Public Trust, Riparian Rights, and Aquaculture: A Storm Brewing in the Ocean State

Jose L. Fernandez
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INTRODUCTION

There is little doubt that the heart of “The Ocean State” is a bay, Narragansett Bay. This magnificent harbor accounts for a significant portion of the 400 miles of coastline that earn the state its nickname. The Bay’s enjoyment, however, is shared by multiple users giving rise to competing and often conflicting demands on the limited physical resources that make up the Bay. While the need to balance the demands on the Bay is not new, recent events have adjusted the needs and rights of the various users of the Bay, raising the prospect of a new allocation of resources.

Controversy has been generated by recent decisions of the Rhode Island Supreme Court which redefined the relation between riparian owners’ rights and public rights under the public trust doctrine. Concurrently, the depletion of the finfish and shellfish stock in the Northeast has resulted in a clamor for the reintroduction of fish farming, aquaculture, to the waters of the state. In turn, the possibility of increased aquaculture provokes a reaction from fishermen who see it as limiting the fishing grounds and reducing the price of the harvest.

This article reviews the common law on riparian rights and public trust rights. It traces these doctrines from their English roots to their arrival at our shores during colonial times. It notes that the public trust doctrine’s

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flexibility makes it useful today despite the exaggerated news of its demise.\textsuperscript{1}

The exploration continues with an analysis of the doctrines as they have evolved in Rhode Island from the earliest cases to the most recent decisions. The probe entails a scan of aquaculture as practiced in the state since colonial times and the legal decisions resolving difficulties that evolved during its history. The article examines the effect that a possible reallocation of rights among the users of the Bay is likely to have on the vitality of efforts to expand aquaculture in Rhode Island. The piece also explores the paths open to developing law and the economic and political reasons that make some directions appealing. This article cautions on the perils inherent in some choices, including the potential for the alienation of the bay bottom to private owners, thereby, dissipating a public resource on which depend the exercise of historical rights.

Finally, the article investigates decisions in other jurisdictions that have balanced the need to allow the productive use of public lands while protecting the public resource. In conclusion, the author posits that Rhode Island's interest will be best served by limiting the application of recent decisions that seem to expand the rights of riparian owners at the expense of the common law rights of fishery and navigation. In addition, the article calls for legislative action to provide for long, conditional leases of the bay bottom to encourage the influx of capital required to make aquaculture a success.

I. AQUACULTURE

"The unthinkable has come to pass: The wealth of oceans, once inexhaustible, has proven finite, and fish, once dubbed 'the poor man's protein,' have become a resource coveted—and fought over—by nations."\textsuperscript{2}

Thus starts the article detailing the incredible depletion of the ocean’s supply


by over-fishing and pollution. Michael Parfit documents the resulting economic disruption that is taking place in a seventy billion dollar worldwide industry that directly employs more than thirteen million workers as either fishermen or as crews on fishing boats. New England’s harvest of fish has not been exempt from this crisis. The catch has dropped from 1.6 billion pounds in 1965 to less than 100 million in 1991. The once plentiful Georges Banks fishery is facing cutbacks as the fish supply dwindles.

The federal government has been compelled to advocate a policy that encourages the growth of aquaculture and the preservation of marine resources, while instituting “buy-out” programs to acquire and destroy part of the fishing fleet. Accordingly, Congress has provided for technical assistance and loans to both public and private fish-farming efforts. The response to federal encouragement and the drop in wild harvest has been a steady increase in fish harvest from 6.66 million metric tons in 1984 to 12.68 million metric tons in 1991, creating a market valued in the billions. In the northeastern part of the United States alone, the 1992 value was set at 146.4 million. Rhode Island’s participation in this increasing market, however, has been limited to five private leases for producing shellfish (oysters,
scallops, and quahogs), and four freshwater fish hatcheries. Yet, the State’s history of fishfarming prior to the 1940s was otherwise.

By 1864, Rhode Island had adopted a program to grant private leases of portions of the Narragansett Bay bottom for the cultivation of shellfish. Early Rhode Island cases explored the troubled border between these rights. As far back as 1822 a charter had been granted for the exclusive use of submerged public lands in the Providence River for the purpose of cultivating oysters. The charter, however, was limited in that it required permission from the owner of the adjacent shore and guaranteed the shore owner’s right to build wharfs. A similar charter was issued to Ephraim Gifford in 1821 to plant a bed of oysters in Mount Hope Bay.

By 1912, approximately 21,000 acres of Narragansett Bay bottom were leased for shellfish farming. This extensive development of aquaculture, however, was not without its detractors. Because of claimed abuses by the leaseholders, by the late 1920s, opposition by “free fishermen”

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11 *Id.* at 12.
12 *Id.*
13 See *State v. Cozzens*, 2 R.I. 561 (1850) (involving two leases granted in 1822 and 1827 for exclusive-right oyster aquaculture). *New England Oyster Co. v. McGarvey*, 12 R.I. 385 (1879), illustrates the existence of aquaculture in the 1870s. The case involved the right of a Rhode Island citizen to sell his ability to obtain a state lease to raise oysters. This particular defendant had acted as a strawman for Massachusetts’ business associates and took the state lease in his name but at the expense of the out-of-state partners. *Id.* at 385. At issue was the right of the citizen to join with non-citizens in a shellfishery effort under a Rhode Island lease. After ruling that interests in a Rhode Island leased shellfishery could indeed be sold to out-of-state partners, the court explained that

> [t]he legislation on the subject is contained in Gen. Stat. R.I. . . . cap 133. . . . [which] relates to private and several oyster fisheries. It authorizes the shell-fish commissioners to lease, in the name of the State, to any person, being an inhabitant in the State, any piece of land within the State, covered by tide-water at low tide, and not within any harbor line, to be used as a private and several oyster fishery.

*Id.* at 389-90.
15 *Id.* at 157.
16 *Id.*
17 See *STEPHEN OLSEN ET AL., COASTAL RESOURCES CTR., UNIVERSITY OF RHODE ISLAND, AN INTERPRETIVE ATLAS OF NARRAGANSETT BAY* (1980).
was strong enough to become a serious political issue in the state.\textsuperscript{18} Today, the possibility of conflict persists. In part this is due to the friction between those that would farm for fish and those who see themselves as “free fishermen.”\textsuperscript{19} Those who exercise the right of free fishery argue that aquaculture conflicts with the public’s right of navigation and fishery\textsuperscript{20} and may drive down the value of the harvest.

Political conflicts arising from a clash of these rights alone, however, did not cause the downfall of the industry to present levels—it took a hurricane to do so. The 1938 hurricane moved tons of sediment onto the existing aquaculture shellfish beds, destroying many of them. After the hurricane destroyed the submerged beds, the leaseholders continued to harvest shellfish without replanting, in effect, reverting to a fishery dependant on free-occurring shellfish rather than cultivation.\textsuperscript{21} Ultimately, most of the leaseholders either gave up or had their leases revoked. The effect is that aquaculture in Rhode Island suffers by comparison to the efforts of

\begin{quote}
Mr. Smith declared the Shell Fish Commissioners were supported by law to lease grounds in the State waters and that before any such lease had ever been given the petition was duly advertised so that persons desiring to remonstrate could do so. He challenged a statement made at a recent Democratic rally by Theodore Francis Green that if elected Governor he would proceed to open up the waters of the State to the free fishermen. He pointed out that the commissioners had always tried to protect the fishermen, referring to the steps taken to prevent the closing of Narragansett Bay by the United States Public Health Service because it was believed to have provided indirect cause of the typhoid epidemic in Chicago and other western cities.

\textit{Id.}
\end{quote}

\textsuperscript{18} See Shell Fish Board’s Action is Defended, PROVIDENCE J., Nov. 4, 1930, at 18. The article reports on a Republican rally at East Greenwich where the clerk of the Shell Fish Commission defended the granting of leases for aquaculture in Narragansett Bay. The article notes that the rally was attended by “[l]arge delegations of both shell and fin fishermen . . . .”

\textsuperscript{19} See Letters, BRISTOL PHOENIX, Mar. 21, 1996, at 6.

\textsuperscript{20} See Daniel A. Curran, Defining the Legal Framework in Aquaculture in Rhode Island (Jan. 22, 1996) (testimony before the Rhode Island Legislative Commission on aquaculture): “Potential conflicts exist among an ever larger user group. This group includes coastal land owners, boaters, environmental groups and others concerned with navigation in the Narragansett Bay.” \textit{Id.} at 2.

\textsuperscript{21} See OLSEN, supra note 17.
neighboring states despite having significantly more coastline.\textsuperscript{22}

In addition to the historic basis for dissension, there are characteristics peculiar to fishfarming operations that are likely to be new sources of contention. Aquaculture beds require shallow water, thus the enterprise also has the potential to interfere with riparian owners’ ability to benefit from the shore and to erect structures on the submerged flats. Finally, while some view aquaculture operations as picturesque or quaint, to many waterside owners it represents a blotch on the water view that initially attracted them to the shore. The extent to which the competing uses will impinge on each other will, of course, depend on the courts’ distribution of rights.

II. Riparian Rights—The Shore and Tidelands

The shoreline and submerged flats are the crucible where rights of common law origin join in amalgamation of legal doctrine. These rights include the Crown or state’s right to alienate the property, the right to the benefits that wash upon the shoreline, the right to wharf-out and access, and the public trust rights of fishery and navigation.

It is axiomatic that under the common law the ownership of the tidelands and submerged flats was with the Crown.\textsuperscript{23} However, the power to use and alienate such lands was determined in part by the interplay of public and private interests, the \textit{jus publicum} and \textit{jus privatum}. The effect was that the Crown’s ability to make grants of this property for private uses was limited by particular rights of the public that could not be conveyed away. These public rights included the rights of navigation and fishery.\textsuperscript{24}

\footnote{22 In 1994, Connecticut grossed $60 million from aquaculture—close to 200 times Rhode Island’s production for the same period. Also, Maine grossed $43 million and Massachusetts $8 million. \textit{See} ANDERSON \& SPATZ, \textit{supra} note 8, at 10.}

\footnote{23 "It is established that the right of property in all the soil which is covered by tide water, and in also a part of the nation’s territory, is \textit{prima facie} in the Crown by the common law.” \textit{JOHN M. GOULD, A TREATISE ON THE LAW OF WATERS} 17 (3d ed. 1900) (citing to Reg. v. Keyn, 2 Ex. D. 63; Direct U.S. Cable Co. v. Anglo-Am. Tel. Co., 2 App. Cas. 394).}

\footnote{24 According to the treatise \textit{De Jure Maris}, commonly ascribed to Lord Hale, and other authorities of the seventeenth century, which refer to early precedents, the Crown’s interest in navigable waters is of a two-fold nature: First, the \textit{jus publicum}, a right of jurisdiction and control for the benefit of its subjects, which is similar to the jurisdiction over public highways on land . . . second, the \textit{jus privatum}, or right of private property, which is subject to the \textit{jus publicum}, and which cannot be used
source of the right of navigation pre-dates the Magna Carta where it was made one of the corner stones of English law. Thus, the Crown had the right to control the tidelands and regulate the dispersement of benefits obtained from wrecks or other wealth such as seaweed and amber that came upon the shore. In addition, the Crown could transfer the *jus privatum* in the shore to a private party; however, such transfer did not give the private owner a right superior to the public’s right of navigation and fishery. The right of navigation has been considered the superior of the two fundamental public trust rights. In the United States, the state legislatures hold both *jus publicum* and *jus privatum*; thus, interference with the right of navigation by obstructing or limiting a channel may only be done with legislative leave. However, the right to navigate does not give license for wanton or malicious interference with the right of fishery and must be reasonably exercised.

Under common law, a riparian owner’s rights included *inter alia*: the right to the water in its natural state (or close to it); the right of access to the water; the right to accretions on the land; the right to use the shore to draw nets; the right to wharf-out (subject to some restrictions for navigation); and the right to use the water adjacent to the property to conduct business. The public’s exercise of common law rights along the same shores has provided the Rhode Island courts with opportunities to expound on the public trust doctrine as it relates to the rights of fishery and navigation and incidental privileges when counterpoised with riparian rights.

A. Land created by accretion

Under the common law, whether accretion of land along the shore

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25 Magna Carta Ch. 23; *see also* Rex v. Clark, 12 Mod. 615 (1702) (holding that interference with the right of navigation is violative of the Magna Carta).

26 Colchester v. Brooke, 7 Q.B. 339 (1846); Post v. Munn, 4 N.J.L. 68 (1818); Flanagan v. Phila., 42 Pa. 219, 228 (1862); Moulton v. Libbed, 37 Me. 472 (1854).


28 *Post, supra* note 26.

belongs to the upland owner or the state depends on how the land was built up. For example, land that was created by accretion was considered to belong to the adjacent riparian estate if the change was slow and imperceptible. The right to the shore itself, the strip between the high and low water marks, however, remained with the state. The land gained could not be the result of an act by the landowner that constituted a nuisance. Accordingly, land created by silting caused by an unauthorized wharf would not belong to the landowner unless there was a supportable claim of adverse possession. However, if the state upon digging a channel deposited the fill upon the shore, the land so created was generally considered as owned by the landowner.

B. The Right to Wharf-Out

While historically the riparian owner may have had the right to wharf-out, if the structure interfered with the public rights of fishery or navigation, it was considered a public nuisance. It is noteworthy that the right to wharf-out, whether or not interfering with a public right, was dependant on who owned the soil upon which the wharf was erected. Therefore, if the Crown owned the flats, the common law would have considered such an encroachment by the riparian owner a prepresture and the wharf would be subject to seizure by the Crown. A wharf would be safe from outside claims, either as prepresture or nuisance, only if the title to the flats had been granted by the Crown and Parliament and if the structure did not create a public nuisance.

In the United States, the riparian owner has been granted the privilege of using the tide flats to erect structures without having title to the flats. Such a privilege has been limited, however, in that the public must still retain the full enjoyment of the rights held in common: fishery, navigation, and those

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31 Camden Land Co. v. Lippincatt, 45 N.J.L. 405 (1836); Mulvey v. Norton, 100 N.Y. 424 (1885).
33 Ledyard v. Ten Eyck, 36 Barb. 102 (1862). See also GOULD, supra note 23, at 312.
34 GOULD, supra note 23, at 330.
35 Id. at 331 n.1.
new public rights that have been developed in each state such as recreation. The Massachusetts Colony Ordinance of 1641-7 became the basis for early colonial and subsequent state law in this field. The 1647 ordinance gave title to the flats to the owner of adjoining uplands. Limited to an ebb of one hundred rods, this grant was not merely an easement or license, but rather conveyed full title in the flats subject to specific limitations. The title granted was enough to maintain an action for trespass on the flats by the riparian owner. The grant of title, however, contained the proviso that the owner was not granted the power to interfere with navigation. This colonial approach was later adopted by the New England littoral states after the Revolution.

Thus, under early American law, until the flats were filled, the public retained the right to navigate over them and to fish in them for finfish and shellfish. However, there was basis for confusion. The riparian owner, while prohibited from unreasonably interfering with navigation, was allowed to build wharves to the low water mark unless prohibited by the legislature. Similarly, the owner could erect fish traps and stakes that would impede fishing by the public. Different states adopted modified versions of the law of ownership of the flats making matters even more complex. In Connecticut, based on usage, the title of the flats extends only to the high water mark, yet the riparian owner may extend wharves beyond the high

37 The relevant date when dealing with flats is 1647. See Forest River Lead Co. v. Salem, 165 Mass. 193, 201 (1896); see also GOULD, supra note 23, at 332 n.5
40 GOULD, supra note 23, at 333.
41 Shively v. Bowlbly, 152 U.S. 1 (1894).
42 See, e.g., Montgomery v. Reed, 69 Me. 510 (1879); Boston Steamboat Co. v. Munson, 117 Mass. 34 (1875); State v. Wilton, 49 Me. 9 (1860);
43 See Packer v. Ryder, 144 Mass. 440 (1887); Proctor v. Wells, 103 Mass. 216 (1869).
44 See Packer, 144 Mass. at 440; Proctor, 103 Mass. at 206.
45 See Matthews v. Treat, 75 Me. 594 (1887); Locke v. Motley, 68 Mass. (2 Gray) 265 (1854); Low v. Knowlton, 26 Me. 128 (1846).
water mark unless prohibited by the legislature. In New Jersey, similar rights are given to the riparian owner, however, the owner also enjoys a license to fill to the low water mark or to wharf-out unless it interferes with navigation.

In Rhode Island, as in Massachusetts, the right to build structures out on the flats and to wharf-out provided there is no interference with navigation is credited to the unpublished ordinance of 1707. To a great extent, the focus of our exploration is determining whether in Rhode Island there is a right to use the flats to the exclusion of the public or whether a license must be obtained from the legislature. Also at issue is what happens when that privilege is exercised to interfere with the navigation or fishery rights of the public and to what extent an aquaculture or riparian owner's rights conflict with both the rights to use the flats and the public's right to navigate and fish the flats. At issue is the scope of public rights and the incidental entitlement that may be needed to make use of those rights. If the public trust rights attach to the flooded flats, what theory can be distilled from state case law to determine when a public right may be extinguished by granting a private party either a title or a license to exclude the public from heretofore public property?

III. THE PUBLIC TRUST DOCTRINE

The doctrine descended to our country from the British Crown through the Colonial Charters, the Revolution, and the formation of the

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46 Ockerhausen v. Tyson, 40 A. 1041 (Conn. 1899); New York R.R. v. Long, 43 A. 559 (Conn. 1899); Mather v. Chapman, 40 Conn. 382 (1873).


48 See ANGEL ON TIDE WATERS 237 (2d ed.). See also Murphy v. Bullock, 37 A. 348, 349 (R.I. 1897); State v. Burdick, 15 R.I. 239 (1886); Folsom v. Freeborn, 13 R.I. 200, 204 (1881); Brown v. Goddard, 13 R.I. 76 (1880); Providence Steam Engine Co. v. Providence S. Co., 12 R.I. 348, 363 (1879); Thorton v. Grant, 10 R.I. 477 (1873); Clark v. Peckham, 10 R.I. 35, 38 (1871).

49 The public trust doctrine generally imposes an obligation on the sovereign to maintain certain natural resources such as shoreline and parks available to the public for the exercise of historically recognized rights such as fishing and navigation. See Joseph L. Sax, The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention, 68 MICH. L. REV. 471 (1970); Charles Wilkinson, The Headwaters of the Public Trust: Some of the Traditional Doctrine, 19 ENVTL. L. 425 (1989); STUART MOORE, HISTORY OF THE FORESHORE 318, 370, 413 (3d ed. 1988).
states. Its original application, as applied to lands under navigable waters in the United States, was stated in *Illinois Central Railroad Co. v. Illinois.*

In that case, Justice Field explained that by common law the state holds title to the soils under the tides and lands under navigable waters in trust for the public. The title "necessarily carries with it control over the waters above them . . . ." This title, however, "is a title held in trust for the people of the State, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties." The court explained that the state’s control may not be alienated to private parties except where control over a particular parcel is given away to advance the public interest or when such a grant does not substantially diminish the public’s benefit in the remaining lands and waters.

The concept that the rights of the state are subordinate to some rights of the public when dealing with tidal flats or other public trust property has ancient roots. It was understood since before the Magna Carta that the people’s rights of navigation and fishery imposed a burden on the Crown’s *jus privatum.* These rights extended to those incidental privileges that were
necessary for the public enjoyment of a right. Thus, the privilege of anchorage was considered necessary for the full enjoyment of the right to navigate.\textsuperscript{57} The Supreme Court has extended this doctrine as adopted in this country by the states to all navigable waters.\textsuperscript{58} However, each state may modify its exercise of the doctrine as to the waters over the lands it controls.\textsuperscript{59} The result is that the case law of each state will define the parameters of the state's ability to alienate public trust property with the concomitant result of possibly extinguishing the public rights that require a particular resource. As Professor Sax explained, "Unfortunately, the case law has not developed in any way that permits confident assertions about the outer limits of state power."\textsuperscript{60}

There is a distinction between public trust rights and "public trust property"\textsuperscript{61} upon which public trust rights may be exercised. In addition, there is an important connection between public trust rights and the limitations placed on alienation of public property by the state. Without

\textsuperscript{57} See Gann v. Whistable, Free Fishers, 11 H.L. Cas. 190 (1865); Colchester v. Brooke, 7 Q.B. 339 (1846). These incidental privileges included the right to disturb the bottom to reach shellfish. See Proctor v. Wells, 103 Mass. 217 (1869); Coolidge v. Williams, 4 Mass. 140 (1808).

\textsuperscript{58} See Propeller Genessee Chief v. Fitzhugh, 53 U.S. 443, 457-58 (1851).

\textsuperscript{59} See Weber v. Harbor Comm'r's, 85 U.S. (18 Wall.) 57, 65 (1873) (explaining that states have title to lands below tidal and navigable waters with the consequent right to use or dispose of any portion thereof with the caveat that such alienation must be done without serious impairment of the rights of the public in such waters). See also Pollard's Lessee v. Hagen, 44 U.S. (3 How.) 212, 220 (1845).

\textsuperscript{60} Sax, supra note 49, at 486.

\textsuperscript{61} See id. at 478.
preserving the public lands and sea resource, it is impossible to protect the public right. However, separate issues arise: first, whether there are limits on the administration and disposition of public property subject to the exercise of public trust rights; second, whether the above limitations are different from any other limitations that may apply to the disposition of other public property and third, whether a legislature may impose restraints on the exercise of public trust rights by limiting the resource on which the right is dependant or by any other means, such as a prohibition on fishing or failure to control pollution that destroys the resource.

IV. RHODE ISLAND’S CASE LAW

For purposes of discussion, it is helpful to separate the State’s case law into a group of early cases and a group of modern cases.

A. The Early Cases

*Payne & Butler v. Providence Gas Co.* 62 may be the first recorded conflict between polluting industries and aquaculture interests in Rhode Island. The case illustrates how the use of a license rather than a fee simple transfer allows the State the needed control over the resource while guaranteeing the investors’ and public’s rights. The action was for trespass causing injury “to their oysters and quahaug,” 63 due to defendant’s polluting upper Narragansett Bay by dumping *inter alia* oil and tar into the Providence River. 64 Plaintiffs had been engaged in aquaculture since 1901 on twenty-eight acres of submerged lands in the Bay. After 1903, the submerged land was held by plaintiffs under a lease from the State for the specific purpose of raising and farming shellfish. 65 According to the claim, defendant’s pollutants rendered 40,000 bushels of plaintiff’s shellfish unfit for market. 66 Defendant responded by challenging the plaintiffs’ ownership of the shellfish, attacking the validity of the leases under which plaintiffs were able to claim

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62 77 A. 145 (R.I. 1910).
63 *Id.* at 146.
64 *Id.*
65 *Id.* at 147.
66 *Id.*
ownership to the product of a specific area of submerged land.67

The challenge to ownership of the shellfish was based on the fact that in twenty of the twenty-eight acres of the leased submerged land the shellfish occurred naturally. Defendants asserted that the state lease could not give plaintiffs ownership rights over the naturally occurring shellfish because these shellfish were held in common by the public under the public trust doctrine.68 The court first noted that Rhode Island law has established that the property right conveyed by the State in such public trust property "is merely a license which may be revoked at the pleasure of the legislature and which ceases with the use of the land for that purpose . . . [s]ubject, however, to the public's right of navigation and of fishery."69 The court went further to state that, if the shellfisheries interfered with such public trust use, "the oysters or clams, etc., may be removed as a nuisance."70

The court traced the development in Rhode Island of public trust law noting that since the Magna Carta, the Crown and Parliament joint action was needed to grant "an exclusive or several right of fishery."71 When the Crown granted the colonial charters it did not have the power to create such exclusive rights. In addition, the colonial government "from the date of the granting of the charter July 8, 1663 to the time of the Revolution, 1776 . . . or to the date of the acknowledgment of our independence by the British government,"72 also lacked the power to create exclusive use licenses on public waters.73 However, with the Revolution the people of Rhode Island "succeeded to all public rights of British subjects, whether originally

67 Id. at 149. Originally, the leases had been awarded by the shellfisheries commissioner. Defendants challenged the authority to originally grant such leases and Chapter 1574, of the Public Laws, Jan. 1908, an act that purported "to cure any defects" in the granting of the leases. Id. at 148.
68 Id. at 152.
69 Id. at 152-53.
70 Id. at 153 (citing 19 ENCYPLOPEDIA OF LAW AND PROCEDURE 998). As to the leases, the court noted an axiom that the license it creates is not renewable as of right. The court also addressed the possibility of a conflict between Chapter 853 of the Public Laws and R.I. CONST. art. 1, § 17. This constitutional provision codifies the public trust doctrine in Rhode Island: "[T]he people shall continue to enjoy and freely exercise all the rights of fishery, and the privileges of the shore, to which they have been heretofore entitled . . . ."
71 Id.
72 Id.
73 Id.
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belonging . . . to the Crown, or exercised and administered by Parliament.\(^7^4\)

To decide on the constitutionality of Law 853, under article 1, section 17 of the Rhode Island Constitution, the court reviewed the earlier decision of *State v. Cozzens*\(^7^5\) in 1850. The case involved an appeal from a guilty verdict under Rhode Island’s “act for the preservation of oysters and other shell-fish in this state.” The defendant was found to have stolen oysters in the value of forty dollars from a private oyster bed in Narragansett Bay.\(^7^6\) On appeal, Cozzens contended that the shellfisheries act was in violation of the Rhode Island Constitution provision stating that “the people shall continue to enjoy and freely exercise all the rights of fishery and the privileges of the shore to which they have been heretofore entitled under the charter and usages of this state.”\(^7^7\) Under the statute, administrative officials were vested with the authority to decide whether “old oyster beds” would provide a greater public advantage if used as a private bed under a state lease rather than “as a free and common oyster fishery.”\(^7^8\) The public benefit that would result from granting private leases would be the encouragement to private interests to plant and cultivate oysters making them more abundant.\(^7^9\)

Despite the constitutional provision, the fact that the oyster bed had traditionally been open to quahog fishing did not protect Cozzens.\(^8^0\) The court avoided exploring whether the Oyster Shell-fishery Act conflicted with other “rights of fishery and the privileges to the shore” guaranteed under Rhode Island Constitution, article 1, section 17. A challenge that was squarely placed by the defendant under exception number 5 on appeal.\(^8^1\) The court’s sole concern became whether the Act properly regulated that right,

\(^7^4\) *Id.*
\(^7^5\) 2 R.I. 561 (1850).
\(^7^6\) *Id.* at 561.
\(^7^7\) R.I. CONST. art. 1, § 17. *Cozzens*, 2 R.I. at 561. With regard to the provision, the court in 1850 decided that the provision was not self-executing but “intended to be carried into effect by legislative regulation.” *Id.* at 563. See also Fernandez, *State Constitutions, Environmental Rights Provisions, and the Doctrine of Self-Execution: A Political Question?*, 17 HARV. ENVT. L. REV. 333, 356 (1993).
\(^7^8\) *Cozzens*, 2 R.I. at 564.
\(^7^9\) *Id.* Also, there was a benefit in the rent to the State.
\(^8^0\) *Id.* at 565.
\(^8^1\) *Id.* at 562. The defendant specifically raised a question over whether “the doings of the commissioner . . . are in violation of the principles of the common law.” Further, the very Act under which the defendant was charged was the kind of legislative enactment that executed art. 1, § 17. *Id.*
not whether a traditionally held right of fishery had been diminished impermissibly. The court interpreted the Act to delegate to the Fisheries Commissioner the conclusive discretion on whether "such oyster bed can be used more to the public advantage as a private bed under lease than as a public bed. . . . in other words, the constitutional right is so regulated as to reserve to the public the greatest benefit." Thus, restricting or regulating the right of fishery through legislative enactment would not violate the constitution. The court did not question whether the legislature had overstepped its constitutional bounds in enacting an act that restricted a right which Rhode Islanders had historically enjoyed. It did not provide an analysis to determine whether the Act was an improper diminution of pre-existing rights guaranteed by the constitution. Rather, the court simply interpreted the constitutional provision to grant a right of public benefit from the oyster fishery.

In Providence Gas Co., the court explored the status of the rights that were reserved under common law. "It is common knowledge that the citizens of the State have always been accustomed to dig clams freely along the shores of the bay and river wherever they could be found, and, subject to some legislative regulations, to fish in the deeper waters." The court felt a need to explain that at least two charters for exclusive-right leases for aquaculture for oysters were granted in 1822 and 1827 by the legislature prior to the adoption of the state constitution in May 1843. The cases that had interpreted the provision prior to and including Providence Gas Co. in 1910, involved challenges under the state constitution to the ability of the legislature to regulate public trust property based on article 1, section 17's statement that "no new right is intended to be granted, nor any existing right impaired, by this declaration." Since prior to the enactment of the provision, the legislature had demonstrated the power to limit the public fishery right by granting exclusive-use charters, no right existed to be free to pursue the public right unimpeded by legislative regulation. "In other words no change [in rights] was made."

This case illustrates that Rhode Island had a clear statement of the

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82 Id. at 565.
83 Id. at 564.
85 R.I. CONST. art. 1, § 17.
86 Providence Gas Co., 77 A. at 158.
87 Id.
public trust doctrine codified in its constitution. Further, this provision was the basis for the legislative regulation of the public trust doctrine. Accordingly, the legislative right to grant farming leases to the submerged lands was limited by the caveat that the regulation must ultimately provide for a benefit for a significant portion of the public, not some few private parties. Cozzens also documents that aquaculture was pursued in Rhode Island with success for a significant time without having to grant fee simples to the operators. By merely granting an exclusive license and lease for a particular use for the benefit of the public, the legislature safeguarded the seabed resource, and the rights of the public. Upon a finding that the licensed activity had consequences overly detrimental to the public trust rights, the license could be revoked.

An early case attempted to distinguish between those public trust rights that could be extinguished and those that could not. Carr v. Carpenter88 involved an action for damages against a defendant who trespassed onto the beach adjoining plaintiff's property to take stranded seaweed. The defendant argued that there was a public right to take the seaweed stranded below the high water mark.89 The court, agreeing with the plaintiff, distinguished the right to take seaweed from rights held in trust for the public by the State such as navigation or fishery.90 The court held that the taking of seaweed is a private right in the shore which belongs to the adjacent land's owner, the littoral owner to control and convey.91

The court noted that in Rhode Island, as distinguished from Massachusetts, the State retains the fee for the land between high and low water marks.92 However, that fact does not alter the rights of public and private parties with regards to use of the tidal flats. Among the rights that attach to the littoral owner, the court included the rights of access to the sea, to build wharves below the high water mark subject to State regulations to protect navigation, to “make new land by filling the flats,”93 and the right to take seaweed, drift-stuff, sand and stones.94 In an interesting portion of dicta, the court agreed that, at some point, the State may lose to a littoral owner

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88 48 A. 805 (R.I. 1901).
89 Id. at 805.
90 Id.
91 Id.
92 Id.
93 Id. at 806.
94 Id.
some control over the rights that may be exercised over the tidal flats. Thus, while the State could have regulated, limited, withheld, or even taken back such rights, it should have done so prior to the prescription acquired by the littoral owner through "long continued usage."\(^9\)

In \textit{Carr}, the court cited with approval to \textit{Enmans v. Turnbull},\(^9\) where a littoral owner defended from an assault on a person taking seaweed from his expanded shoreline by claiming private ownership of the seaweed.\(^9\) In \textit{Enmans}, the court explained that there are "marine increases arising by slow degrees," that belong to the littoral owner.\(^9\) The axiom has historically been based on the need to reward the littoral owner for the encroachments of the sea upon his waterside property: "The rule is that if the marine increase be by small and almost imperceptible degrees it goes to the owner of the land; but if it be sudden and considerable, it belongs to the sovereign."\(^9\)

After reviewing case authority for the adoption of the rule in Rhode Island, in \textit{Carr} the court stated that a basis for its refusal to alter the rule is the likely impact it would have on the values of littoral estates that until then had been fixed with consideration for the attached property rights.\(^10\) Here is one of the earliest cases to decide the reach of public trust rights based on riparian property values. It is interesting that the cost-benefit balance was carried out by the court absent legislative action. This contrasts with the approach of the court in \textit{Cozzens} who stated that the legislature was the proper body to limit the exercise of public trust rights. Consequently, private economic impact may be a factor used by the court in deciding whether public lands could be alienated thereby extinguishing public rights.

A 1910 case delved into the relation between economic impact and public rights. \textit{In re R.I. Suburban Railroad}\(^10\) determined whether a railroad could condemn private property for public use. The trial judge decided that the taking of a private lot to create a power house was "necessary and for a public use."\(^10\) On appeal, the court explained that whether a particular use

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\(^9\) Id.

\(^9\) 2 Johns 313 (N.Y. 1807).

\(^9\) Carr, 48 A. at 806.

\(^9\) Id.

\(^9\) Id. (quoting Enmans v. Turnbull, where the court cites from 2 Black. Com. 261 HARG. LAW TRACTS 28).

\(^10\) Id. at 807.

\(^10\) 48 A. 591 (R.I. 1901).

\(^10\) Id. at 591.
is a "public use is a question of law, to be settled by the court." The court continued that in Rhode Island two types of public uses are recognized—one is when the State takes property for its own use, and another is when property is taken "for the use of the public." While this case involved the appropriate legal standard to apply in a condemnation, the construction of "public use" may be used to illuminate the issues raised in the public trust cases.

The court explained that "public use" must either be "direct and obvious" or when a property is committed to "public use" yet it will not be directly used by the public, the "public" character of the use must itself be a "direct and obvious" necessity. The court explained that a "public" character will also be implied when a property is controlled by the State in order to carry out another public purpose. Examining the relationship between economic welfare and public rights, the court stated that "there are many kinds of business of great benefit to the public generally, which could not be claimed to warrant a taking of property as for a public use." This reasoning is in conflict with opinions such as Carr and Providence Gas Co. where the court relied solely on the economic harm to riparian owners or private business to find a "public purpose." The court concluded by explaining that as to "public use," the fact that the property's intended use "will tend incidentally to benefit the public, is not sufficient . . . ."

B. Harbor Lines

Also called dock lines or wharves lines, harbor lines are a legislatively set boundary to regulate interference with navigation. The establishment of the harbor line does not expand or diminish property rights, nor does it automatically equate to a relinquishment by the state of the right to regulate

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103 Id.
104 Id. at 592.
105 Id.
106 Id.
107 Id.
108 Id. at 593.
109 See GOULD, supra note 23, at 273.
waters and submerged lands within the harbor line.\textsuperscript{110} However, the statutes setting these lines can have different impacts, based on whether they are interpreted as implied legislative permission to build to the line or as tacit acquiescence with such construction.\textsuperscript{111}

In Rhode Island and some other states, however, the statutes and case law granting riparian owners the license to build to the harbor line do not divest the state of regulatory power over such submerged lands or waters within the harbor lines until there has been structure built or the tidal flat filled.\textsuperscript{112}

In \textit{Gerhard v. The Seekonk River Bridge Comm'rs},\textsuperscript{113} the court resolved a claim for damages by tide flats holders for harm caused by the construction of the Providence to East Providence Bridge over the Seekonk River. The plaintiffs held the tide flats under leases from the riparian owners. The court denied compensation, holding in part that the “title to the soil under tide-water is in the State, and that even the establishment of a harbor line does not transfer the fee to the riparian owner, but only operates as a license to him to fill out and incorporate the flats with the upland.”\textsuperscript{114}

While the court in \textit{Gerhard} stated that the license to fill did not transfer a fee simple to the flats, that license has become the basis for adverse possession claims against the State. In \textit{Bailey v. Burges},\textsuperscript{115} Chief Justice Durfee restated that based on common law, the fee on the submerged land below the low water mark is with the State. However, riparian owners are allowed to fill in front of their properties with the permission or acquiescence from the State. Most important, the establishment of a harbor line became “at the least equivalent to [the State’s] permission expressly given.”\textsuperscript{116} Further,
in filling below the high water mark, the riparian owner "will take the land so filled . . . from the State." Chief Justice Durfee continued the reasoning in *Folsom v. Freeborn*, where he stated:

> [T]he fee of the soil under tide-water, and within its ordinary ebb and flow, is in the State. The riparian owners are, or at least were, until the recent statute, Pub. Laws R.I. cap. 611, § 5, of March 30, 1877, permitted to build and maintain wharves in front of their land, provided they are so built as not to impede navigation."

The court also allowed riparian owners to erect structures that "do not interfere with the public right of navigation, and maintain and enjoy them against everybody but the State."

Thus, the case law establishes that the riparian owner does not take title to the shoreline or the flats below the high water mark. However, the owner does obtain rights over the shoreline to exclude the public from the benefits that wash upon the shore. In addition, the riparian owner, while not obtaining title to the submerged flats, gains an implied license to fill upon the setting of the harbor lines. Further, if the State does not make an affirmative claim of its rights, the owner may acquire title to the property created by filling the flats to the harbor line. The cases also demonstrate that the owners were given the right to erect structures upon the flats to the harbor line. However, all the cases make clear that the riparian right to erect wharves upon the flats is limited by the superior public trust right of navigation.

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117 *Id.* at 332.
118 13 R.I. 200 (1881).
119 *Id.* at 204.
120 *Id.* at 205.
121 This acquisition of title is subject, of course, to the limitations imposed by other acts such as the federal and state clean water acts regulating the filling of wetlands.
V. The New Cases

A. Nugent

In *Nugent v. Vallone*, the Rhode Island Supreme Court affirmed the dismissal of an action by a group of realtors to stop Commerce Oil Refining Corporation from erecting a 900-foot pier into Narragansett Bay. The pier was to extend from Jamestown into the east passage of the bay. The State supreme court narrowed the questions on appeal to two. First, whether the refinery should be permanently enjoined from “interfering with or encroaching upon public rights in and to the public waters and public lands adjacent to the area in question.” Second, whether the refinery should be enjoined from “interfering with the riparian rights of the public . . . to the tidewaters and tidelands beyond the high water mark.” Among the asserted claims, the realtor contended that the oil company’s wharf would interfere with navigation and would “constitute an unlawful appropriation of the public domain under the waters of the east passage.” Thus, the case presented a clear opportunity to redefine riparian and public trust rights.

The court acknowledged that while the public has a right of passage upon the shore itself between the high and low water marks, there was also a common law riparian right to “wharf-out” which will not be denied unless such wharfing-out interferes with navigation or the rights of other riparian

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123 *Id.* at 803. The action also sought to restrain the state director of public works from authorizing or expending any public funds on the construction of the pier. *Id.*
124 *Id.*
125 *Id.* at 804. An interesting side issue was created by the fact that, in order to assert public rights in an equity action, the realtors needed and obtained permission from the State attorney general. However, the attorney general also filed an answer on behalf of the director of public works, asserting that there had been no violation of public rights by approving or funding construction of the pier and that the structure would not be a public nuisance. This led the court to note, with some discomfort, that “nominally at least the public appears to be on both sides of the controversy.” *Id.*
126 *Id.*
Here, the claim of interference with navigation was resolved, however, by relying on the Corps of Engineers' certification that the proposed wharf "would not be a hazard to navigation." The court also noted that the State director of public works had previously agreed that the proposed pier would not interfere with navigation and had approved the construction plans pursuant to Rhode Island General Laws, section 46-6-2.129

*Nugent* raises several concerns. The court's reliance on the judgment of federal and state officials to resolve the issue of interference with navigation implies that the right of navigation held by the public, and historically based on the common law, may be defined by legislative power. Consequently, the decision may be interpreted to permit unlimited legislative restrictions on public trust rights, even extinguishing altogether the public's right of navigation and fishery. As the case law has developed, however, the issue is still murky.

Another issue raised in *Nugent*, the ability of the State to alienate the soil under waters affected by the doctrine,131 will likely be the most tension-filled confluence of interests in the State's plan to develop a successful aquaculture industry. It involves the conflict of public trust rights with riparian and ownership rights of shoreline owners and the needs of aquaculture operators. The court concluded that while the common law right to wharf-out is limited by the public's rights of fishery and navigation, the State, as trustee, may pursuant to legislative enactment certify that there will be no interference with publicly held rights and authorize building on to the

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127 *Id.* at 805. One of the earliest cases that detailed the rights and obligations of riparian owners, Clark v. Peckman, 10 R.I. 35 (1871), made the statement:

[T]hat while the shore itself, and the space between high and low-water mark is public for passage, the riparian owner has a right of access to the great hegemony of nations, of which he cannot be deprived, provided the exercise thereof does not interfere with navigation or the rights of other riparian owners.

*Id.* at 38.

128 *Nugent*, 161 A.2d at 804.

129 *Id*.

130 This applies even though that power was exercised in *Nugent* via an administrative agency.

131 *Nugent*, 161 A.2d at 802.
submerged lands.\textsuperscript{132}

A key concern of the advocates of aquaculture has been the need to provide assurances to potential entrepreneurs regarding the security of their investments in aquaculture. Insecurity arises from the possibility that aquaculture investments may be lost due to claims under public trust or riparian law in addition to the inherent risks of the enterprise. Since there would be no land to use as collateral, the operators are likely to mortgage their homes in order to secure start-up capital. Any additional insecurity is likely to diminish the already reduced borrowing power of the new operators. One way to assuage this fear is to provide the putative investors with assurances that, in return for developing the industry, they will receive a higher claim of title to the affected properties than that held by the State, the public, or a riparian owner. To this end, some have sought to vest the aquaculture developers with fee simple title or very long protected leases. A prerequisite to this plan, of course, is the State’s ability to alienate title to the submerged lands on which the industry must be based.

In \textit{Nugent}, the court gave the State the qualified power to alienate the submerged flats. The court explored the realtors’ claim that the statute under which the State approved the construction was unconstitutional because it “would be tantamount to giving away the soil under the waters of east passage which the State holds in trust for the public,” in violation of Rhode Island Constitution article I, section 17, article III, and article IV, sections 1, 2, and 14.\textsuperscript{133} This challenge was dismissed as meritless.\textsuperscript{134} However, the court explained that while “the State holds title to the soil under the public waters... it holds such title not as proprietor but only in trust for the public to preserve their rights of fishery, navigation and commerce in such waters.”\textsuperscript{135} Thus, the case stands for two propositions regarding the State’s ability to alienate. First, the State holds title to the submerged lands. Second, the State’s power over such title is limited by its trusteeship on the public’s behalf.

\textsuperscript{132} The State authorities certified that the pier would not interfere with publicly held rights in accordance with R.I. GEN. LAWS § 46-6-2 (1956). Although this challenge was brought prior to the erection of the pier, the court found that if in actual use the wharf interfered with the public rights, the question would be subject to review based on “the manner in which the pier is hereafter used.” \textit{Id.} at 806.

\textsuperscript{133} \textit{Id.} at 804.

\textsuperscript{134} \textit{Id.}

\textsuperscript{135} \textit{Id.}
The scope of the limits imposed on the State by the public's interest remains unresolved. *Nugent* provided some of the pieces. The State may rely on legislative enactments certifying that navigation would not be significantly impaired to permit some private use of submerged public trust property.\(^{136}\) Also, legislative fiat may declare that a particular use will not interfere with publicly held rights. Finally, the decision indicates that when the public's rights of navigation conflicts with other common law rights, such as the riparian right to wharf out, a balancing test will decide whether the State is authorizing a proper use for the public trust property.\(^{137}\)

In *Hall v. Nascimento*,\(^ {138}\) the court echoed *Nugent*'s language as to the control of the State over submerged lands subject to the public trust doctrine. At issue were lands created when submerged flats were filled. The water over these flats had been subject to the public trust rights of fishery and navigation. The court relied on *Carr v. Carpenter*,\(^ {139}\) to hold that "owners of land adjoining navigable waters have the right to 'enjoy what remains of the rights and privileges in the soil beyond their strict boundary lines, after giving to the public the full enjoyment of their rights.'"\(^ {140}\) The court, however, did not define "the full enjoyment of [the public's] rights."

By not itemizing the public's rights as they existed at the time of *Carr*, the court again left unanswered some of the same questions raised in *Nugent*. The court did use *Carr*, nevertheless, to hold that, by implication, the riparian owners of the land adjoining the waters retained some rights beyond the strict boundaries of their lands.\(^ {141}\)

While the court reaffirmed that submerged lands may be alienated by legislative act, in *Nascimento* there was no record of a legislative grant conveying the land created by the dredge-fill. Thus, the issue became whether the riparian owners original beach rights could have produced a

\(^{136}\) *Id.* at 806.

\(^{137}\) The factors to be balanced include: on the side of riparian owners, the right of access to the navigable waters from his lot, the right to make a landing, to erect a wharf for his use or for public use; on the public side, those rights protected by the public trust doctrine as modified by legislative regulations to protect fishing, navigation, and commerce. *Id.* at 805.


\(^{139}\) 48 A. 805 (R.I. 1901).

\(^{140}\) *Id.* at 877.

\(^{141}\) *Id.* In *Nascimento*, the riparian owners enjoyed the rights of their predecessors in title over the shoreline and submerged flats before the new property was created by the Army's dumping of the fill.
claim of title to the filled land which had not been transferred by legislative enactment. The court concluded that the “defendants [could] continue to maintain rights in that area [the old beach and the newly created shore] as long as their use of the area is not inconsistent with the public trust.”142 The riparian owners did not receive title to the filled land, rather they were allowed to maintain rights. Title, however, was still held by the State subject to the public trust doctrine.143

The decision also addressed the trial court’s holding granting title of the filled land to the riparian owner based on a claim of adverse possession. The court noted that because the property was publicly owned, adverse possession was not available, and therefore reversed the trial judge’s finding.144 Thus, such property may not be adversely possessed, but may only be transferred by legislative grant, and when transferred must contain the limitations necessary in the fee to preserve the public’s rights guaranteed by the doctrine. This conclusion is in keeping with Rhode Island’s long tradition of preventing adverse possession claims against public property. In Freeborn, the plaintiff asserted a claim of title based on “prescription . . . by proof of possession or actual enjoyment.”145 In response, the court referred to the claim as “novel and extraordinary . . . [placing on the plaintiff the burden of establishing title] inasmuch as it is in derogation of the public rights, being to a great extent at least incompatible with them.”146

Nascimento is significant because it acknowledged that regardless of physical change, property that was once submerged land continues to be subject to State title and the public trust doctrine. In this way, the decision limits dicta in Carr to the effect that littoral owners have priority rights to the use of the shore and submerged lands adjacent to their land. The decision raised a red flag to all owners of property created by filling-in submerged

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142 Id. (emphasis added).
143 Id.
144 Id. In Rhode Island, adverse possession of public property is not recognized by statute and common law. Id.
145 Folsom v. Freeborn, 13 R.I. 200, 205 (1881). The court characterized this claim as an “incorporeal right of easement, involving an appropriation of a portion of the tidal flow.” Id.
146 Id.
land. The ruling put in doubt the status of the title to such properties through the State being used for private purposes such as marinas by owners of “adjoining lands.” The decision also raised the issue of whether property owners have to make way for public access to the water. How must they avoid interfering with other rights inherent in the public trust doctrine? Perhaps more importantly, it raised the question of who owned the Providence waterfront.

B. Greater Providence

The riparian owners’ concerns finally exploded into litigation in Greater Providence Chamber of Commerce v. State. The decision by Justice Shea was a declaratory judgment as to the effect of public trust doctrine on the properties held by plaintiffs, owners of properties on the Providence Waterfront. These properties were created by filling tidal flats on Narragansett Bay below the mean high water mark. The properties consisted of two groups. The first group, the “Cove Lands,” were created from filling the “Great Salt Cove,” and were comprised of several hundred acres in Providence. The filling of the Cove was carried out in the seventeenth and early eighteenth century. The second group of properties were labelled by the court as the “Harbor Line” properties. These parcels were created by filling below the mean high water mark on the Providence River between 1857 and 1886, and in 1907, 1909, and 1914, to the harbor line as it existed in 1879 and 1880.

The court recognized that the action resulted from the concerns raised by their earlier decision in Hall v. Nascimento. Justice Shea explained that Nascimento had been interpreted as subjecting “all land created by placing of fill below the mean high tide [to the public trust doctrine].” After
tracing the origins of the doctrine from Roman law through the American Revolution, the court acknowledged that the doctrine is part of every state's jurisprudence. The court also noted that judicial precedent makes clear that Rhode Island had embraced "the whole body of general law known as the public trust doctrine," including the principle "that title to the lands below the high-water mark vests in the . . . [State] as trustee . . . for the public." However, the court explained that public trust exists in Rhode Island "as it has been changed by local legislation or custom." Accordingly, in Rhode Island, the public trust doctrine is based on the principle that "lands below the high water mark will not be appropriated by, or conferred upon private individuals for purely private benefit." This formulation, however, is to be administered and interpreted "according to [Rhode Island's] own views of justice and policy . . . reserving . . . or granting rights therein to individuals or corporations . . . as [the State] consider[s] for the best interests of the public." Based on these principles, the court explored whether the title of the properties or some particular property rights had been transferred by the State to the present owners through some form of legislative action. As to some of the Harbor Line properties, the court could not find records of a legislative grant or approval. However, the court stated, "[I]t is safe to assume that such filling would not have been allowed . . . without at least the State's tacit approval, if not its express approval." The rest of the Harbor Line properties were found to have been filled pursuant to permits issued by the Rhode Island Board of Harbor Commissioners in 1907, 1909, and 1914. As to these properties, the court decided that ownership had been relinquished by the State. As to the "Cove Lands," the decision failed to mention whether or not the filling of the Great Salt Cove was authorized by the State.

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156 Greater Providence, 657 A.2d. at 1042.

157 Id. at 1043 (citing a body of Rhode Island cases that quote the law from federal and state sources on the doctrine).

158 Id. at 1042 (citing Comstock, 65 A. 307).

159 Id.

160 Id.

161 Id. at 1041. Although this language does not grant a right of prescription, it places an affirmative burden on the State to preserve its title rights.
the court explored "whether the public trust doctrine was extinguished in the Cove Lands by the State’s express grant of those lands to the city of Providence in 1870." In addition, the court considered whether the public trust interests were extinguished by filling the “Harbor Line” properties in the absence of express legislative approval. In both instances the court held that public trust interests in all the created lands were extinguished and the present owners held in fee simple absolute.

This ruling seems in conflict with the weight of decisions in Rhode Island that have held that, even in the case of a legislative enactment, public trust property could only be transferred subject to the rights of the public for whom the State holds the land in trust. Most problematic, the decision seems to contradict the court’s earlier ruling in Nascimento.

In Greater Providence, the court characterized Nascimento as “a conflict between public rights and private rights in filled land along the shore.” According to Greater Providence, Nascimento held that an owner of property adjacent to the filled land did not have title to the created land because “any such claims must be based on littoral rights to the tidal lands that were filled.” In Nascimento, the “owners’ predecessors in title never abutted the former high water mark” and there was no evidence of a legislative grant to the owners’ predecessors in title, or that there had been an acquisition of the filled land by deed or adverse possession. Thus, under Greater Providence, the last case on the subject, a riparian owner may obtain fee simple title to public trust property that was once submerged tidal land. Further, the riparian owner’s fee may exclude any of the historical public right uses. In this way, Nascimento drastically changed the doctrine from its common law form and from Rhode Island’s own developed doctrine.

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162 Id. at 1040.
163 Id. at 1041.
164 Id. at 1043.
165 Id.
166 Id.
167 Id. This leads to several questions. Would the court find a different level of rights if the original property abuts the shoreline that is later filled? Just how fact-specific is Nascimento? The court noted that the property created by the fill could not have been granted through the fill-permit since the permit only authorized 50 additional feet of shoreline, yet the Army Corps actually created 260 feet of beach. For this unplanned property there could not have been a grant of any kind at the time of creation. Accordingly, title to the new land rested with the State.
It must be noted that while dealing with land that had been filled for many years, the Greater Providence decision has the potential to profoundly impact the public ownership of shoreline and submerged lands. The title that the Greater Providence owners now hold and that was held to have been in one way or another, granted by the State, was not a title to the particles of soil that made up the dumping—this is too rich a legal fiction even for a Rhode Island court. The title in this instance must be based on the State’s ownership of the previously partially or fully submerged flats that gave the State power to regulate the waters above them. In other words, the Greater Providence owners were given fee simple title to a piece of Narragansett Bay bottom that had been filled up.

The implications of the decision on the development of aquaculture and on riparian owners’ rights and how these two will impact on public trust rights is significant. If the bay bottom may be alienated, completely extinguishing public trust rights, aquaculture entrepreneurs could be guaranteed that the submerged land on which their industry is based will not be retaken by the State or be troubled by trespassing public uses. The investor security created, however, is at the expense of diminishing the State’s permanent holding of public-trust-resource property, the loss of public rights on the waters that cover such submerged lands, and possible loss of control over the future alienation of those lands because of “tacit” permission to fill.

As to the riparian owner’s rights, the decision expanded historical common law and Rhode Island state law rights. In part, this expansion arises from the interplay of the right to wharf-out and the concept of tacit acceptance and permission in Greater Providence allowing the possibility of reliance-based claims against public lands. Accordingly, the riparian owner may fill with express or implied permission of the State. As the court stated:

There is nothing in the record to indicate that this filled parcel of land was filled with the express approval of the state. However, it is safe to assume that such filling would not have been allowed to occur in a busy waterway without at least the

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169 The court stated that “these factors establish that the fee-simple absolute title rests in the title holders . . . subject, of course, to any encumbrances that the title holders may have placed on the land themselves.” Greater Providence, 657 A.2d at 1043-44.
Additionally, the riparian owner may erect structures upon the filled land or submerged flats in order to wharf-out. And, as against the rest of the public, the riparian owner may assert a superior right of use and access to the shoreline. All rights of the riparian owner, however, are subject to the superior claim of the state, and the limitations imposed by navigation. If a riparian owner chooses to wharf-out she might be claiming the submerged property on which her wharf is rooted. At some point, failure of the State to reassert control over such submerged land may give rise to a claim equivalent of the owner’s claim in Greater Providence—unless, of course, some legal fiction is erected to distinguish dry from wet-land title. The issue is further complicated by the court’s holding that harbor lines are indicators of legislative authorization to wharf-out.

The court in Greater Providence noted several factors that distinguished the land created in that case: as to the Harbor Line properties, some of the property was filled “to a harbor line with the express approval of the State;” the approval for the filling of some of the other parcels was carried out “with the tacit or implied approval of the State;” and the land had “been substantially improved upon many years.”

The court explained the significance of the “harbor line” in public trust cases involving the filling of land: “The harbor lines were drafted in cooperation between state and local authorities to establish the point beyond which fill, wharves and other structures would create an obstruction to navigation, commerce, and fishery.” In the case of the “Harbor Line” properties along the Providence Waterfront, the court saw the harbor lines as a legislative determination “that encroachment on the waters to the harbor line would not constitute interference with fishery, commerce, or navigation.” Here the court seems to extend itself in its effort to limit Hall v. Nascimento, referring to “the limited application that Hall has,” implying

170 Id. at 1041.
171 Id. at 1043.
172 Id.
173 Id.
174 Id. at 1044. It is possible, however, that the State was merely willing to allow such structures subject to a public servitude or to the State’s right to reclaim the property for public use in the future.
175 Id.
that *Nascimento*’s reasoning may not apply “where no harbor lines are involved.” However, under *Greater Providence*, once an owner has relied on the harbor line to fill the flats without interference from the State, the owner may extinguish even the incidental public rights of access to the water and the shoreline. Thus, the protection of historical rights has been made dependant on a vigilance that the State is unlikely, if not unable, to maintain. This rather extreme impact from *Greater Providence* could be alleviated by restricting the case to its facts. Specifically, the case could be limited to properties such as the Providence Waterfront that have been filled and substantially improved over many years on busy waterways. Such a reading of the case would prevent future claims of ownership by riparian owners erecting mere wharves or lesser structures or by uncontrolled filling. An approach more protective of the public would require that in order to establish the required adverse claim of the flats, the owner must notify the State of such intention prior to erecting structures or filling the flats.

Ultimately, the court adopted a two-part test “to establish ownership rights in filled tidal lands,” to be applied “on a case-by-case basis according to the facts of each situation.” The test provides that two conditions must be met to obtain “title to [the] land that is free and clear.” First, the owner of “littoral” property must have filled along the shoreline “with the acquiescence or the express or implied approval of the state.” Second, the owner must build or improve on the created land “in justifiable reliance, of the State’s acquiescence or express or implied approval.” The title that results may not, under the court’s test, be again, taken away by the State “on the strength of the public trust doctrine alone.” The court did leave the State with the ability to restrict the filling of shoreline, but such restrictions must be adopted before a littoral owner changes her position based in justifiable reliance of previous State conduct.

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176 *Id.*
177 *Id.*
178 *Id.*
179 *Id.*
180 *Id.*
181 *Id.*
182 *Id.*
183 *Id.*
184 *Id.*
185 *Id.*
The court also explained in dicta that when it spoke of harbor lines as "licenses" in *Nascimento*, it meant that the establishment of the harbor lines was an invitation or permission by the State to fill to that line. The court cited to several cases for the conclusion that the riparian owner acted properly when she relied on the establishing of the harbor line as an invitation to fill and extend the upland, thereby obtaining clear title to the newly created land. But the court did not explain why the owner's reliance is "justifiable" in light of the "pervasive" and long-standing public trust doctrine. The statutes setting harbor lines may be presumed to contain a legislative resolution as to whether building to the line will interfere with navigation. It is a long analytical jump, however, to conclude that the rights of the public held in trust by the State have been forfeited; that the State has given up all property rights in the submerged lands covered within the line; or that the line eliminates the traditional rights of access to the shoreline as incidental to the ancient rights of navigation and fishery. Assuming that the court is correct in interpreting the establishment of the harbor line as a legislative attempt to alienate this public property, the resulting alienation of public trust property may be as unconscionable as the grant in *Illinois Central Railroad*. In addition, such a legislative act would be impermissible under the State constitution unless a public purpose is served by the granting of the property right. The purpose of the line is to regulate navigation, not to increase the holdings of the shore owners. The protection of navigation can be accomplished without the State giving up either ownership or control over the submerged lands or the waters that cover them.

*Kayrouz v. R.I. Depositors Economic Protection Corp.*, illustrates some of the constraints that the State constitution imposes on the alienation of public property. At issue was Rhode Island Constitution, article 6, section 1, which states, "The assent of two-thirds of the members elected to each
house of the general assembly shall be required to every bill appropriating the public money or property for local or private purposes." This constitutional provision would seem in conflict with the majority view in Greater Providence that the mere establishing of the harbor line was enough to convey the submerged land when filled by the private owner. In this case, the Act in question was passed by a simple majority in each House. The court presented the issue as "whether the purposes for which the General Assembly enacted the [Act] constitute public purposes and not local or private purposes." As in Greater Providence, there were serious private economic concerns to balance against the public grant. The Act was an attempt to address the "economic crisis" brought about by the failure of Rhode Island Share and Deposit Indemnity Corporation.

Kayrouz began by noting that "[a] self-serving recitation of a public purpose . . . is not conclusive." In this attempt at defining public purpose, the court analogized the analysis to that of determining public use in "takings" cases:

[The taking of property for public use] must provide the general public, or an appreciable portion thereof, with the right to use or employ such property or at least have it used or employed by some agency, public or private in the public interest under appropriate regulations and restriction in order to provide the public as such with some service deemed to be necessary to it or to a proper function of government."

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190 Id. at 946 (emphasis added).
191 Id.
192 Id.
193 Id. The Act included a legislative declaration that "without prompt state legislative action, there will be a serious negative impact on the health, safety and general welfare of the people of the state and the economy of the state . . . This act shall, therefore, be deemed to be an exercise of the police powers of this state . . ." Id. at 947.
194 Id. at 947. However, the legislative determination of a public purpose is entitled to great deference by the judiciary.
195 Id. at 947-48 (citing Romeo v. Cranston Redevelopment Agency, 254 A.2d 426, 431 (1969)). The court continued, however, that the concept of public purpose is not static and must change to meet the "ever-changing needs of our complex society." Also, the court cited to Cranston Redevelopment for support on the need to liberally construe and expand the meaning of public purpose.
In this instance, it was enough that the Act was protecting private business in the State for the court to wave aside the fact that there was no State debt resulting from the economic crisis, and to conclude that the Act served a public purpose making its enactment by a simple majority constitutional.196

Thus, in Greater Providence, under the Rhode Island Constitution, the court had two choices: first, decide that the granting of the public land to the private owners was to avoid economic harm to some private economic entities, which would have required a two-thirds votes in each house; or second, determine that the grant was to effect some public purpose. The court’s stated concern was “large amounts of valuable private properties [becoming] worthless in the real estate market.”197 This private purpose would require compliance with article 6, section 1. In addition, the existence of article 6, section 1 militates against the court’s conclusion that the State may by “tacit” approval grant public property “free and clear” to the private owners. Also questionable is the role of the court in deciding that protection of the private economic interests was enough of a “public purpose.” As the court stated in Cranston Redevelopment, while public use must be given a liberal interpretation to conform with changing needs, the definition of public interest belongs with “the legislature, not the judiciary . . . [as] the guardians of the public needs . . . .”198

Maybe the most troubling aspect of Greater Providence is the court’s basis for drastically altering the doctrine to permit the end of the trusteeship on a piece of what once was submerged land. The ultimate reasons given by the court were the need to produce employment through economic development and concern that economic dislocation would result from placing a cloud over the sizable holdings that made up the Providence Waterfront properties. Applying such a cost-benefit analysis has the potential for immoderate results. It is foreseeable that during economic hard times, or when the choice is politically controversial, the usual decision will be to extinguish the public right.

Because the court equated economic development with “for the benefit of the public,” the court elevated economic concerns to the same level as public rights. This equation is fraught with political controversy specially

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196 Id. at 948. The basis for the conclusion was the adverse economic impact that would affect numerous depositors and their creditors. Id.

197 Greater Providence, 657 A.2d at 1044 (emphasis added).

198 Cranston Redevelopment Agency, 254 A.2d at 432.
in an area involving environmental concerns, economic concerns, and cultural and aesthetic concerns. A danger is that by balancing the diffused rights of the general public against the concentrated economic rights of a few powerful private interests, the balance will be inherently tilted to the private side. This concept was explored by Justice Marshall in *Citizens to Preserve Overton Park v. Volpe.* Justice Marshall explained that if the use of public lands was based strictly on a utilitarian cost-benefit analysis, those lands would be used up before private economic interests were denied. In part this results because the State already owns title, so there is no need to exercise eminent domain powers or spend public funds, and those lands are almost always uninhabited and thus less likely to produce political controversy. While this same concern would arise from a legislative resolution, in the legislature there is at least the possibility of public political participation, a factor almost totally absent in a judicial proceeding. This lack of an express legislative input is especially of concern in light of article 6, section 1 of the Rhode Island Constitution.

In *Greater Providence,* the State offered the court the option of finding that littoral owners who fill and occupy the resulting land be seen as holding under a “license . . . to exclusively occupy the premises . . . and that the public rights in both parcels ‘are not self-executing but must await affirmative legislative action in order to be exercised.’” Adopting this position would have preserved the public rights and given the riparian owner the assurance that any interference with her private interests would require action by the legislature. In addition, by requiring the legislature to act to reclaim the public rights, the court would seem to give the public the opportunity for political consideration of the policies at stake. Instead, the court made the policy conclusion that using a license from the State would make any property “virtually unalienable . . . [resulting in] large amounts of valuable private properties [becoming] worthless on the real estate market. For these reasons alone . . . the state must fail.” Because under the *Greater Providence* decision, the State does not retain a reversionary right on these properties, the natural resource, in this case tidal flats or submerged land, is diminished and will continue to diminish over time. The diminution of this

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200 Id. at 412-13.
201 Greater Providence, 657 A.2d at 1044.
202 Id.
irreplaceable resource\(^{203}\) will per force diminish the right itself—the only way to preserve the right is to conserve the resource on which the right is exercised.

VI. A DIFFERENT APPROACH

In *State v. Central Vt. Ry.*, \(^{204}\) the Vermont Supreme Court explained that the State’s approach to control over public property impressed with public trust rights and offered some limitations on its alienation. At issue was the ability of the Central Vermont Railway to sell a 1.1 mile strip of filled land on the shore of Lake Champlain. The land had been filled pursuant to legislation enacted in 1827 to encourage the building of wharves by filling the shore and guaranteeing the owners and heirs exclusive benefit of the use forever (so long as the wharves did not interfere with navigation). The court ruled that Central Vermont owned the land in “fee simple impressed with the public trust doctrine. This means that the [Railway] is free to convey such lands to any other parties... so long as the land is used for a public purpose.”\(^{205}\) The court also retained jurisdiction to resolve any questions on whether a “proposed use of the property complies with the public purpose condition.”\(^{206}\)

The Vermont Supreme Court quoted:

> Historically, no developed western civilization has recognized absolute rights of private ownership in [submerged] land as a means of allocating this scarce and precious resource among the competing public demands. Though private ownership was permitted in the Dark Ages, neither Roman law nor the English common law as it developed after the signing of the Magna Carta would permit it.\(^{207}\)

As an emphasis on the public interest, the court also noted that Vermont’s

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\(^{203}\) While, in theory, the State could buy the property back, it is likely that the resource itself would no longer exist in the same form as when it was granted away.

\(^{204}\) 571 A.2d 1128 (Vt. 1989).

\(^{205}\) *Id.* at 1129-30.

\(^{206}\) *Id.* at 1130.

\(^{207}\) *Id.* at 1131 (quoting United States v. 1.58 Acres of Land, 523 F. Supp. 120, 122-23 (D. Mass. 1981)).
Constitution provides, “The inhabitants of this State shall have liberty in seasonable times, to hunt and fowl on the lands not inclosed, and in like manner to fish in all boatable and other waters (not private property) under proper regulations, to be made and provided by the General Assembly.”

Ultimately relying on Vermont precedent, the court explained, “This Court has invoked the public trust doctrine in rejecting claims of private rights with respect to public waters.”

The court concluded that “the state’s power to supervise trust property in perpetuity is coupled with the ineluctable duty to exercise this power.” It emphasized that a present legislature cannot by conveying trust property limit the discretion of succeeding legislatures to regulate trust property for a public purpose as they perceive it. “Every legislature must, at the time of its existence, exercise the power of the State in the execution of the trust devolved upon it.” The exceptions to this bar on alienation of trust property were “grants of submerged parcels for purposes of aiding commerce or promoting the public interest and grants of parcels which, being occupied, do not substantially impair the public interest in the lands and waters remaining.”

The first exception, rejected in Vermont, does not address what follows if a grantee later seeks to abandon the public purpose. As to the second exception, the State argued that an unqualified grant of fee simple would indeed impair the public interest in the remaining land and waters. The court, however, avoided this issue by ruling instead that the 1827 statute did not intend to grant the lands free from public trust. The court concluded that the legislature meant to preserve the public trust component of the fee and that the Railway enjoyed a fee simple subject to the “condition subsequent that the lands be used for railroad, wharf, or storage purposes. This meant that the State has the right of reentry in the event that the condition is breached by the railroad.”

208 Id. (citing VT. CONST. ch. II § 67 (emphasis removed)).
210 Central Vermont Ry., Inc., 571 A.2d at 1131.
211 Id. at 1132 (citing to National Audubon Soc’y v. Superior Court of Alpine County, 658 P.2d 709, 721 (Cal. 1983)).
212 Id. at 1132-33 (citing Illinois Central R.R. v. Illinois, 146 U.S. 387, 460 n.4 (1892)).
213 Id. at 1133.
The significant difference between the Vermont court and the ruling in *Greater Providence* is the limited character of the permissible public uses of the property held in fee simple by the railroad and the State’s ability to regain the public trust property if it were ever put to a use that was incompatible with the public’s rights. The lower court in the Vermont case had listed multiple possible public uses including restaurants, hotels, and shopping malls. The supreme court, however, held that public uses were to be defined by legislative act. Thus, only those uses in the original legislative grant were permissible public uses. Otherwise, the legislative control over public trust properties would have been ceded to the private owner, “and this legislative control cannot be delegated to others.”

By this ruling the Vermont court reserved to the legislature the important public issue of how and whether to use some or all of a precious natural resource. The court went further by rejecting a claim of laches and equitable estoppel, and relying on California case law to hold that the State’s control over public trust property was a continuing one that did not extinguish because of a grant to one grantee. Further, the State’s reserved power “extends to the revocation of previously granted rights or to the enforcement of the trust against lands long thought free of the trust.”

**VII. CONCLUSION**

The Rhode Island Supreme Court in *Greater Providence* was faced with alternatives fraught with potentially disruptive economic consequences. It is possible that this situation led to a decision that, while stabilizing a significant portion of the State’s economic base, may seriously diminish the rights held in common by the citizens since pre-colonial days. In retrospect, it might have served the State better if the court had withheld its judgment and sent the parties to the legislature for a resolution to their problem. Be that as it may, the court can still limit that case to its historical facts in future opinions and adopt either a system of State licensing or, like Vermont, the concept of defeasible fees when ruling on the alienation of public property thereby preserving the resource on which public trust rights depend. Otherwise, the court may have opened a sluice through which will ebb a limited resource on which historical rights are based.

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216 *Id.* (citing *National Audubon Soc’y*, 658 P.2d at 723).