachusetts enacted a law prohibiting the taking of oysters without a permit from the selectmen of the town where the taking occurred.⁷⁶ That statute remained in force until 1795, when a similar law regulating the fishery was enacted.⁷⁷ The legislative body also created laws pertaining to specific localities. For example, under a 1793 statute, the citizens of Hamilton could "improv[e] the clam banks."⁷⁸ In no case,

75. *James v. Inhabitants 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 . . ."); *See also* Opinion of the Justices, 437 A.2d 597 (Me. 1981).

76. The statute of February 28, 1765, is cited in *Keene v. Gifford*, 32 N.E. 946, 947 (Mass. 1893) as 4 Prov. Laws, p. 743.

77. *Keene v. Gifford*, 32 N.E. 946, 947 (Mass. 1893). The court notes in *Keene*, that "no provision was made, until 1848, by which, if an individual artificially created oyster beds on public flats, he could be protected in their enjoyment, and allowed to take oysters from them at pleasure." *Id.*

It was the 1848 statute at issue in *Keene*. In that case the defendant had a license to plant oysters in a given area of Bourne, Massachusetts which expired in June of 1889. Although he applied for a renewal of the license, he did not pick it up. The selectmen subsequently issued a license to the plaintiff in April of 1890. The court ruled that the plaintiff had the exclusive use of the flats because the defendant had allowed his license to expire.

78. *Commonwealth v. Bailey*, 95 Mass. (13 Allen) 541, 543 (1866). The court notes

however, was the power of the legislative body to make laws pertaining to the resource successfully challenged.

The bifurcation of authority evident in the earliest statutes, in which the legislative body delegated part of its responsibility concerning marine resource to the towns, was duplicated in Maine after it separated from Massachusetts. A few examples will suffice to illustrate the point. One of the earliest post-statehood acts, passed in March of 1821, was named "An Act for the preservation of certain Fish."⁷⁹ It provided penalties for destroying shellfish or willfully obstructing their growth and granted towns the authority to issue permits to take shellfish at the times and in the quantities the selectmen deemed reasonable. It also created exceptions for family use, bait, and native Indians.⁸⁰ An 1883 Act similarly regulated the taking of clams. Named "An Act to regulate the taking of shell fish or clams,"⁸¹ it created, however, exceptions for bait, personal consumption, and hotel owners but did not provide an exception for Indians. Clearly, in creating a new exception for hotel owners and eliminating the exception for Indians, the Legislature had and exercised the authority to define public rights in the intertidal zone.

Contrary to Pazolt's arguments concerning a several fishery,⁸² the legislative bodies of both Massachusetts and Maine have recognized that granting exclusive use of a fishery can serve the interests of conservation and is within legislative authority. Massachusetts recognized that principle at least as early as 1848, when it granted exclusive licenses to cultivate oysters.⁸³ In Maine, the legislature enacted the first fish culture statute in 1889.⁸⁴ It authorized towns to appropriate money for the propagation of fish shortly thereafter, in 1893.⁸⁵ By 1905, the legislature granted the commissioner of the Department of Sea and Shore Fisheries authority to appropriate up to \$1,000 to conduct experiments in shellfish cultivation. Named "An Act for the encouragement, development and conservation of the Shellfish Industry," it also allowed individuals to engage in cultivation if they had the permission of the riparian owners whose flats would be

that this statute pertained to the division of the Town of Ipswich into the Town of Ipswich and the Town of Hamilton and that the right created by the statute is undefined. *Id.*

79. 1821 Me. Laws 179.

80. *Id.*

81. 1883 Me. Acts 178.

82. *See supra* notes 11-14 and accompanying text.

83. *See supra* note 77.

84. 1889 Me. Laws 254.

85. 1893 Me. Laws 151.

used.⁸⁶ The Maine Legislature continued to appropriate money for such experiments for a number of years thereafter.

What the members of the legislature apparently knew is that cultivation results in conservation by replenishing the resource. This fact is evident both in the statements regarding the purposes of cultivation statutes, and in the statements of courts evaluating those statutes. For example, in *Keene v. Gifford*,⁸⁷ the Massachusetts Supreme Judicial Court observed:

The facts that the place licensed is not to contain a natural oyster bed, and the low price charged in fees, make it apparent that the purpose of the statute is to encourage the artificial propagation of oysters It is naturally to be expected that the presence of oysters for a number of years in any locality will tend to make, in the vicinity, extensive and valuable beds.⁸⁸

As mentioned above, Justice O'Connor also conceded this point in his concurring opinion in *Glaze*.⁸⁹ In fact, cultivation, or aquaculture in modern parlance, does replenish the resource. In the case of clams, their fertilized eggs develop into free swimming larvae. These larvae can be scattered widely from their parents' spawning grounds, due to tidal action and water currents.⁹⁰ Thus, an aquaculturist may indeed "farm" the

86. 1905 Me. Laws 88. The statute read in pertinent part:

Section 2. Said commissioner . . . may, for the purposes of this act, take any shore rights, flats and waters not exceeding an area of two acres . . . in the prosecution of the work of fish culture and scientific research relative to shellfish

. . .

Section 3. The commissioner, upon the application of any person or corporation interested or engaged in scientific research relating to shellfish . . . or in the cultivation and development of the shellfish industry for economic purposes . . . shall, after being satisfied . . . that the applicant either owns or has the consent, so far as the same can be granted, of the owner of the flats, shore rights and waters where such work is to be undertaken, . . . give notice of a hearing. . . and if, upon such hearing, the commissioner is satisfied that the interests of the state will be promoted by such experiments [shall set aside up to one acre for that purpose].

Id.

87. 32 N.E. 946 (Mass. 1893).

88. *Id.* at 947.

89. See *supra* note 65 and accompanying text.

90. See ROBERT L. DOW & DANA E. WALLACE, DEPARTMENT OF SEA AND SHORE

shellfish he plants in the flats. Unlike the traditional breeder of farm animals, however, he has no control over their offspring. Instead, he is returning those offspring to the wild, making them available to the public for capture.

C. Judicial Evaluation of Legislative Enactments

In reviewing the numerous cases addressing public rights in the intertidal zone, it is a mistake to look solely at the holdings in order to understand the scope of those rights. In many if not most cases, the courts evaluated challenges to statutes. Because of these factual bases, a recitation of the holdings does not accurately reflect judicial evaluation of legislative authority in the intertidal zone. It is therefore necessary to examine the situations under which the courts upheld statutory authority to affect private and public rights in tidal lands.

Where the courts have concluded that a legislative enactment is designed to preserve public rights, the statutes for the most part have been upheld. For example, in *Inhabitants of Stoughton v. Baker*,⁹¹ the Massachusetts Legislature authorized, via a resolution, that an alteration be made in a sluiceway in a dam in Dorchester. The defendant dam-owners refused to make the alteration, arguing that the legislature had no authority to pass the resolve. The Supreme Judicial Court concluded that the resolve was constitutional, noting that the right to build the dam was subject to certain limitations, one of which was to protect the rights of the public in the fishery "so that the dam must be so constructed that the fish should not be interrupted in their passage up the river to cast their spawn."⁹² Conversely, where the legislature has not acted to curtail public rights, they cannot be abridged. In *Inhabitants of Arundel v. McCulloch*,⁹³ the town built a bridge over the Kennebec River between

FISHERIES, THE STORY OF THE MAINE CLAM 8 (1950).

91. 4 Mass. (4 Tyng) 522 (1808).

92. *Id.* at 528. It is interesting to note that Stoughton, the defendant dam-owner, was granted the right to build the mill and dam in 1634. No fish way was constructed, however, until 1789, more than 150 years later. It was at that point that the sluiceway, which the legislature concluded required alteration, was built. In vindicating the public rights, the court stated: "This limitation [pertaining to making the fish accessible to the public], being for the benefit of the public, is not extinguished by any inattention or neglect, in compelling the owner to comply with it. For no laches can be imputed to the government, and against it no time runs so as to bar its rights." *Id.*

93. 10 Mass. (10 Tyng) 70 (1813).

Arundel and Wells without legislative authority to do so. The defendant, sailing his vessel up the Kennebec, removed a part of the bridge in order to pass through. The court concluded the defendant committed no trespass, because the town could not interfere with the public right of navigation in the absence of legislative approval.⁹⁴ In another vindication of the public right of navigation, the court in *Commonwealth v. Alger*⁹⁵ wrote:

[N]one but the sovereign power can authorize an interruption of such passages, because it has power to judge of what the public convenience requires, and may enact conditions to preserve the natural passages; . . . all navigable rivers are public property, for the use of all the citizens; and there must be some act of the sovereign power, direct or derivative, to authorize any interruption of them.⁹⁶

Thus, with respect to preserving public rights, the courts have repeatedly upheld legislative authority.

Likewise, the courts have also upheld legislative authority to alter public rights of navigation and fishing if it is in the interests of the state to do so. The court in *Inhabitants of Arundel v. McCulloch*,⁹⁷ for example, stated that had town been authorized by the legislature to construct the bridge, it would have found a trespass.⁹⁸ In *Parker v. The Cutler Milldam Company*⁹⁹ the court wrote: "The regulation of the navigable waters within the State is vested in the sovereign power to be exercised by laws duly enacted. The navigation may be impeded, if in the judgment of

94. *Id.* In a factual circumstance similar to that in *Stoughton*, the bridge had been in use for fifty years. Nevertheless, the court wrote:

It is an unquestionable principle of the common law, that all navigable waters belong to the sovereign, or in other words, to the public; and that no individual or corporation can appropriate them to their own use, or confine or obstruct them, so as to impair the passage over them without authority from the legislative power.

Id. at 71.

95. 61 Mass. (7 Cush.) 53 (1851).

96. *Id.* at 79 (summarizing the conclusion of the court in *Commonwealth v. Inhabitants of Charlestown*, 18 Mass. 184, 1 Pick. 180 (1822)).

97. 10 Mass. (10 Tyng) 70 (1813).

98. *Id.* at 71. See *supra* notes 91-92 and accompanying text.

99. 20 Me. 353 (1841).

that power the public good requires it.”¹⁰⁰ With respect to fishing, the courts have approved legislative power to modify the scope of public rights as well. In construing the Colonial Ordinance in *Commonwealth v. Bailey*,¹⁰¹ the court stated:

But this [ordinance] did not . . . confer on the inhabitants of the several towns as existing in 1641 a right of property in the fisheries in their respective limits. It simply declared the public right of fishing, in the absence of any law, regulation or grant to restrain it. The qualification “unless the freemen of the same town or the general court have otherwise appropriated them” is not a mere specific exception of privileges previously granted; but a general law, prescribing by what authority this public right may be regulated or granted away.¹⁰²

In addition, the courts have repeatedly upheld the authority of towns, granted by statute, to discriminate against non-residents.¹⁰³ Such discrimination is surely a modification of public rights, which had its genesis in the Colonial Ordinance itself.¹⁰⁴

What could be characterized as the ultimate form of discrimination, i.e., granting exclusive rights to individuals that the public would ordinarily be able to exercise, has been upheld by the courts as well. Thus, in *Commonwealth v. Manimon*,¹⁰⁵ the court upheld a conviction of the defendant who dug quahogs in beds designated for a licensee’s exclusive use. The court wrote:

100. *Id.* at 357. In *Parker*, the defendant corporation was granted authority to construct a dam at the head of a harbor in Cutler. The plaintiff alleged that the dam interfered with the right to navigate the river. The court held that though the dam did alter the flux of the tide, the legislature had the power to alter the public right of navigation.

101. 95 Mass. (13 Allen) 541 (1866).

102. *Id.* at 542. In *Bailey* the court held that the general law requiring permits to take clams applied in the town of Ipswich.

103. *See, e.g.,* State v. Lemar, 87 A.2d 886 (Me. 1952) (statute allowing towns to exclude non-residents from worm-digging upheld); State v. Leavitt, 72 A. 875 (Me. 1909) (statute allowing Scarborough to exclude non-residents from harvesting shellfish upheld); Commonwealth v. Hilton, 54 N.E. 362 (Mass. 1899) (statute allowing towns to exclude non-residents from harvesting shellfish upheld). But see State v. Norton, 335 A.2d 607 (Me. 1975) (town ordinance excluding non-residents must be based on findings of fact that such ordinance will protect shellfish from over-harvesting).

104. The ordinance limited free fishing to householders exercising that right in the town in which they lived. *See* THE BOOK OF THE GENERAL LAUUES *supra* note 1.

105. 136 Mass. (22 Lath.) 456 (1884).

Th[e] statute provided for the planting of artificial oyster beds under a license from the selectmen of towns, and gave to persons licensed the exclusive use, for that purpose, of the flats assigned to them, and an action of trespass . . . and in addition thereto imposed . . . a fine . . . for each offence.

It seems plain, from an examination of these statutes, that when the Legislature provided for private ownership in oyster beds, there ceased to be any public or common right to take oysters from such beds, and the provisions intended to regulate the exercise of the common right do not apply to them¹⁰⁶

In a similar Massachusetts case,¹⁰⁷ the court declared: "The power of the legislature to determine the mode of use of fisheries in the public interest, even to the granting of exclusive rights of fishing to individuals, has been broadly stated by the courts, and frequently exercised."¹⁰⁸ Maine authority for the same proposition is stated in *State v. Leavitt*: "[T]he great weight of authority and judicial expression is to the effect that the state in the exercise of its power of regulation and control may grant exclusive rights of fishery to individuals."¹⁰⁹ The assumption underlying these statements and the statutes to which they pertain was explained in *Commonwealth v. Hilton*: "It is not to be assumed that a Legislature would undertake to grant exclusive rights, except on the ground that the interests of the public would thereby be promoted."¹¹⁰ Thus, the courts in both Massachusetts and Maine have uniformly affirmed that it is within the legislatures' power to determine the scope of rights in tidal lands if the public interest is served by their decisions.

D. The Law Court's Construction of Public Rights

There is a good argument that the Maine Law Court has construed public rights in the intertidal zone more liberally than the Massachusetts Supreme Judicial Court.¹¹¹ For example, the Law Court has stated that

106. *Id.* at 457.

107. *Commonwealth v. Hilton*, 54 N.E. 362 (Mass. 1899).

108. *Id.* at 363-64.

109. *State v. Leavitt*, 72 A. 875, 877 (Me. 1909).

110. *Commonwealth v. Hilton*, 54 N.E. at 364.

111. *See Bell v. Town of Wells*, 557 A.2d 168, 186-87 (Me. 1989) (Wathen, J., dissenting).

the public right of navigation "includes the right of mooring their vessels thereon, and of discharging or taking in their cargoes. The owner of the flats has no power to take away or restrict this right, while the space is unoccupied."¹¹² Likewise, in *Andrews v. King*,¹¹³ the court extended this right to include boarding and discharging passengers for business as well as pleasure.¹¹⁴ The Law Court has also upheld the right to pass over the flats when they are frozen.¹¹⁵ These public rights appear to have been acknowledged because they make the right of navigation complete. In that sense they can be described as "incidental to" the right of navigation.

When an activity, however, is in no way linked with the acknowledged rights of fishing, fowling and navigation, the Law Court has rejected arguments that public rights should be expanded. In *Moore v. Griffin*,¹¹⁶ the Law Court held that mussel-bed manure could not be collected from private flats. The court has prohibited the taking of seaweed as well.¹¹⁷ In *McFadden v. Haynes and De Witt Ice Co.*,¹¹⁸ the court also concluded that ice-shavings could not be deposited on the flats without the littoral landowner's consent. Finally, in *Bell v. Town of*

112. *Deering v. Proprietors of Long Wharf*, 25 Me. 51, 65 (1845).

113. 129 A. 298 (Me. 1925).

114. *Id.* at 299.

115. *French v. Camp*, 18 Me. 433 (1841); *Marshall v. Walker*, 45 A. 497, 498 (Me. 1900) ("Others . . . may ride or skate over [the tidal flats] when covered with water-bearing ice . . .").

116. 22 Me. 350, 355-56 (1843). *Accord* *Porter v. Shehan*, 73 Mass. (7 Gray) 435 (1856).

117. *Hill v. Lord*, 48 Me. 83 (1861). *Accord* *Anthony v. Gifford*, 84 Mass. (2 Allen) 549 (1861) (holding that the public can collect seaweed if it is floating on the tide, but not if it has come to rest on the sand).

There is an argument that the authors of the Colonial Ordinance, while codifying the public rights to fishing, fowling and navigation, were aware of an approved other public uses of the intertidal land. For example, in 1820, the Maine Legislature passed "An Act to divide the town of Wells, and incorporate the northeasterly part thereof as a town by the name of Kennebunk." 1820 Me. Laws 5. Section 5 of that act specifies: "That the privileges of obtaining clams, sea-weed, and rock-weed from the beaches and flats in said towns, which the inhabitants have been accustomed to use from time immemorial, shall continue in common as heretofore." *Id.* In addition, in *Bell v. Town of Wells*, 557 A.2d 168 (1989) the Law Court noted that the lower court found that the "framers of the Colonial Ordinance did not intend to curtail the public use of the intertidal zone that was current at the time for travel and for driving and resting cattle" but also found that the usage did not survive long enough to become a common law right. *Id.* at 173 n.15.

118. 29 A. 1068 (Me. 1894).

Wells,¹¹⁹ the Law Court held that there is no right to use the intertidal zone for recreational purposes such as sunbathing.¹²⁰

In this way, the Law Court appears to have fashioned a test based on whether the activity is necessary for a full exercise of the acknowledged rights. Had the Court made this test explicit, it would have a defined means of evaluating activities conducted on tidal lands. Maine courts then could avoid mistakes like those of the *Pazolt* court. In addition, an explicit test would clarify the basis of the court's analysis and avert the unnecessary confusion apparent in the *Bell* case. There, the Law Court, in evaluating whether the public easement extends beyond the reserved rights in the Colonial Ordinance, stated that public uses of the intertidal zone are "only for fishing, fowling, and navigation (whether for recreation or business) and any other uses reasonably incidental or related thereto."¹²¹ There should be no "reasonable" element in an analysis of whether an activity is necessary to full exercise of a public right.

IV. CONFLICTS IN THE INTERTIDAL ZONE

Under Maine law, an applicant for a municipal lease must have the permission of the riparian owner to engage in shellfish aquaculture on the owner's flats.¹²² The question this requirement raises is whether this deference to the littoral property owner is consistent with the historical development of the relative rights of the public and private owners. Given the purpose of the Colonial Ordinance as described in the case law, the requirement gives undue discretion to the littoral property owner.

According to every authority available, the purpose of the provision extending riparian owners' title to the low water mark was to encourage the construction of wharves.¹²³ Consequently, a relevant question is

119. 557 A.2d 168 (Me. 1989). *Bell*, however, differs from the other cases cited in this section because the Law Court evaluated a the constitutionality of a statute purporting to grant the public general recreational use of the intertidal zone. At the same time, the court concluded that the public had not established a right to use the intertidal zone for general recreationa by custom.

120. *Accord* *Butler v. Attorney General*, 80 N.E. 688 (1907).

121. *Bell v. Town of Wells*, 557 A.2d at 169.

122. *See supra* note 72 and accompanying text.

123. *See, e.g., Boston Waterfront Development v. Commonwealth*, 393 N.E.2d 356, 360 (Mass. 1979) ("The main object of the Massachusetts Colony ordinance has always been understood to be to induce the erection of wharves for the benefit of commerce.") (quoting note following *Commonwealth v. Roxbury*, 75 Mass. (9 Gray) 451, 515 (1857));

whether the rights of the riparian owner should remain the same if the implied condition of the grant is never met. At least one authority has concluded the rights of the riparian owner should be reassessed.¹²⁴

The State, however, grants these lands for a particular purpose; namely, to further its commercial interests depending upon navigation. It is not unreasonable, therefore, to say that the grant is upon condition that the land be used for no other purposes than those of the commerce marine. If the property is used for any other purpose, the State should have the privilege of entering and determining the riparian proprietor's estate.¹²⁵

Under these circumstances, it is worthwhile to consider whether a riparian owner historically may exclude the public if the grant is not used by the riparian owner in the prescribed manner.

In *Austin v. Carter*,¹²⁶ surveyors in Charlestown removed a pier the plaintiff had constructed on his flats. The Attorney General argued that:

[S]o also all the inhabitants of the Commonwealth, had a right to pass and repass on the waters so long as the owner of the adjoining land leave them open and unobstructed—yet the owner of the adjoining land may, whenever he pleases, enclose, build and obstruct to low-water-mark, and exclude all mankind.¹²⁷

The court agreed. Similarly, in *Deering v. Proprietors of Long Wharf*,¹²⁸ the court stated: "So long as [the flats] remained open and free from such erections as stop and hinder the passage of boats, &c. there is reserved for all, the right to pass freely. . . . The owner of the flats has no power to take away or restrict this right, while the space is unoccupied."¹²⁹ In addition, Chief Justice Shaw, summarizing past authority on the subject

Storer v. Freeman, 6 Mass. (6 Tyng) 435, 438 (1810) ("For the purposes of commerce, wharves erected below the high water mark were necessary. But the colony was not able to build them at publick expense. To induce persons to erect them, the common law of England was altered . . .").

124. Alfred E. McCordic & Wilson G. Crosby, *The Right of Access and the Right to Wharf Out to Navigable Water*, 4 HARV. L. REV. 14 (1890).

125. *Id.* at 24.

126. 1 Mass. (1 Will.) 231 (1804).

127. *Id.* at 232.

128. 25 Me. 51 (1845).

129. *Id.* at 64-65.

in *Commonwealth v. Alger*,¹³⁰ wrote: "That [the Colonial Ordinance] vested the property of the flats in the owner of the upland in fee, in the nature of a grant; but that it was to be held subject to a general right of the public for navigation until built upon or inclosed" ¹³¹ Finally, in *Marshall v. Walker*,¹³² the Law Court stated: "[The public's] right remains so long as [the flats] be left in a natural state, covered by the flow of the tide and left bare by its ebb."¹³³ Taken together, the statements represent 100 years of judicial authority on the point that the riparian owner must make use of the tidelands by building on or enclosing them in order to exclude the public. While construction would be a severe requirement in 1995, it is appropriate to require that the riparian owner have a reasonable purpose in excluding the public.¹³⁴

Assuming for the purposes of argument that aquaculture leasing is within the public right of fishing, the next question is whether requiring an applicant to obtain the riparian owner's permission, even when that owner has not made use of the tidelands, is consistent with the proper exercise of the state's public trust responsibility to conserve the resource. Arguably it is not. As even the court in *Pazolt* acknowledged, "[t]he private property rights of coastal owners in the tidal area may be subordinate to the public's right if the public purposes are reasonably related to the protection or promotion of fishing or navigation. In those circumstances, public rights may prevail" ¹³⁵ If public rights are to prevail, riparian owners cannot be allowed to defeat a project on a whim.¹³⁶ On the other hand, as suggested above, riparian owners who are making some use of the tidelands (as Glaze was by mooring his boats on the site, or as

130. 61 Mass. (7 Cush.) 53 (1851).

131. *Id.* at 79.

132. 45 A. 497 (Me. 1900).

133. *Id.* at 498.

134. Indeed, it would be hard to argue that a legislature has the authority to alter public rights in the intertidal zone, but lacks the power to lower the burden on riparian owners seeking a right to exclude the public.

135. *Pazolt v. Director of Div. of Marine Fisheries*, 631 N.E.2d 547, 551 (Mass. 1994) (citing *Crocker v. Champlin*, 89 N.E. 129 (Mass. 1909); *Home for Aged Women v. Commonwealth*, 89 NE. 124 (Mass. 1909)).

136. See Tim Eichenberg & Barbara Vestal, *Improving the Legal Framework for Marine Aquaculture: The Role of Water Quality Laws and the Public Trust Doctrine*, 2 TERR. SEA J. 339, 371-72 (1992) (arguing that "unregulated power" in the hands of riparian owners to assert their individual interests is inconsistent with the public trust doctrine).

Pazolt was by making the shore available to her guests) should have the right to refuse aquaculture projects on their flats.

In Maine, as outlined above, aquaculture leasing can be conducted only as part of a municipal shellfish conservation program.¹³⁷ This provision provides the key to distinguishing aquaculture in Maine and the factual situation in *Pazolt*. The requirement means that, at least theoretically, the town has developed a conservation plan involving all the town's tidal flats. If that is the case, the town should have reviewed various uses to which the flats have been put, including personal uses such as mooring boats, and commercial uses such as providing recreational opportunities for motel guests, prior to designating which flats are appropriate for shellfish aquaculture. After such a review, the towns should have the factual bases necessary to assess and eliminate potential conflicts in the intertidal zone. Because, however, "private rights of coastal owners in the tidal area may be subordinate the public's right if the public purposes are reasonably related to the protection or promotion of fishing,"¹³⁸ there should be a rebuttable presumption in favor of the public. In addition, the burden should be on the riparian owner to demonstrate that shellfish aquaculture would interfere substantially with the riparian owner's reasonable expectations concerning the use of the flats.

V. CONCLUSION

This Comment has demonstrated that both legislative authority and judicial precedent can be used to construe shellfish aquaculture as within the public right of fishing. To strengthen that interpretation, Maine courts, if faced with the question, should clearly delineate which test is applicable on the given facts. Specifically, the "reasonably related" test should be confined to an analysis of statutory provisions pertaining to shellfish aquaculture. In contrast, the "incidental to" test should be confined to analyses of situations in which a given activity may appertain to the public right of fishing, but no statutory authority is available on the point. The "natural derivative" standard should be discarded without ceremony.

In addition, Maine policy-makers should reconsider the deference to riparian owners currently codified in the municipal leasing statute. While

137. See *supra* notes 70-71 and accompanying text.

138. *Pazolt v. Director of Div. of Marine Fisheries*, 631 N.E.2d at 551.

in some instances a riparian owner may have a good argument to preclude aquaculture on his property, which should prevail, the presumption should be in favor of the public. A riparian owner should have the burden of demonstrating that aquaculture would constitute a substantial interference with the use he has made of the flats. Finally, the public trust doctrine requires the state to manage the shellfish resource responsibly. Maine statutory law, as it currently stands, can effectively support that effort. Its success, however, will depend upon the willingness of coastal communities to actively conserve the resource. Shellfish aquaculture can play a dynamic role in that process.