Trust Issues: A Revisitation of Louisiana's Public Trust Doctrine

Thuy Le*

* © 2023 Thuy Le. Attorney, Kanner & Whiteley, L.L.C., J.D., Tulane University Law School. I'd like to express immense gratitude to my colleagues the Tulane Institute on Water Resources Law and Policy, who acted, not only as valuable advisors, but also as the inspiration for this Article. I'd also like to thank the students who dove head-first into the deep end of the public trust doctrine with me. Lastly, thank you to the members of the *Tulane Environmental Law Journal* for your careful edits and improvements. Without you all, this Article would not exist.

I. INTRODUCTION

On Sunday, August 29, 2021, Hurricane Ida made landfall at Grand Isle as a Category 3 storm, a downgrade from its Category 4 status only hours before. Predictions about the storm were frequent over the course of the week, and on Thursday it finally became obvious to most that this was going to be a doozy. The city of New Orleans initiated a mandatory evacuation for areas lying outside of levee protection and voluntary evacuation for areas within. Rapid intensification removed contraflow as an option, and the deadline for decisions was fast approaching. Suddenly, many Louisianians had to ask themselves the all too familiar question: should I stay or go? For many, this choice often does not exist. In a decision to evacuate properly (or even haphazardly), so many factors come into play. Where do you go? *When* do you go? Do you have enough time to leave? Is there transportation? Are there accommodations? What about your job? Pets? Family? Most importantly, can you afford it? Very often, the answers to these questions lead a person to the difficult conclusion that evacuating is not an option. We like to say that nothing is more important than your life, but what if the choice is between paying for the costs of evacuation and paying rent? The median income in New Orleans is $38,000. In many of our coastal communities, it is much lower. The simple fact of the matter is that leaving during a natural disaster is not feasible for many people. While these hardships are caused by natural forces, the exacerbation of their effect is a direct consequence of Louisiana's management of our natural resources, such as wetlands, barrier islands, and beaches.

Wetlands serve a multitude of purposes, one of which is acting as a buffer between storms' impact and our coastal communities. But what happens when those wetlands are damaged or degraded because of actions sanctioned by the state or a lack of action on the part of the government to protect and conserve them? On whose shoulders does the burden of environmental protection fall? To guarantee a clean Mississippi River? To decrease the adverse health impacts of Cancer Alley? According to the public trust doctrine, that responsibility falls on the State. The doctrine takes different forms in each state, however, and whether a public trust duty exists depends on how you define the doctrine. If defined broadly, it can encompass any form of a relationship that exists among the sovereign, its natural resources, and its people. Defined narrowly, it could stand for the idea that the sovereign is required to protect natural resources for the benefit of the public. For the purpose of this Article, the

public trust doctrine will refer a responsibility placed on the sovereign to prudently manage the natural resources for the benefit of the public—similar to the responsibility of a trustee in estates and trusts.

When states recognize the existence of a public trust duty, they do so in at least one of several forms: constitutional provision, statutory provision, or through case precedent. Louisiana is one of twenty-three states whose public trust doctrine appears in all three forms. Despite this seeming significance placed on it, Louisiana's public trust doctrine is, in practice, neither very robust nor clearly defined. While its state constitution implies the existence of a public trust, for the most part the document has left the implementation of this policy to the legislature, and the interpretations of legislative actions are left to the courts. This Article will explore Louisiana's use of the public trust doctrine, and how other states have approached the doctrine. It is often stated, and there is little dispute, that Louisiana's natural resources are some of its most valuable assets. Despite this acknowledgement, however, we fail to utilize the public trust doctrine to its full potential to protect them.

There are a multitude of environmental issues that plague the state, including coastal erosion, nutrient pollution, and groundwater contamination, among others. This is but a mere sample of the environmental issues plaguing Louisiana—issues that need to be addressed. As this Article later discusses, Louisiana law places an affirmative duty on the state to protect and conserve natural resources. But where does that duty fall? Solely the legislature? Are agencies also bound? Does the judiciary have a responsibility to consider trust obligations in a particular way? This Article attempts to answer these questions and explore how Louisiana can improve its use of the public trust doctrine to better ensure environmental protection. We start with a dive into an overview of the public trust doctrine in general.

II. OVERVIEW OF THE PUBLIC TRUST DOCTRINE

Based on the idea that the government holds certain property in trust for the use and benefit of the public, the public trust doctrine is an instrument in the environmental toolbox that is being used with increasing frequency, by environmentalists and state governments alike. One way to understand the responsibilities of the government, according to the public trust doctrine, is to look at the rules and principles for the operation of private trusts. The Louisiana trust code defines a trustee as "a person to whom title to the trust property is transferred to be administered by him

as a fiduciary."[1] The trustee is required to administer the trust "solely in the interest of the beneficiary"[2] and "exercise reasonable care and skill, considering the purposes, terms, distribution requirements, and other circumstances of the trust."[3] If these principles are applied to the administration of natural resources, the government (trustee) is responsible for administering public trust lands for the interest of the public (beneficiary). The "trust" in this case is the collection of natural resources owned by the state; the trust is also sometimes referred to as the "corpus" of the trust. Traditionally, the public trust consisted exclusively of navigable waterways and their waterbeds. However, that category has been expanded over time and by different states to include other natural resources, such as groundwater, wetlands, forests, and the natural environment in general. The application of the doctrine is constantly evolving, shaped and polished to respond to the needs of each state.

A. Public Trust: The Origin Story

The public trust doctrine is a principle that has roots in ancient Western legal tradition and over time has evolved and manifested in a multitude of ways. Many scholars attribute its origins to English common law and Roman civil law, which, while accurate, is an incomplete description of the doctrine's foundation.[4] Missing from that conversation are the *Liber Augustalis* and *Las Siete Partidas*, the legal codes for Italy and Spain, respectively. While the influence of these codes is not as immediately apparent as that of Roman civil law and English common law, they must be considered in the public trust analysis. In a tapestry, where threads are interwoven to create an image, the removal of a few threads would change the composition of the fabric and alter the portrait it presents. As Captain Jean-Luc Picard learned, the tiniest omission can have the largest of consequences.[5] To consider only some of its historical roots is to have a skewed image of the public trust doctrine; this is especially so as medieval rulers often looked to their foreign peers to seek

1. LA. REV. STAT. 9:1781(2021).
2. LA. REV. STAT. 9:2082 (2021).
3. LA. REV. STAT. 9:2090 (2021).
4. Melissa Kwaterski Scanlan, *Evolution of the Public Trust Doctrine and the Degradation of Trust Resources: Courts, Trustees and Political Power in Wisconsin*, 27 ECOLOGY L.Q. 135, 140–41 (2000).
5. *Star Trek: The Next Generation*, *Tapestry* (NBC television broadcast Feb. 15, 1993) (In this episode, Captain Jean-Luc Picard (starring Patrick Stewart) is given a chance to relive his past and prevent the chain of events that necessitated his use of an artificial. However, his actions not only changed that aspect of his life, but the entire trajectory of it).

guidance in forming their own legal code. The public trust doctrine's civil law origins back to the ancient Roman law, the most famous of which is the Corpus Juris Civilis, which, having been promulgated in 534 A.D., is one of the earliest and most comprehensive codifications of customs and laws in history. In Roman civil law, within the Corpus Juris Civilis is a component titled the Code of Justinian, which was meant to be textbooks for law students. On the law of nature, the Code states,

> [B]y the law of nature these things are common to mankind—the air, running water, the sea and consequently the shores of the sea. No one, therefore, is forbidden to approach the seashore, provided that he respects habitations, monuments, and buildings, which are not, like the sea, subject to only the laws of nations.[6]

But just as Plato drew from Socrates, the Code of Justinian had a predecessor from which it drew many of its ideas and principles: the Institutes of Gaius. Much of the Justinian Code was based on the Institutes of Gaius, which were written in 170 A.D. (almost 300 years prior) and were an essential exposition of Roman law at the time. According to the Second Commentary of the Institutes of Gaius, things are subject to either divine right or human right. Things subject to divine right cannot be possessed by any individual and are sacred and religious. Things subject to human right can be owned, but even then, ownership is not absolute. Public things "are considered to be the property of no individual, for they are held to belong to the people at large."[7] This language still appears today within Louisiana's own Civil Code, and while it is not referenced as explicitly, the ideas it espouses can been seen in the bedrock of modern water laws in the United States, which we will explore later. But there is another link in the chain connecting Roman law to the current state of laws in the United States: early English law.

From English common law, the principles that are thought to inspire the public trust doctrine can be found in documents as early as the 1215 Magna Carta, which also drew upon Roman law. Instead of subscribing to the notion of "ownerless" things (as Roman civil law does), however, the drafters of the Magna Carta maintained the then-current status quo and chose to simply place (arguably minor) restrictions on the Crown's powers. Most of these restrictions served to reduce the Crown's then-absolute power and vested some rights in the barons, but did not place any

6. INSTITUTES OF JUSTINIAN, Book I, Section I.

7. THE INSTITUTES OF GAIUS, Second Commentary (170 A.D.), http://thelatinlibrary.com/law/gaius2.html#:~:text=(11)%20Things%20which%20are%20public,are%20the%20property%20of%20individuals.

affirmative responsibility on the king to serve as steward of natural resources. One particular section implied a public use doctrine but came nowhere near what we think of today as a public trust responsibility. Section 23 reads, "All fish–weirs shall be removed from the Thames, the Medway, and throughout the whole of England, except on the sea coast."[8] This provision was intended to make it easier to navigate on rivers. Still, it was the beginning of the shift in the power dynamic between the Crown and its subjects. The king's authority was no longer perceived as absolute, and his right to rule became, which at the time was thought to be divinely bestowed, subject to restrictions.

English law was not the only legal system that looked to Roman law a guide. The *Liber Augustalis*, which is also known as the Constitutions of Melfi (Constitutions), had similarities to the Justinian Code. Promulgated in 1231 A.D. by Emperor Frederick II of Sicily, it was a collection of laws for the Kingdom of Sicily and is currently considered to be the longest-surviving written constitution in the Western legal tradition. As with Louisiana's Civil Code, it was divided into separate books, each concerning itself with different areas of the law. Book I dealt with public law, Book II laid out matters of procedural law, and Book III concerned feudal and criminal law. It is in Book III where the Constitutions established something bearing semblance to a public trust doctrine. Title 47 of Book III required citizens to preserve the "healthfulness of the air," emphasizing the importance of keeping cities clean:

> We intend to preserve the healthfulness of the air insofar as we can, for it has been reserved to the attention of our provision by divine judgment. Herefore, we order that no one should be permitted to soak flax or hemp in water within a mile of any city or near a castrum so that the quality of the air may not [. . .] be corrupted [. . .] We order that burials of the dead which are not contained in urns should be as deep as half an ell[9] extended [. . .] We order that cadavers and filth that make a stench should be thrown a quarter mile out of the district or into the sea or river.[10]

8. Fishing weirs are fish traps placed in a river to direct or trap fish. Oftentimes, it can obstruct the waterway and hinder navigation. *English Translation of Magna Carta*, BRITISH LIBR. (July 28, 2014), https://www.bl.uk/magna-carta/articles/magna-carta-english-translation.

9. An "ell" is a unit of measurement used in northwestern Europe that originally equated to the combined length of the forearm and extended hand (45 inches). So, one ell is 3.75 feet, and half an ell is 1.875 feet.

10. JAMES M. POWELL, THE LIBER AUGUSTALIS OR CONSTITUTIONS OF MELFI PROMULGATED BY THE EMPEROR FREDERICK II FOR THE KINGDOM OF SICILY IN 1231, 135 (1971).

Notice that the first sentence expresses an idea similar to the public trust doctrine. First, there is an intent to preserve the healthfulness of the air, a natural resource, and "insofar as [they] can."[11] The exact language of this is significant because it makes appearance in another body of law—one that follows it by seven hundred years. The second part of the sentence explains why there is an intent to preserve the healthfulness of the air: because is "has been reserved to the attention of [their] provision," meaning it was placed under their responsibility "by divine judgment." The word "provision" was used during the fourteenth and fifteenth centuries as "the act or process of supplying or providing something" or "as stock or needed material, supplies, or food."[12] While this definition may not definitively apply to the thirteenth century, when the *Liber Augustalis* was written, it provides insight as to how the term was used. Applied to Title 47, it can be read that the people of medieval Sicily believe the air to be a needed supply or material granted to them by God, and thus, must be preserved as much as possible. The protection of the air so that it may not be "corrupted" seems to imply the belief that people were entitled to clean air, which may result from fact that the miasmic theory of disease was the predominant public health belief at the time. According to the miasmic theory, diseases are caused by bad air caused by foul odors due to rotting carcasses and vegetation as well as molds and dust particles.[13] Note that while Title 47 placed restrictions on polluting the air, it demanded that "cadavers and filth that make a stench should be thrown a quarter mile out of the district or into the sea or river."[14] At the time, clean air took precedence over clean water; this belief continued through the medieval era in Europe, into the late nineteenth century.[15] It was not until John Snow published a paper in 1858, positing that cholera outbreaks in London were caused by contaminated water, that people started thinking that clean water might be just as important as clean air.[16] Even then, his theory was not widely accepted. It was later in the 1890s

11. *Id*.

12. *The Provenance of 'Providence,'* MERRIAM-WEBSTER, https://www.merriam-webster.com/words-at-play/usage-of-province-providence-provenience-provenance (last visited Jul. 10, 2022).

13. Ajesha Kannadan, *History of the Miasia Theory of Disease*, 16 ESSAI 41, 41 (2018).

14. POWELL, *supra* note 10, at 135.

15. *See* Stephen Halliday, *Death and Miasma in Victorian London: An Obstinate Belief*, 323 BRITISH MED. J. 1469, 1471 (2001).

16. *Id*. at 1470.

that priorities flipped and clean water seemed to take precedence over air.[17]

In contrast to the *Liber Augustalis*, medieval Spain's *Las Siete Partidas* had an explicit provision for water ways. Over thirty years after the promulgation of the *Liber Augustalis*, *Las Siete Partidas* was commissioned in 1265 by King Alfonso X of Spain—sometimes referred to as the Justinian of Spain—and he pulled from the Justinian Code in drafting his own code for Spain. Within this code were provisions that very much resemble our modern-day nuisance statutes. The third volume of *Las Siete Partidas*, in Law VII, gave men the right to repair or clean canals, which were tasks necessary to ensure their continued use by cities and villages.[18] It was in the best interest of the public that the canals be kept well-maintained.[19] These structures were vital to the transportation of water, and many acted as aqueducts for watering crops. Therefore, it was in their best interest to ensure that these channels remained usable and unobstructed. Unlike Title 47 of the *Liber Augustalis*, which sought to maintain the air in healthful condition, Law VII of the third volume of *Las Siete Partidas* had the primary goal of ensuring that water was accessible, and canals were usable for everyone. Despite this difference, these two provisions share one major identify characteristic: they both seek to protect an important common resource.

The examples above may not clearly resemble what the public trust doctrine is generally perceived to be—a duty held by the government to manage resources for the benefit and use of the public—but they each contribute to the foundation of the doctrine. The Code of Justinian establishes that certain resources belong to no one, and that each person is entitled to access and use of them. The Magna Carta placed limits on the king's power, which was the first step to developing the idea that the government's authority is not absolute and the public's interest has a role in the management of state affairs. The *Liber Augustalis* could be considered, among the texts of Western legal traditions, the one that most closely resembled the modern-day public trust doctrine. In combination with the *Las Siete Partidas,* we can see that throughout early Europe, there was an acknowledgment that resources needed to be managed for the wider benefit of the public—mostly in the context of public health and

17. *Id.*

18. No one can forbid a man from making new works for the purpose of repairing or cleaning out the canals, or earthen troughs, that are necessary for the use of their houses. LAS SIETE PARTIDAS, Vol. 3, Title XXXII, Law VII.

19. *Id.*

agriculture. These pieces of legal tradition eventually made their way to the United States. As colonists immigrated to America, they carried with them their legal ideologies from England. There is little doubt that these ideas influenced and inspired them in the crafting of their own government. In doing so, they drew inspiration from legal philosophers, such as John Locke, Jean Jacque Rousseau, and Baron de Montesquieu, and tailored it to fit their needs. However, as the nation developed and the distinction between the federal government and state governments grew, it became clear that the needs of the federal government sometimes differed from the needs of state governments. The public trust doctrine is no exception. As a result, there is currently a distinction between the federal public trust doctrine and the public trust doctrine in some states. While some states have doctrines similar to what could be considered a federal public trust doctrine, others have diverged. Still, every variation is based on the foundations created by legal philosophers and texts of the past.

III. THE PUBLIC TRUST DOCTRINE AS APPLIED IN FEDERAL AND STATE CONTEXTS

A. Does a Federal Public Trust Doctrine Exist?

There are inconsistencies among courts about whether the doctrine exists in federal law in the way that it does in state laws.[20] Most of the time, states acknowledge and enforce it. There is no public trust responsibility placed on the federal government via the Constitution, and even the federal cases involving the doctrine are usually brought in the context of state actions and within the scope of state-made public trust doctrine.[21] However, it has been acknowledged by the United States

20. *See* PPL Montana, LLC v. Montana, 565 U.S. 576, 603 (2012) ("Unlike the equal-footing doctrine, however, which is the constitutional foundation for the navigability rule of riverbed title, the public trust doctrine remains a matter of state law."); District of Columbia v. Air Florida, Inc., 750 F.2d 1077, 1083 (D.C. Cir. 1984) ("In this country the public trust doctrine has developed almost exclusively as a matter of state law. Traditionally, the doctrine has functioned as a constraint on the states' ability to alienate public trust lands[.]"); *but see* Juliana v. United States, 217 F. Supp. 3d 1224, 1257 (D. Or. 2016) (noting that a close interpretation of PPL Montana does not yield and interpretation that it forecloses all federal trust claims, and that it "said nothing about the viability of federal public trust claims with respect to federally-owned trust assets."); *see also* Brigit Rollings, *The Public Domain: Basics of the Public Trust Doctrine*, NAT'L AGRIC. L. CTR., https://nationalaglawcenter.org/the-public-domain-basics-of-the-public-trust-doctrine/ (last visited Apr. 20, 2023) ("Generally, the PTD has been viewed solely as a function of state law.").

21. *See* Illinois Central Railroad Co. v. State of Illinois, 146 U.S. 387 (1892) (Illinois effectively granted title to submerged lands under Lake Michigan via a legislative act. The state

Supreme Court that "all the public lands of the nation are held in trust for the people of the whole country."[22] So, if all land is held in trust, and the states' governments are responsible for their state lands, then presumably the federal government is responsible for federal land. So, where does that public trust responsibility come from if not from the courts? According to Justice Lamar in *Light v. United States*, it originates from Congress.[23] There is the argument that a common-law public trust doctrine does not exist because it is completely preempted by federal statutes. In *District of Columbia v. Air Florida, Inc.*, the court expressed concern about this very issue, stating that Congress, by passing legislation addressing many of the interests which the public trust doctrine protects, has preempted the federal common-law public trust doctrine.[24] Consider the Promotion and Regulation section of U.S.C. Title 54, which governs the National Park Service. Subsection (a) states that the purpose of the National Park System is "to conserve the scenery, natural and historic objects, and wild life in the System units and to provide for the enjoyment of the scenery, natural and historic objects, and wild life in such means as will leave them unimpaired for future generations."[25] This statutory duty imposed by 54 U.S.C. Section 100101 is not distinct from the government's "trust" duties, and has been held to "comprise all the responsibilities" the applicable agency must discharge.[26] The good news is that it looks like we may have something resembling a federal public trust doctrine; but the bad news is that, without a common-law backbone, the doctrine's existence is at the mercy of Congressional whims. This becomes ever more of a concern as Congress becomes more partisan and less productive.

---

legislature then repealed the act a few years later and brought suit to enjoin the railroad from further construction on the lake and to establish its title over those submerged lands.); Phillips Petroleum Co. v. Mississippi, 484 U.S. 469 (1988) (Mississippi issued oil and gas leases for property underlying Bayou LaCroix and stream, all of which hare non-navigable but tidally-influenced. Phillips Petroleum brought action for quiet title to establish ownership. The court held that the state owned those lands under the equal footing doctrine based on the fact that it was the waters were affected by the ebb and flow of the tides.); PPL Montana, LLC v. Montana, 565 U.S. 576 (2012) (Montana claimed that it was owed compensation from PPL Montana for its use of state land); United States v. Walker River Irrigation Dist., 986 F.3d 1197 (9th Cir. 2021) (A county sought to establish minimum flow requirements into a lake pursuant to the public trust doctrine.).

22. Light v. United States, 220 U.S. 523, 537 (1911).

23. *Id.* ("'All the lands of the nation are held in trust for the people and of the whole country.' And it is not for the courts to say how that trust shall be administered. That is for Congress to determine.") (citation omitted).

24. *See* 750 F.2d 1077, 1085–56 (D.C. Cir. 1984).

25. 54 U.S.C. § 100101(a) (2014).

26. Sierra Club v. Andrus, 487 F. Supp. 443, 449 (D.D.C. 1980).

This is perhaps why, with the advent of climate change litigation, the courts are finding themselves becoming the popular venue for public trust issues, with lawsuits being brought with increasing frequency. Two types of climate change litigation seem to be developing. In the first type, municipalities file lawsuits against oil and gas companies seeking compensation for the damage done to their natural resources by industry operations. In these cases, the public trust doctrine acts as a background principle that underlies the reason for the lawsuits.[27] In bringing such lawsuits, the cities and municipalities are acknowledging that they are responsible for managing certain natural resources and are therefore implicitly claiming a public trust responsibility. We will not, however, dwell on these cases, as they are currently in their infancy and most of the developments so far have centered on jurisdiction (state vs. federal court), rather than the merits of the complaints, and many get dismissed.[28] Instead, we will focus on the second type of climate change litigation, which are cases brought by private citizens and organizations, many of them involving young people as claimants. These, too, are battling to overcome standing and jurisdiction challenges, but are further along in their journey. Some of these are brought by Our Children's Trust, an Oregon-based public interest law firm that filed the leading case for this new type of environmental litigation, *Juliana v. United States*.[29] The plaintiffs are seventeen minors ranging from ten to eighteen years old who each claim that they have been, and will continue to be, negatively impacted by the consequences of climate change and believe that the government, as the sovereign, has a duty to preserve the environment and "ensure [the Plaintiffs'] reasonable safety and that of [their] Posterity,

27. *See* Mayor and City of Baltimore v. BP P.L.C., 952 F.3d 452 (4th Cir. 2020); *see also* City of New Orleans v. Apache Louisiana Minerals, 2019 WL 6825435 (La. Civil D. Ct. 2019), Petition for Damages and Injunctive Relief Under the Louisiana State and Local Resources Management Act; County of San Mateo v. Chevron Corp., 960 F.3d 586 (9th Cir. 2020); Massachusetts v. Exxon Mobil Corp., 462 F. Supp. 3d 31, (D. Mass. 2020).

28. Bruce Gil, *U.S. Cities and States Are Suing Big Oil Over Climate Change. Here's What the Claims Say and Where They Stand*., FRONTLINE (Aug. 1, 2022), https://www.pbs.org/wgbh/frontline/article/us-cities-states-sue-big-oil-climate-change-lawsuits/.

29. 217 F. Supp. 3d 1224 (D. Or. 2016), *rev'd and remanded*, 947 F.3d 1159 (9th Cir. 2020). It should be noted that while Juliana was the first of this type of case to receive widespread attention, it is not the first one to bring such an argument to the court's attention. *See* Alec L. v. Jackson, 863 F. Supp. 2d 11 (D.D.C. 2012) (Minor plaintiffs seeking declaratory and injunctive relief for the federal agencies' alleged failure to reduce GHG emissions. The court held that granting such a relief would amount to a mandate placed on the Executive Branch and dismissed the case.).

from harm[.]"[30] The plaintiffs recount instances of climate anxiety, increased asthma and allergies, reduced food sources, and lowered water supply, among others.[31] In their complaint, they argued that, through its inaction in addressing climate change and its continued action in furthering fossil fuel operations, both of which lead to increased carbon dioxide production, the federal government has violated the public trust doctrine.[32] Since then, several similar cases have made their way through the courts, all with varying degrees of success, but with very much the same themes. Courts claim to be hesitant to exceed their authority by creating policies that may be best left to the other branches of government.[33] That being said, these cases tend to have a better chance in state court, as exemplified by *Held v. Montana*, which survived a motion to dismiss hearing and is the first of the bunch to receive a trial date: February 6, 2023.[34] Of course, success rates depend on a variety of factors, such as state law, political climate, and the sitting judges.

It is unsurprising that these cases are seeing more success in state courts, as unlike the nebulous federal public trust doctrine, state public trust doctrines are a little more concrete, but as with anything involving state powers, your mileage may vary. Originally applied only to navigable waters, the public trust doctrine's application has broadened over the years in some states to include other natural resources as well. This expansion is anything but consistent, however. There is no one "public trust doctrine." Rather, each state individually expands and limits its application. When you walk into an ice cream store, there is often several

30. Complaint for Declaratory and Injunctive Relief at 6, Juliana v. United States 217 F. Supp. 3d 1224 (D. Or. 2016) (No. 6:15-cv-01517-TC), 2015 WL 4747094.

31. *Id*. at 8–38. Some of the cited harms cited are: harmful algal blooms prevent drinking from previously potable water sources (Kelsey Juliana); damage to family hazelnut orchard (Alexander Loznak); worsening asthma due to poor air quality (Isaac V.); forced migration as a result of water scarcity (Jaime B.); and marine die-off from dead zones and ocean acidification (Aji P.).

32. *Id.* at 51–64, 93.

33. Clean Air Council v. United States, 362 F. Supp. 3d 237, 243 (E.D. Pa. 2019) (seeking declaratory relief from the court that present and future actions by the federal government which aggravate climate change to be unconstitutional. The court dismissed the case for lack of standing and failure to submit a claim.); Sagoonick v. State, 503 P.3d 777 (Alaska 2022) (Minor Plaintiffs sued the State of Alaska for its land use and management policies that seemed to conflict with the Alaskan Constitution's Natural Resource Policy regarding conservation. The Plaintiffs proposed to the Alaska Department of Environmental Conservation a policy for the reduction and regulation of GHG emissions. The agency denied the rulemaking petition, arguing that it was broad and went beyond the agency's statutory authority.)

34. Eric Fayeulle, *Youth-Led Climate Change Lawsuits are Increasing Across the Country*, ABC NEWS (Apr. 22, 2022), https://abcnews.go.com/US/youth-led-climate-change-lawsuits-increasing-country/story?id=84172785.

flavors to choose from. Perhaps you are a mint chocolate chip person, or maybe you prefer strawberry, or you prefer to stick to good old vanilla. Whatever flavor you choose, you can be sure that they are all made with the same base consisting of milk and sugar. Similarly, the many flavors of the public trust doctrine are results of the varying approaches of different governments. Some states have robust expressions of the public trust doctrine, while others prefer a more slimmed-down approach. Regardless, the base is still there: a responsibility on the part of the government to manage natural resources as a trustee for the public. The amount of protection, however, still hinges on whether the state acknowledges the existence of the doctrine. This Article looks at several states: Illinois, California, Pennsylvania, and Louisiana. We will not spend too much time on the major seminal cases in each, as they have surely been discussed by more established scholars, but rather focus on how different states have approached the public trust doctrine and what Louisiana can learn from them implementing our own.[35]

B. Illinois

One of the most pivotal cases in the public trust doctrine world is *Illinois Central Railroad Co. v. Illinois*, in which the United States Supreme Court held that Illinois could not give up ownership of submerged lands under navigable waters, as those lands are held in trust by the state for the benefit of the public.[36] As the Court put it, "the state can no more abdicate its trust over property in which the whole people are interested . . . than it can abdicate its police powers in the administration of government and the preservation of peace."[37] At issue in *Illinois Central* was whether the state could give title of the lands under Lake Michigan to the Illinois Central Railroad Company (Illinois Central), a private entity. In 1869, the Illinois legislature passed the Lake Front Act, which purported to give title of 1,000 acres of submerged land to the railroad company.[38] Four years later, in 1873, the legislature repealed the act, but not to be deterred, Illinois Central continued construction on the land. Illinois Central brought suit to establish its title over the previously-

35. *See* Erin Ryan et al., *Environmental Rights for the 21st Century: A Comprehensive Analysis of the Public Trust Doctrine and Rights of Nature Movement*, 42 CARDOZO L. REV. 2447, 2476–2479 (2021); Erin Ryan, *A Short History of the Public Trust Doctrine and its Intersection With Private Water Law*, 39 VA. ENV'T L.J. 135, 160–68 (2020); Oliver Houck, *Save Ourselves: The Environmental Case That Changed Louisiana*, 72 LA. L. REV. 409 (2012).

36. Illinois Central Railroad Co. v. State of Illinois, 146 U.S. 387, 453 (1892).

37. *Id*. at 453.

38. *Id*. at 454.

conveyed land, and the State of Illinois argued that it retained ownership over the land.[39] The case was ultimately taken up by the United States Supreme Court, which held that the state holds title to the lands under navigable waters under the equal footing doctrine, which is necessary to preserve the use of navigable waters for public use and protect them from private encroachment. Because that land is held in trust for the public, it cannot be abdicated unless to promote the public interest, or if it can be done without "substantial impairment of the public interest."[40] The Court compared the state's public trust responsibility to its police powers, neither of which can be relinquished. This case was decided in 1892. In 1970, the state adopted a new constitution, one that contained two new provisions that explicitly gave each person the right to a healthful environment and mandated the general assembly to pass laws for the implementation and enforcement of this policy.[41] Article XI, Section 1 declared it to be the "public policy of the State and the duty of each person . . . to provide for and maintain a healthful environment for the benefit of this and future generations."[42] Article XI, Section 2 grants each person the ability to enforce this right against "any party, government or private through appropriate legal proceedings subject to reasonable limitations."[43] These provisions were drafted with the specific intent of addressing Illinois' environmental pollution problem; [44] by establishing constitutional rights and duties tied to the environment, they created avenues for enforcement of these policies.

C. California

California recognizes an affirmative duty to protect navigable waters for their common use,[45] and Article 10, Section 2 of the California constitution requires the waters of the state be used and conserved in a way that is in the interest of the people and the public welfare.[46] This

39. *Id*. at 439.
40. *Id*. at 453.
41. ILL. CONST. art. XI, § 1.
42. *Id*.
43. *Id*. § 2.
44. Glisson v. City of Marion, 188 Ill. 2d 211, 225–26 (Ill. 1999) (citing the Record of Proceedings, Sixth Illinois Constitutional Convention at 693, 695) ("The committee sought to resolve the problem of environmental pollution by creating constitutional rights and duties concerning the environment.").
45. *The Public Trust Doctrine*, SAN FRANCISCO BAY CONSERVATION & DEV. COMM'N, https://bcdc.ca.gov/public-trust.html (last visited Apr. 20, 2023).
46. CA. CONST. art. 10, § 2 ("It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial

provision is self-executing and the legislature *may* enact laws in furtherance of the policy.[47] This implies that the legislature is entitled, but not obligated, to create laws to implement the public trust doctrine. While the existence of this provision is helpful, it is through the state's common law that its public trust doctrine is frequently developed, with the seminal case being, *National Audubon Society v. Superior Court of Alpine Count*y, more commonly called the *Mono Lake* case. In *Mono Lake*, the plaintiffs alleged that the City of Los Angeles was violating the public trust doctrine by diverting water from streams flowing into the lake. Mono Lake gets replenished mostly from snowmelts in the Sierra Nevada Mountains and five freshwater streams carry the annual runoff into the lake.[48] In 1940, after getting a permit to appropriate all of the flow from four of those streams, the City of Los Angeles' Division of Water Resources (now the California Water Resources Board) diverted half of the flow into the Owens Valley aqueduct.[49] The level of the lake dropped substantially and the ecosystem that depended on water level changed.[50] The National Audubon Society brought suit to enjoin the city from further diversion, claiming that the public trust doctrine protects the shores, bed, and waters of Mono Lake. The Supreme Court of California held that the public trust doctrine precludes anyone from acquiring a vested right in the public trust.[51] Further, it requires that the state consider possible harm to the public trust when allocating water it holds in trust.[52] Unlike the eastern United States, which functions on the system of riparian rights, western water law uses prior appropriation to manage water rights, which allocates water rights based on who is the earliest user of the water—"first in time, first in right." To perfect a water right, the appropriator must: 1) intend to apply water to a beneficial use; 2) divert it from a natural water source; and 3) use the water within a reasonable time.[53] Therefore, when the City of Los Angeles diverted the water from Mono Lake and used it, they

use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare.").

47. *Id.*

48. Nat'l Audubon Soc'y v. Superior Court, 33 Cal. 3d 419, 424 (Cal. 1983).

49. *Id.*

50. *Id.*

51. *Id.* at 447.

52. *Id.* at 452.

53. *Overview of Prior Appropriation Water Rights*, SEA GRANT L. CTR., http://nsglc.olemiss.edu/projects/waterresources/files/overview-of-prior-appropriation-water-rights.pdf (last visited Apr. 20, 2023).

perfected a right to that water. When National Audubon Society sought to enjoin the city from continued diversion, it was essentially pitting the city's water rights against the public trust doctrine. The California court's ruling was significant because it acknowledged the importance of both the public trust principle and the appropriative rights system, declining to make one subservient to the other and requiring a balancing of the two interests.[54] Even more importantly, it not only allowed, but required continued supervisions by the state of approved appropriations and a reallocation when necessary to preserve the public trust.[55]

This contrasts with the Nevada Supreme Court's ruling that, while the public trust doctrine applies to already adjudicated water rights and is a constraint in every appropriated right,[56] it does not permit the reallocation of water rights that have already been decided.[57] The role the public trust doctrine plays in these cases, the court said, was threatening the loss of those water rights if the holders fail to continuously use them beneficially.[58] While California's constitution does not have a specific public trust provision, its breadth of judicial precedent has helped the state develop the doctrine into a tool against the increasingly common climate change-inducing droughts.

D. Pennsylvania

Pennsylvania's public trust doctrine is enshrined in Article I, Section 27 of its state constitution and is commonly referred to as the Environmental Rights Amendment (ERA), which states:

> The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic, and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them of the benefit of all the people.[59]

Despite this language that seemingly imposes a duty of preservation and protection on the state government, for forty years from 1973 to 2013, the

54. *Nat'l Audubon Soc'y*, 33 Cal. 3d., at 445.

55. *Id*. at 447 ("In exercising its sovereign power to allocate water resources in the public interest, the state is not confined by past allocation decisions" and "the state accordingly has the power to reconsider allocation decisions even though those decisions were made after due consideration of their effect on the public trust.").

56. Mineral Cnty v. Lyon Cnty., 136 Nev. 503, 512 (Nev. 2020).

57. *Id*. at 518.

58. *Id*.

59. PA. CONST. art. I, § 27.

Commonwealth of Pennsylvania engaged in a balancing test whenever a public trust doctrine case arose. In 1973, in *Payne v. Kassab*, several individual citizens in the City of Wilkes-Barre sued the city and the Pennsylvania Department of Transportation seeking to enjoin the agency from encroaching on a park area as part of a road expansion project.[60] The case eventually made it to the Supreme Court of Pennsylvania. Three things of note came out of the case. First, it held that Article 1, Section 27 "itself declares and creates a public trust of public natural resources for the benefit of all the people (including future generations as yet unborn) and that the Commonwealth is made the trustee . . ."[61] Second, it established that legislation is not needed to enforce this obligation on the state in regard to public property; interestingly, the court stopped short of declaring the constitutional amendment to be self-executing.[62] Third, it created a balancing test in which judicial review of the Commonwealth's decisions must impose a three-prong standard on state actions: (1) compliance with all applicable statutes and regulations relevant to the protection of natural resources; (2) reasonable efforts to minimize environmental impact; and (3) whether environmental harm will outweigh the benefits to be derived.[63] By opting for a balancing test, the court's holding resulted in "a controlled development of resources rather than no development."[64] The court stated that while the Commonwealth of Pennsylvania, as a trustee, has a duty to conserve and properly manage public natural resources for the people's benefit, it has a duty to maintain other public resources (such as highways, roads, and buildings) prudently.[65] The fulfillment of these responsibilities requires, according to the court, that a careful balancing must take place so as to minimize environmental damage.[66] And so, because this came from the state's highest court and Pennsylvania is a common law jurisdiction, this balancing test was utilized for the next four decades.

In 2017, however, the Pennsylvania Supreme Court reversed its 1973 decision and held in *Pennsylvania Environmental Defense Foundation v. Commonwealth* that the ERA did three things: (1) limited the state's police power to act contrarily to the right of citizens to a healthy

60. Payne v. Kassab, 312 A.2d 86, 88 (Commonwealth Ct. Pa. 1973).
61. *Id.* at 245.
62. *Id.*
63. *Id.* at 247, n. 23 (citing Payne v. Kassab, 312 A.2d 86, 88 (Commonwealth Ct. Pa. 1973)).
64. *Id.*
65. *Id.*
66. Payne v. Kassab, 361 A.2d 263, 273 (Pa. 1976).

environment; (2) established "common ownership by the people, including future generations," of the state's public natural resources; and (3) established the natural resources of the state as the corpus of the public trust, the Commonwealth as the trustee, and the people as the beneficiaries.[67] Just as importantly, the court declared the ERA to be self-executing and therefore did not depend on the legislature for its implementation.[68] This means that the rights granted by the ERA exist independent of legislative action. Self-executing, however, does not necessarily guarantee a right to compel the state to act. In *Funk v. Wolf*, the plaintiffs sued the Commonwealth of Pennsylvania based on the state's ERA, claiming that the state, in failing to fulfill its duties as trustees of its natural resources, infringed on their rights to a clean environment as given by the state constitution's ERA.[69] They sought various declaratory and mandamus relief, requesting that the court require the Pennsylvania Public Utilities Commission (PUC) to take affirmative action to address climate change and greenhouse gas emissions pursuant to their duties and obligations imposed by the ERA.[70] The court held that, while there exists a right to a healthy environment granted by the ERA, the state does not have a mandatory duty to implement regulations or take actions to address climate change, which the court deemed to be "either discretionary acts of government officials or is a task for the General Assembly."[71] So, while the provision may be self-executing and grants a right to the citizens of Pennsylvania, it does not provide an avenue with which to compel state action absent an injury.

IV. LOUISIANA'S PUBLIC TRUST DOCTRINE

Louisiana has established the public trust doctrine via our state constitution and cases such as *Save Ourselves v. Environmental Control Commission* and *Avenal v. State*. Our public trust doctrine applies to navigable waters, water bottoms, and certain non-navigable tidelands.[72] The exact contents of the corpus of the state's public trust is unclear, as Louisiana's geography lends to disputes and confusion as to which waters

67. Pa. Env't Def. Found. v. Commonwealth, 161 A.3d 911, 931–32 (Pa. 2017).
68. *Id.* at 98.
69. Funk v. Wolf, 144 A.3d 228, 233 (2016).
70. *Id.* at 232.
71. *Id.* at 250.
72. ALEXANDRA B. KLASS AND LING-YEE HUANG, CENTER FOR PROGRESSIVE REFORM, RESTORING THE TRUST: WATER RESOURCES AND THE PUBLIC TRUST DOCTRINE, A MANUAL FOR ADVOCATES 8 (2009).

and lands are state resources and which are federal resources.[73] It makes sense because of the state's dependency on our natural resources. Over 1.6 million acres of land and waterways are managed by the Louisiana Department of Wildlife and Fisheries as wildlife management areas, refuges, and conservation areas.[74] Add that to the over 1.17 million acres of national parks, preserves, and refuges, and that equals eight percent of Louisiana land—land that is managed by the government. While this does not sound like a significant percentage, this land provides valuable use. Not only are some of them conservation areas, but many also provide venues for recreational use. The state prides itself on the having the nickname "Sportsman's Paradise" as a result of the popularity of water and land recreation. If the state is to maintain that attractive status, it must ensure that the natural resources that make that reputation possible is protected.

Louisiana's public trust doctrine stems from multiple sources: the Louisiana constitution, the civil code, and the revised statutes—all of which are expressions of legislative will. As any good civilian knows, in a civil law jurisdiction, the civil code and statutes are the first and primary sources. Expressions of legislative will are considered authoritative sources of law to be interpreted, refined, and explained by the courts.[75] If the law is unambiguous, then interpretation is unnecessary; it is when the law is unclear that the judiciary performs the crucial role of examining the law and clarifying its meaning.[76] Such is the case with the public trust doctrine. Because there is much ambiguity in its language, the courts have played a significant role in its development. Therefore, while the judiciary is not a primary source of the public trust doctrine, we would be remiss if we fail to consider how the courts have shaped it.

The Louisiana Civil Code draws heavily on the Code of Justinian. This is seen in Articles 449 and 450. Article 449 governs common things and notes that they include things such as the air and high seas, which "may be used freely by everyone conformably with the use for which

73. James G. Wilkins & Michael Wascom, *The Public Trust Doctrine in Louisiana*, 52 LA. L. REV 861, 869 (1992).

74. *Wildlife Management Areas, Refuges, and Conservation Areas*, LA. DEP'T OF WILDLIFE AND FISHERIES, http://www.wlf.louisiana.gov/page/wmas-refuges-and-conservation-areas (last visited Oct. 12, 2021).

75. Albert Tate, Jr., *Techniques of Judicial Interpretation in Louisiana*, 22 LA. L. REV. 727 (1962).

76. *Id*. at 731.

nature has intended them."[77] Article 450 states that "public things are owned by the state or its political subdivisions their capacity as public persons," and included in these "public things" are navigable water bodies, the territorial sea, and the seashore.[78] As part of the nature of this kind of ownership, the lands held by the state are regarded to be out of commerce and are "dedicated to public use, and held as a public trust, for public uses" and are inalienable.[79] These articles, when read in tandem, provide a basis for the idea that there are certain rights every person has to the usage of natural resources.

A. Broad Strokes: Article IX, § 1

In its own constitution, Louisiana imposes a responsibility of public trust onto government to ensure that natural resources are "protected, conserved, and replenished insofar as possible and consistent with the health, safety, and welfare of the people."[80] At first blush, this provision seems to create an affirmative responsibility on the state to preserve and protect resources. However, the phrase, "insofar as possible" acts as a limiter on this edict, and there has been little clarification as to how much of a limitation this phrase places on the power of the public trust doctrine.

Louisiana's current state constitution is the tenth constitution, meaning that there have been ten separate constitutional conventions. Ten separate documents that have been adopted to govern the state. Ten iterations of a blueprint of Louisiana, and in only two of those iterations were there express environmental provisions.[81] The first inkling of a public trust doctrine in Louisiana appeared in the 1921 Louisiana constitution, under Article VI, Section 1, which required that the state's natural resources be "protected, conserved, and replenished," and that the legislature "enact all laws necessary to protect, conserve, and replenish"

77. Article 449's counterpart in the Institutes is located under Book II, Title I: "it is held, cannot belong to individuals: for some things are by natural law common to all [. . .] the following things are by natural law common to all—the air, running water, the sea, and consequently the seashore. No one therefore is forbidden access to the seashore, provided he abstains from injury to houses, monuments, and buildings generally; for these are not, like the sea itself, subject to the law of nations." LA. CIV. CODE art. 449; INSTITUTES OF JUSTINIAN, Book II, Section I.

78. LA. CIV. CODE art. 450.

79. City of New Orleans v. Carrollton Land Co., 131 La. 1092, 1094–95 (La. 1913) (citing City of Shreveport v. Walpole, 22 La. Ann. 526, 529 (La. 1870)).

80. LA. CONST. art. IX.

81. Charles C. McCowan, *The Evolution of Environmental Law in Louisiana*, 52 LA. L. REV. 907 (Mar. 1992); *Louisiana's Constitutions*, LAW LIBRARY OF LOUISIANA, https://lasc.libguides.com/c.php?g=967774&p=6992518 (last visited July 8, 2022).

those resources.[82] This wording changed with the 1974 constitution. During the 1973 Constitutional Convention, the provision was moved and altered to now appear under Article IX of the Louisiana constitution as the Natural Resources provision. That minor change gave rise to different interpretations on the responsibilities of the state when it came to preserving, conserving, and protecting its natural resources. Though minor the change may have been, it was critical in the development of the story of Louisiana's public trust doctrine.

On a brisk[83] Tuesday morning on December 18, 1973, seventy-eight delegates gathered in Baton Rouge to continue their arduous task of drafting a new constitution for the state of Louisiana. By this time, the state had gone through nine different constitutions in a little over a century.[84] Now, here they were again, redrafting and revising the 1921 version—a priority of then-Governor Edwin Edwards.[85] When they got around to discussing Article IX, they had been at it for five months and plenty of compromises were surely made on the way, both in committees and at the convention itself.[86] On December 18, Mr. A. Edward Hardin rose and read into the record Section 1 of Article IX:

> The natural resources of the state, including air and water, and health, scenic, historic, and esthetic value of the environment shall be protected, conserved, and replenished, insofar as possible and consistent with the health, safety, and welfare of the people. The legislature shall implement this policy by appropriate legislation.[87]

Note the differences between this version and its predecessor:

> The natural resources of the State shall be protected, conserved and replenished; and for that purpose shall be placed under a Department of Conservation, which is hereby created and established. The department of

82. LA. CONST. art. VI (1921) ("The natural resources of the State shall be protected, conserved and replenished; and for that purpose shall be placed under a Department of Conservation, which is hereby created and established. The department of Conservation shall be directed and controlled by a Commissioner of the Conservation to be appointed as elsewhere provided in this Constitution, who shall have and exercise such authority and power as may be prescribed by law. The Legislature shall enact all laws necessary to protect, conserve, and replenish the natural resources of the state, and to prohibit and prevent the waste or any wasteful use thereof."

83. *Weather History for Baton Rouge, LA*, ALMANAC, https://www.almanac.com/weather/history/LA/Baton%20Rouge/1973-12-18 (last visited Aug. 24, 2021).

84. *Louisiana's Constitutions*, LAW LIBRARY OF LOUISIANA, https://lasc.libguides.com/c.php?g=967774&p=6992518 (last visited July 20, 2022).

85. E. L. Henry, *Creating and Organizing CC 73*, 62 LA. L. REV. 29, 29 (2001).

86. *Id.* at 36.

87. *Louisiana Constitutional Convention Records Commission*, *Records of the Louisiana Constitutional Convention of 1973: Convention Transcripts*, Vol. 9, 2912 (1977).

> Conservation shall be directed and controlled by a Commissioner of the Conservation to be appointed as elsewhere provided in this Constitution, who shall have and exercise such authority and power as may be prescribed by law. The Legislature shall enact all laws necessary to protect, conserve, and replenish the natural resources of the state, and *to prohibit and prevent the waste or any wasteful use thereof*.[88]

While the 1974 constitution explicitly references air and water as protected resources and seeks to preserve its "health, scenic, historic, and esthetic value," its addition of the phrase "insofar as possible" places a limitation on the state's responsibility to execute these duties. Compare this to the last part of the 1921 provision, which states that the legislature is to enact laws that "protect, conserve and replenish the natural resources" *and* "prohibit and prevent waste or any wasteful use thereof."[89]

Mr. Hardin went on to explain the committee's thoughts in drafting this section. The Committee on Natural Resources wanted to issue a policy statement that recognized that "the people of this state are entitled to a clean environment," but also struck a balance between the environmentalist and agri-industrial interests.[90] During the reading of the section, Mr. Hardin said, "So, I assure you that we have debated this at great length and we have made a sincere effort to come up with something that gives you more than what you had in the past than, but yet is not so extreme as to jeopardize the operation of industries and businesses in our state."[91] In other words, it was a compromise.

The reason for compromise was clear as day. Oil and gas were on the rise, and Louisiana certainly was not going to be left behind. It was bringing in millions of dollars of revenue for the state. The delegates stopped short of creating a provision for citizen suits because there were a number of provisions in Louisiana law that had already provided for them.[92] The purpose of the provision was to create an express right of the people to a clean environment, declare that this environment should be protected and conserved insofar as possible, and mandate the legislature to act in furtherance of this vision.[93] The enforcement of that policy would be left to the currently-existing and future laws of the state. The drafters of Article IX "looked at other recent state constitutions that were either

88. *See* LA. CONST. art. VI, § 1 (1921) (emphasis added).

89. *Louisiana Constitutional Convention Records Commission, Records of the Louisiana Constitutional Convention of 1973: Convention Transcripts*, vol. IX, 2912.

90. *Id.* at 2911.

91. *Id.* at 2912.

92. *Id.*

93. *Id.*

adopted or attempted, and that in that particular area."[94] Which "particular area" Mr. Lambert was referring to in his statement is uncertain, but it is clear that Louisiana's constitution, and therefore its laws, drew inspiration and influence from other states. Alongside passing Section 1 of Article IX of the 1974 Louisiana constitution, the delegates passed Section 3, which prohibited the alienation of a navigable water body, except for purposes of reclamation by a riparian owner for the purpose of recovering land lost as a result of erosion.[95] This provision aligns more with the Supreme Court's opinion in *Illinois Central*; it is the most basic version of the public trust doctrine—that states cannot relinquish their ownership of submerged lands under a navigable water body.[96] These provisions together lay the foundation for Louisiana's public trust doctrine.

The delegates placed the responsibility of implementation on the legislature, mandating that it "shall implement this policy by appropriate legislation." Pursuant to Article IX, the legislature passed several laws to implement Article IX, one of which was the State and Local Resources Management Act, which had the aim of "protect[ing], develop[ing], and, where feasible, restor[ing] or enhance[ing] the resources of the state's coastal zone,"[97] a reflection of the language seen in the 1974 Louisiana constitution. In 1980, it passed the Louisiana Environmental Quality Act (LEQA) with the specific declaration that "the maintenance of a healthful and safe environment for the people of Louisiana is a matter of critical concern," and that clean air and water resources should be maintained and their scenic beauty preserved.[98] In 1989, it passed Act No. 437, which was enacted to close production pits in wetlands and "implement the provisions of Section 1 of Article IX of the Louisiana constitution."[99] In 2012, it created the Coastal Protection and Restoration Authority and empowered the agency to administer programs, projects, and activities "relating to and affecting coastal protection, including conservation, restoration, creation, and enhancement of coastal wetlands."[100] As statutes are enacted, agencies are often created, and with that, the public trust duties may be delegated. Article IX, Section 1 requires the Louisiana Legislature to implement by legislation, but it is silent on who is authorized to enforce it. Unlike the Illinois constitution, there is no

94. *Id.* at 2911.
95. LA. CONST. art. IX, § 6.
96. *See* Ill. Cent. R. Co. v. Illinois, 146 U.S. 387, 453 (1892).
97. LA. REV. STAT. 49:214.22.
98. LA. REV. STAT. 30:2002(1).
99. LA. REV. STAT. 30:254A(1).
100. LA. REV. STAT. 49:214.6.1.

language urging private and public citizens to ensure the doctrine's implementation. So, it fell to the executive branch. The Louisiana Department of Environmental Quality (LDEQ) is the agency primarily responsible for implementing and enforcing the policies of LEQA. Shortly after the adoption of the 1974 constitution and the passage of LEQA, the Louisiana Supreme Court found itself with the daunting task of interpreting a constitutional provision that was not yet ten years old.

B. Filling in the Details: The Public Trust Doctrine in Louisiana Jurisprudence

1. *Save Ourselves, Inc. v. Environmental Control Commission*

In the late 1900s, IT Corporation proposed the construction of an $84 million hazardous waste disposal plant in Burnside, Louisiana. The Environmental Control Commission (ECC), the predecessor to the LDEQ, granted a permit despite strong opposition from residents.[101] The ECC was created by the Louisiana Environmental Affairs Act and given the responsibility of regulating environmental affairs.[102] Located in Ascension Parish, Burnside has had—and will have—its fair share of chemical processing plants. The town is located in what is infamously called Cancer Alley, a stretch of land between New Orleans, Louisiana, and Baton Rouge, Louisiana, known for 150+ oil refineries, plastic plants, and chemical facilities.[103] More than 10,000 residents opposed the facility and sent at least 287 letters to then-Governor Dave Treen about it. They were concerned about the lack of oversight of the facility and how little input they had in the construction of a waste management plant in their own backyards. They had good reason to be; the then-assistant secretary of the state office of environmental affairs remarked earlier that the plant would be permitted if it was technically feasible to do so.[104] This was done much to the chagrin of the citizens in Burnside, and a community group, Save Ourselves, Inc., enlisted the help of some attorneys and filed suit

101. David N. Young, *Residents Come Out Fighting IT Waste Site*, COMMUNITY MIRROR, Aug. 5, 1980.

102. Charles S. McCowan Jr., *The Evolution of Environmental Law in Louisiana*, 52 LA. L. REV. 907, 913 (1992).

103. *Environmental Racism in Louisiana's 'Cancer Alley,' Must End, Say UN Human Rights Experts*, UN NEWS (Mar. 2, 2021) https://news.un.org/en/story/2021/03/1086172; Tristan Baurick et al., *Welcome to "Cancer Alley," Where Toxic Air is About to Get Worse*, PROPUBLICA (Oct. 30, 2019), https://www.propublica.org/article/welcome-to-cancer-alley-where-toxic-air-is-about-to-get-worse.

104. David N. Young, *Residents Come Out Fighting IT Waste Site*, COMMUNITY MIRROR, Aug. 5, 1980.

against the ECC. *Save Ourselves, Inc. vs. Louisiana Environmental Control Commission* is heralded as the seminal case about Louisiana's public trust doctrine, but the fact is that none of the parties even mentioned the doctrine in their pleadings; the court brought it up *sua sponte*. However, that does not suggest that the court pulled the public trust doctrine out of nowhere. Quite the opposite. In writing his opinion, Justice Dennis—and his law clerk— performed extensive research into the public trust doctrine, though he was not very familiar with it at the time. Something about the case just did not "sit right" with the court and the justices felt that they needed to investigate the issues and controversy surrounding the case. In his research, he looked at several cases that laid the foundation for the public trust doctrine—among them the *Illinois Central* case—and at the 1974 Louisiana constitution. and from it all, he determined that Louisiana has what he calls a "little NEPA"[105]—a requirement by the Louisiana constitution that state agencies fulfill duties of heightened care and consider probable risks of environmental harm prior to permitting an activity. Unlike NEPA, however, the balancing required by *Save Ourselves* does not demand environmental impact statements, comment periods, and extensive environmental studies. Instead, the court was concerned about several question they had regarding the permitting process:

> (1) had environmental harm been "avoided or minimized the maximum extent possible,"
>
> (2) was there a cost-benefit analysis performed to "demonstrate that the issuance of the permit would be compatible with the constitutional and statutory standard of environmental protection,"
>
> (3) was there an assessment of whether the environmental costs outweighed the social and economic benefits, and
>
> (4) were mitigation measures addressed.[106]

It was later that these factors were codified in L.R.S. 30:2018.[107]

---

105. 42 USC §§ 4321 et seq. (National Environmental Policy Act) (requires federal agencies to perform environmental assessments and prepare environmental impact statements prior to agency action).

106. Save Ourselves, Inc. v. La. Env't. Control Comm'n, 452 So.2d 1152, 1154 (La. 1984).

107. "The environmental assessment statement provided for in this Section shall be used to satisfy the public trustee requirements of Article IX, Section 1 of the Constitution of Louisiana shall address the following issues regarding the proposed permit activity: (1) the potential and real adverse environmental effects of the proposed permit activities; (2) A cost-benefit analysis of the environmental impact costs of the proposed activity balanced against the social and economic benefits of the activity which demonstrates the that the latter outweighs the former; (3) The

Justice Dennis cited Article IX, Section 1's call for "protection, conservation, and replenishment" of the state's natural resources, referring to it as a continuation of the public trust doctrine.[108] But while the court breathed new life into Louisiana's public trust doctrine, it also limited it. In the very same section in which it held that the state constitution requires a certain amount of environmental protection, it also took care to clarify that it was a "rule of reasonableness"—a "balancing process."[109] The constitutional intent, the court concluded, was not a command to prioritize environmental protection over other considerations, but rather to implement this rule of reasonableness and ensure that the state gives adequate consideration to the environment in the decision-making process.[110] The case would later be referred to as the "I.T. Decision" and courts that cited the opinion would reference the "I.T. analysis," a series of factors an agency's decision must address when granting a permit.[111] It is not clear whether the Louisiana Supreme Court itself intended to set forth the I.T. analysis attributed to *Save Ourselves* or it merely pointed out the deficiencies in the record of ECC's assessment of I.T.'s permit.[112] Regardless, it was the Louisiana Court of Appeal for the 1st Circuit in *Blackett v. Louisiana Dept. of Environmental Quality* that interpreted *Save Ourselves* to have created a test:

> (1) have adverse environmental effects been avoided to the maximum extent possible;
>
> (2) do social and economic impacts outweigh environmental cost;
>
> (3) have alternative projects been properly considered;
>
> (4) have alternative sites been properly considered;

alternatives to the proposed activity which would offer more protection to the environment without unduly curtailing non-environmental benefits." LA. REV. STAT. 30:2018(B)(1)-(3) (2021).

108. *Save Ourselves, Inc.*, 452 So.2d at 1160–61.

109. *Id*. at 1157.

110. *Id*.

111. Mostly by the Louisiana Court of Appeal for the First Circuit. See Blackett v. La. Dept. of Env't. Quality, 506 So.2d 749, 755 (La. Ct. App. 1987); Matter of Rubicon, Inc., 95-0108 (La.App. 1 Cir. 2/14/96), 670 So. 2d 475, 482; Matter of Browning-Ferris Industries Petit Bois Landfilling, 93-2050 (La.App. 1 Cir. 6/23/95), 657 So. 2d 633, 637; Matter of American Waste and Pollution Control Co., 633 So.2d 188, 193 (La. Ct. App. 1993).

112. Based on Judge Dennis' description of events, it is likely that he did not. The Honorable James L. Dennis, Senior Judge of the United States Court of Appeals for the Fifth Circuit, Panel at Tulane Law School: Save Ourselves Then and Now: Revisiting Louisiana's Public Trust Doctrine (Nov. 12, 2021).

(5) have mitigating measures been properly considered?[113]

Most of the cases involving the balancing requirement from *Save Ourselves* are brought in the Louisiana Court of Appeal for the First Circuit, since that is the jurisdiction for LDEQ and the other governmental agencies responsible for implementing public trust policies. Sometimes, however, the doctrine manages to find its way into other circuits, such as in the cases of Avenal v. State and St. Martin Parish Government v. Champagne.

2. *Avenal v. State*

In *Avenal v. State*, plaintiff, owners of oyster leases near the site of the Caernarvon Diversion Project, brought an action against the State of Louisiana, alleging that the opening of the diversion released freshwater from the Mississippi River and reduced salinity to a level that resulted in "permanent and substantial interference with plaintiffs' use and enjoyment of their land" amounting to a taking without compensation under Louisiana constitution Article 1, Section 4.[114] The Caernarvon Freshwater Diversion, which began operating in 1991, is a structure located in Plaquemines Parish between the Mississippi River and the Breton Sound estuary.[115] It was designed with the objective of controlling salinity and enhance marsh vegetation growth via the reintroduction of up to 8,000 cubic feet per second (cfs) of freshwater from the river in to the estuary.[116] Central to the issue in *Avenal* was the existence of oyster leases in the basin, and many of those leases contained clauses holding the state harmless from damages resulting from the diversion project.[117] Because of the levees constructed to hold back the Mississippi River, there was a

113. Blackett v. La. Dep't of Env't Quality, 506 So. 2d 749, 754 (La. Ct. App. 1987).

114. Avenal v. State, 2003–3521 (La. 10/19/04); 886 So.2d 1085, 1092; LA. CONST. art. I, § 4(B)(1) (stating "[p]roperty shall not be taken or damaged by the state or it is political subdivisions except for public purposes and without just compensation paid to the owner of into the court for his benefit.").

115. LOUISIANA DEPARTMENT OF NATURAL RESOURCES, CAERNARVON FRESHWATER DIVERSION PROJECT ANNUAL REPORT 2002, 1 (2003).

116. *Id.*

117. *Avenal*, 886 So.2d at 1096–97. The hold harmless clause stated: "This lessee hereby agrees to hold and save the State of Louisiana, its agents or employees, free and harmless from any claims for loss or damages to rights arising under this lease, from diversions of fresh water or sediment, depositing of dredged or other materials or any other actions, taken for the purpose of management, preservation, enhancement, creation or restoration of coastal wetlands, water bottoms or related renewable resources; said damages to include, but not to be limited to, oyster mortality, oyster disease, damage to oyster beds or decreased oyster production, due to siltation, pollution or other causes."

reduction in the freshwater that made it into the Breton Sound Basin and an increase in salinity.[118] This resulted in freshwater wetland areas turning brackish, which created an ideal environment for oysters and led to new oyster farms closer inland.[119] Oysters are picky on their environment and prefer salinity levels between five and fifteen parts per thousand (ppt), which meant that, for the purposes of controlling salinity to prevent vegetation deterioration, there's a specific amount of freshwater that can be diverted while still maintaining a balance between oyster health and marsh health.[120] However, there would still be zones where "conditions will become too fresh for oyster cultivation as a result of the diversion" and the oyster leases in that zone would be inversely impacted. Holders of oyster leases in that zone were given the option to move their leases outside the impact zone.[121]

After the first few years of its operation, the Caernarvon Interagency Advisory Committee (CIAC) determined that the project had not achieved all of its intended benefits, and voted to significantly increase the flow, which improved oyster production in seed grounds, but damaged oyster leases closer to the diversion.[122] The oyster farmers brought a lawsuit, heavily basing their argument on the court's decision in *Jurisch v. Jenkins*, which held that the "unilateral insertion" of hold harmless clauses in 1989 oyster leases were legally invalid.[123] The court in *Avenal* upheld that the oyster leases in this case were valid for a variety of reasons, but the one most pertinent to our discussion is the rationale that it furthered a public trust doctrine goal. According to the court, the difference lay in the purpose of the clause. The hold harmless clauses in *Jurisch* were "to protect oil and gas companies from claims by oyster lessees" and were "clearly not mandated by the public trust doctrine" as argued by the Louisiana Department of Wildlife and Fisheries.[124] In *Avenal*, however, "the implementation of the Caernarvon coastal diversion project fits precisely with the public trust doctrine."[125] The impact of *Avenal* on the public trust doctrine is that it showed that the state

118. *The Breton Sound Basin*, CWPPRA (Aug. 8, 2022) https://www.lacoast.gov/new/about/Basin_data/bs/Default.aspx.

119. *Avenal*, 886 So.2d at 1089.

120. *Id.* at 1090–91.

121. *Id.*

122. *Id.* at 1091.

123. *Id.* at 1099.

124. *Id.* at 1101.

125. *Id.*

can utilize the doctrine as a defense for its actions, so long as it is pursuant to a public trust goal.

3. *St. Martin Parish Government v. Champagne*

Tucked in St. Martin Parish and nestled in the cypress trees is Lake Martin, a waterbody that serves as a home for the Cypress Island Nature Preserve and a destination for recreationalists, biologists, fishers, and general appreciators of nature. From New Orleans, you drive north up the I-10, making an optional stop in Baton Rouge, a not-so-optional stop at one of many boucheries along the way, and exiting towards St. Martin Parish—a little bit before Lafayette. Following Google Maps will take you straight to Lake Martin's only boat launch, whose unimpressiveness juxtaposes with the picturesque scenery of the lake to which it leads. Like complementary colors, the lake's calm waters serve to highlight the jagged lines of its bald cypresses, creating a natural beauty that might almost make you forget that you are standing in 90-degree weather.[126]

Unlike its waters, Lake Martin's history and the issues surround it are anything but calm. Lake Martin, as it is now, was established in 1950 by Legislative Act 337 which created the St. Martin-Lafayette Game and Fish Commission, whose job it was to establish the St. Martin-Lafayette Game and Fish Preserve from Lakes Martin, Lake Charlo, and Lake LaPointe. To do so, a levee was erected around the low-lying area around the lakes, and the area within the levees was flooded. The state then purchased property around the lake, and where it could not purchase land, it obtained servitudes over all private lands to allow public access to the lake.[127] Eventually, authority over the preserve was transferred to the Louisiana Department of Wildlife and Fisheries (LDWF), who "shall exercise and perform their powers, duties, functions, and responsibilities as provided . . ."[128] While the lake was inarguably meant for public access and falls under the jurisdiction of the LDWF, questions arose as to who manages the land around it, as the lake is surrounded by privately-owned land.[129] It all came to a head when Mr. Bryan Champagne applied for and was granted a permit for the construction of a commercial building on 1076 Rookery Road, the road that is part of the levee that encircles the

126. Almost, but not quite—speaking from personal experience.

127. Megan Wyatt, *Who Owns Lake Martin? That Has Yet to be Determined; Here's How the Public Can Access It*, THE ACADIANA ADVOCATE (May 17, 2019), https://www.theadvocate.com/acadiana/news/article_c93d6844-7744-11e9-a47b-c7e25f5f357b.html.

128. LA. REV. STAT. 36:610 (B)(8), (C).

129. Wyatt, *supra* note 127.

lake. A few years later, the St. Martin Parish Government discovered that the permits had been granted in error in violation of the zoning ordinance and requested that Mr. Champagne cease operation of his business. When Mr. Champagne refused, the parish filed suit to enjoin him from violating the parish ordinance. It argued that the permits were invalid because Mr. Champagne's business was constructed on the side of Rookery Road that was owned by the LDWF, and therefore the parish had no authority to grant the permit. In response, Mr. Champagne claimed that he had a vested right in the property because he relied on the parish government's granting of the permits. The case made it to the Louisiana Third Circuit Court of Appeal, where the judges, in a 3-2 decision, held that Mr. Champagne "relied in good faith, to [his] detriment, on the permits issued . . . [and therefore has] acquired a vested right."[130] In that decision, Judges Conery and Kyzar dissented, with Judge Conery authoring the reasons. In his dissent, he noted that the lake fell under the LDWF, which was noticeably absent from the litigation, and that any properly authorized permits for commercial operation on the lake needed action from LDWF, not St. Martin Parish Government.[131]

Furthermore, he called for the LDWF, the Louisiana Department of Natural Resources (LDNR), the Nature Conservancy (who owned part of the land around the lake), and the U.S. Army Corps of Engineers to join, as they may have been indispensable parties to the litigation.[132] More significantly, however, the judge raised the public trust doctrine's role in the matter, an issue that was not mentioned in the majority opinion. According to Judge Conery, the St. Martin Parish Government had a public trust responsibility under Article IX, Section 1 of the 1974 constitution to enforce its zoning ordinances and protect the lake from commercial activities that would cause environmental harm.[133] He referenced Parish President Chester Cedar's testimony in which Mr. Cedars took an expansive view of Article IX, Section 1 and concluded that Article IX says that "parish officials, local government, government, period, [sic] local and state needs to adopt all steps to protect the environment and to protected the characteristic of facilities and habitats like Lake Martin which is a natural preserve."[134] While Judge Conery

130. St. Martin Parish Gov't v. Champagne, 2019-499 (La. App. 3 Cir. 8/19/20), 304 So. 3d 931, 947.

131. *Id.* at 965.

132. *Id.*

133. *Id.* at 961.

134. *Id.*

does not explicitly agree with Mr. Cedar's interpretation of the public trust doctrine, he states that, as a body of water under the jurisdiction of the LDWF, the lake is "constitutionally protected" by the doctrine and an "administrative error" does not remove that protection.[135] After losing at the Third Circuit Court of Appeal, St. Martin Parish Government submitted a writ application to the Louisiana Supreme Court, requesting review of the lower court's ruling. The writ incorporated Judge Conery's public trust doctrine argument and urged the court to interpret the public trust doctrine a way that would protect public wildlife areas from "vested right" determinations.[136] The case had the potential to give Louisiana courts another much-needed opportunity to address the underutilized doctrine. But alas, 'twas not meant to be. Unfortunately, the Louisiana Supreme Court denied cert, and the case ended there.[137]

This case is significant for multiple reasons. First, it is one of the situations in which the public trust doctrine could be asserted by a government entity to protect the natural environment against an action by a private citizen. Second, it is another occurrence in which a court brought up the doctrine *sua sponte*, without briefing by either party. The fact that the parish failed to plead the doctrine in its original petition is also an example of the doctrine's underutilization. The doctrine is a confusing one, a principle shrouded in ambiguity made all the more so by the endless interpretations of it, the lack of a clear definition, and the fear that too broad of an application might improperly impact private rights. It is because of this ambiguity that plaintiffs often find themselves facing difficulties when bringing a public trust doctrine claim into court, including standing and a failure to state a claim.

V. THE ROLE OF THE JUDICIARY

A. Interpretations of the Law

One obstacle that litigants face when bringing public trust doctrine cases is standing. The standing doctrine has long been an enemy of environmental citizen suits. In federal courts, plaintiffs must establish standing by showing, first, that they have suffered an "injury in fact" that

135. *Id.* at 964.

136. Application for Writ of Certiorari and Review to the Third Circuit Court of Appeal at 4, St. Martin Parish Gov't v. Champagne, 2019-499 (La. App. 3 Cir. 8/19/20), 304 So. 3d 931 (No. 19-499).

137. St. Martin Parish Gov't v. Champagne, 2019-499 (La. App. 3 Cir. 8/19/20), 304 So. 3d 931.

is: (1) concrete and particularized and (2) actual or imminent.[138] Second, there must be a causal connection and the plaintiff must show that the injury is "fairly traceable" to the defendant's actions. Lastly, plaintiff must show that the injury is likely to be "redressed by a favorable decision."[139] While non-economic harm can be considered an injury, the party suing must still be personally injured by the action. In *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, the U.S. Supreme Court clarified that the necessary injury is not just injury to the environment, but injury to the plaintiff, even if only for the "aesthetic and recreational values of the area."[140] This poses a barrier to practice because injuries are not always particularized to the plaintiff, and if the purpose of enforcing the doctrine is to prevent future degradation of the resources, they might also not be imminent.

States like Illinois and Pennsylvania have taken steps to lessen the hurdles plaintiffs encounter in bringing a public trust doctrine suit. The way the public trust doctrine is raised in courts is largely dependent on how the respective states express and/or acknowledge their public trust duties. Where there are constitutional provisions, the road is a little easier, and plaintiffs often claim violation of those enumerated responsibilities as a cause of action. For example, as previously discussed, the Illinois constitution's Article XI, Section 2 grants citizens a right to a healthful environment. The Supreme Court of Illinois later interpreted that provision to grant standing for plaintiffs raising public trust claims.[141] Compare this to the Pennsylvania constitution Article 1, Section 27, which also grants people a right to "clean air, pure water, and to the preservation of the scenic, historic and esthetic values of the environment."[142] Like the Illinois constitution, it mentions protection of the environment for future generations; but unlike the Illinois constitution, it is silent on implementation.[143] As a result, plaintiffs bringing public trust claims in Pennsylvania must survive the traditional Article III standing analysis, as was the case in *Funk v. Wolf*.

The respondents claimed that the plaintiffs asserted only generalized injuries and harms were speculative—the "injury" component of standing. Under Pennsylvania law, a party has standing if he or she can

138. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).
139. *Id.* at 560–61.
140. Friends of the Earth, Inc. v. Laidlaw Env't Servs. Inc., 528 U.S. 167, 181, 183 (2000).
141. Glisson v. City of Marion, 188 Ill. 2d 211, 228 (Ill. 1999).
142. PA. CONST. art. I, § 27.
143. *See* ILL. CONST. art. XI, § 1, 2.

"establish that he has a substantial, direct[,] and immediate interest in the outcome of the litigation. In addressing issues of standing, Pennsylvania courts must assume that the action is contrary to some rule of law and utilize Article III standing as a guide—"concrete and particularized," and "actual or imminent[.]" Here, the court noted that the fact that an injury is widespread does not preclude it from the judicial process—thus satisfying the "concrete" and "particularized" component. The Pennsylvania Supreme Court also held that "the right to enjoy public natural resources and to not be harmed by the effects of environmental degradation now and in the future" are protected interests of the Pennsylvania Environmental Rights Amendment. Regarding the "actual or immediate" component, the Court held that, despite the fact that impacts of climate change were likely "future harms," an immediate interest is shown because the "zone of interest" sought to be protected by the ERA includes future generations of the people of the Commonwealth of Pennsylvania. Therefore, the court needed to first determine whether the plaintiffs had standing. Despite the self-executing nature of Pennsylvania's ERA, it does not automatically grant standing.

Even if the plaintiffs do manage to overcome the obstacle of standing and scope, and have their cases heard on the merits, courts are often reluctant to extend the public trust doctrine beyond its traditional application to navigable waterbodies and their beds. This is due to the concern that they might be overstepping their authority under the political question doctrine, which refers to the idea that the courts, as an apolitical form of government, should avoid ruling on issues that fall within the purview of the legislature. Most notably explored in *Baker vs. Carr*, the political question doctrine often acts as form of self-restraint by courts to prevent overreach of authority. In Baker, the Supreme Court identified six factors often present in issues that present nonjusticiable questions: (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; (2) a lack of judicially discoverable and manageable standards for resolving the question; (3) the impossibility of a court to decide the case without expressing a lack of respect to the coordinate branches of government; (4) an unusual need for unquestioning adherence to a political decision already made; and (5) the potentiality of embarrassment from issuing different and varying legal declarations on the same issue.[144]

144. Baker v. Carr, 369 U.S. 186, 217 (1962).

Therefore, many judges take care not to broaden the public trust doctrine's applicability beyond what has been traditionally established. This caution is most apparent in increasingly frequent climate change cases. For example, in *Chernaik v. Brown*, the plaintiffs argued that the state, as a trustee under the public trust doctrine, was required to protect Oregon's natural resources from substantial impairment due to greenhouse gas emissions and climate change, and requested that the court declare that the state had a fiduciary duty that it breached when it failed to prevent those impairments.[145] The plaintiffs, minor residents of Oregon and their guardians, filed against the governor of Oregon and the State of Oregon, seeking injunctive relief in the form of a declaration from the court that the state has a fiduciary duty as a public trustee to take action to curb the effects of climate change and preserve Oregon's natural resources for future generations.[146] It also sought a declaration from the Oregon Supreme Court that the scope of the public trust doctrine extended beyond the traditional jurisdiction of navigable waterways and the lands underlying them.[147] Central to their argument was a statement made by the state in a separate case, *State of Oregon v. Monsanto Company*, in which the state claimed itself to be the trustee of "all natural resources—including land, water, wildlife, and habitat areas—within its borders."[148]

The state responded that while it agrees with plaintiffs about the effects of uncontrolled climate change, such regulation must stem from the legislative and executive branches, not the judiciary, and that changes like these should be results of ballot boxes, not lawsuits.[149] It argued that the public trust doctrine does not give authority to the courts to "prescribe environmental policy to the legislature and executive branches."[150] In essence, the State of Oregon claimed that the court lacked jurisdiction and invoked the political question doctrine, arguing that courts should respect the separation of powers among the branches of government and refrain from passing judgments that would dictate how the legislative and executive branches fulfill their duties.

The Oregon Supreme Court agreed with the state and declined to extend the application of the public trust doctrine. Despite admitting that

145. Chernaik v. Brown, 367 Or. 143, 147 (Or. 2020).

146. Brief for Petitioner, Chernaik v. Brown, 367 Or. 143, 147 (Or. 2020) (No. S066564), 2019 WL 3782018 at *1, *43–44.

147. *Id.* at *24–25.

148. *Chernaik*, 367 Or. at 163.

149. Brief on the Merits of Respondents on Review, Chernaik v. Brown, 367 Or. 143, 147 (Or. 2020) (No. S066564), 2019 WL 5295267 *1, *1–2.

150. *Id.* at *2.

it was "within the purview of this court to examine the appropriate scope of the doctrine and to expand or to mold it to meet society's needs,"[151] and acknowledging that Oregon courts have done so in the past, the court expressed major concerns that the tests posited by the plaintiffs were too broad to be practical.[152] Still though, as a glimmer of hope—or perhaps stopper to prevent the door from closing on such notion—the court did not "foreclose the idea that the public trust doctrine may evolve to include more resources in the future."[153] What kind of resources? How far into the future? Well, the court kicked that can down the road. A year later, in Iowa, the state Supreme Court, citing *Chernaik*, came to a similar conclusion. The Iowa court, however, decided not to leave the question open-ended and definitively stated that courts do not have the authority to hold the State accountable to the public, and doing so would be to go beyond the accepted roles of the court.[154]

As one would expect in novel cases such as these, there were dissents. In *Chernaik*, Justice Walters argued that the judicial branch possessed "an important constitutional role to play" in declaring what the law is regarding the applicability of the public trust doctrine, and that the responsibility for addressing climate change is not one that belongs solely to the legislative and executive branches.[155] According to her, the court is within its authority to declare that the government has an affirmative fiduciary duty to protect trust resources against climate change, and such a declaration would not violate the principle of separation of powers because it does not compel the state to act, but rather simply establishes that there is a responsibility to fulfill by way of interpretation of the public trust doctrine.[156] In *Iowa Citizens for Community Improvement v. State*, Justices Appel, McDonald, and Oxley authored separate dissents, but all suggested that the courts play a larger role in defining and enforcing the public trust doctrine. Justice Walters is not alone in her view that courts need to play a more active role in ensuring natural resource protection in the face of climate change. Some scholars believe that, in this era of

151. *Chernaik*, 367 Or. at 158.

152. *Id*. at 165–66. The plaintiffs argued that there are two "unifying features" of resources belonging to the public trust—"(1) they are not easily held or improved, and (2) they are of great value to the public for uses such as commerce, navigation, hunting, and fisheries"—and suggested a test for adding resources to the public trust, which required the court to ask "(1) is the resource is not easily held or improved, and (2) is the resource of great value to the public for uses such as commerce, navigation, hunting, and fishing?"

153. *Id*.

154. Iowa Citizens for Cmty. Improvement v. State, 962 N.W. 2d 780, 799 (Iowa 2021).

155. *Chernaik*, 367 Or. at 177–78 (Walters, J., dissenting).

156. *Id*. at 181.

climate change, the judicial branch should reassess barriers to environmental litigation, such as jurisdiction and the political question doctrine, and help to enforce public trust duties when their fellow branches will not.[157] In these cases, the parties were dependent on the courts to interpret their respective state's constitutional provisions. Pennsylvania's Environmental Rights Amendment wasn't self-implementing until the courts interpreted it to be. Illinois' constitutional provision didn't grant standing until the court determined so. Louisiana's Article IX, Section 1 did not create a rule of reasonableness until the Louisiana Supreme Court held that it does. While constitutional provisions provide an explicit acknowledgement of the public trust doctrine, it falls to states to form the contours of it. As a result, their hesitancy to involve themselves in the development of the doctrine is incongruent with their responsibility of as judiciaries to interpret laws. In states that contain explicit public trust provisions, the law is already created. To abstain for making substantive decisions on it and deferring the role to the other branches would be to shirk their roles.

In Louisiana, where the court's authority is subject to the constitutional provisions and statutes, the political question doctrine plays a smaller role. Louisiana's civil law prioritizes the constitution, codes, and legislation—which, in theory, leaves the judiciary with less power than its common law counterparts. In practice, however, this is not the case, particularly in the realm of public trust. The 1974 Constitution provided the broad strokes of the public trust doctrine, but it is up to Louisiana courts to fill in the details. By its interpretation of Article IX, § 1, the Louisiana Supreme Court essentially defined what the public trust doctrine is in Louisiana. Lack of clarity about our public trust doctrine has placed the judiciary in a position crucial to the development of the doctrine, and issues around expanding the scope of the doctrine have not brought about major concerns about the judiciary's role. Arguably, because of the vague language of Article IX, Section 1, the judiciary would be within its power to clarify the doctrine.

B. Decisions Based on Incomplete History

Another main question around the public trust doctrine and its application is the scope of the corpus of the trust. This question is coming up more frequently with cases like *Juliana*, which seek to include air in the corpus of the public trust. Courts often look to historical perspectives

157. Alfred T. Goodwin, *A Wake-Up Call for Judges*, 2015 WIS. L. REV. 785, 788 (2015).

and custom to answer address this issue, and in doing so, two of the main sources of guidance remain to be Roman civil law and the Magna Carta. However, as previously discussed in this article, the concept of the public trust doctrine appears in other pertinent legal regimes, and if the process of interpreting the scope of the public trust doctrine involves looking to historical western legal tradition, it would be a significant oversight to not consider two major historical texts that helped build the foundation of western legal tradition, the *Liber Augustalis* and *Las Siete Partidas*. The *Liber Augustalis* reference to air as resource provided by "divine judgment" that needed preservation "insofar as [they] can" presents a public trust doctrine-like duty it. The law also bears a striking resemblance to Article IX, Section 1 of the 1974 Louisiana constitution, further strengthening the case of this provision being an expression of the public trust doctrine in ancient law. The Children's Trust cases seek to extend the public trust doctrine beyond the navigable waterbodies and their beds, claiming that the corpus of the trust includes other natural resources, such as the air. Judges, however, are hesitant to affirm this interpretation of the public trust and employ its historical use to limit applications of the doctrine to waterbodies. This provision in the *Liber Augustalis* indicates that at least one application of the public trust doctrine included protection of air. As it is one of the first written constitutions of government in Western legal tradition, it indubitably has influenced legal texts that follow it, whether directly or indirectly. Therefore, when looking to historical usage to interpret the scope of the public trust doctrine, one must acknowledge that there is historical precedent for the application of the public trust doctrine to the air.

VI. RULE OF REASONABLENESS: ARE WE APPLYING ARTICLE IX CORRECTLY?

The word "reasonable" is often used in the law: reasonable doubt; could have reasonably known; the reasonable man; reasonable notice; reasonable care; on and on. But what is "reasonable"? Black's law dictionary defines "reasonable" as "agreeable to reason; just; proper. Ordinary or usual."[158] So, what is reason? The Merriam Webster Dictionary defines it as "a sufficient ground of explanation or of logical defense."[159] When we cut through the semantics, it all comes to down to

158. THE LAW DICTIONARY, www.thelawdictionary.org/reasonable/ (last visited Apr. 20, 2023).

159. *Reason, Definition and Meaning*, MERRIAM WEBSTER, https://www.merriam-webster.com/dictionary/reason (last visited Apr. 20, 2023).

the understanding that "reasonableness" requires the proper use of facts and knowledge to arrive at a conclusion that does not require mental gymnastics to justify.

The issue inherent in a rule of reasonableness is that the strength of the doctrine can change as government administrations change; reasonableness is a subjective standard. Does the balancing test of *Save Ourselves* and its progeny create a substantive duty, or does it impose only a series of procedural steps that eventually give way to agency deference? If it is the latter, then there is a risk of inconsistent implementation of the doctrine by state agencies. If only a *consideration* of environmental factors is required of the state, then an agency has fulfilled its trust duties so long as it engages in the I.T. analysis. Under this approach, the proposed project is the base that is then adjusted to minimize impacts on the environment. Thus, the environment is not the focus of the analysis, but rather the project is. Such an application changes the protection mandate of the constitutional provision into a safeguard that is, while helpful for environmental protection, a weaker manifestation of the public trust doctrine. When Pennsylvania courts were applying their balancing test, cases often resulted in holdings favorable to the government.[160] The bar set for the state to meet its public trust duties required only that there was a reasonable effort to minimize environmental impact. Even for administrative agency review decisions, utilization of the *Payne* balancing test rarely led to a final determination that the challenged action posed environmental harm that outweighed its benefits.[161] However, if a *prioritization* of the environment is required, then the base is the maximum level of protection that is then adjusted to allow the state to perform its other duties, such as those relating to education, safety, and infrastructure building, without excessive obstacles. Therefore, perhaps it is time for a reexamining of what "insofar as possible" means in the implementation of public trust duties. It does not simply create a NEPA-like requirement, but rather allows room in environmental protection and conservation for accommodation of the other state responsibilities.

To illustrate this idea, let's take an empty mug. Next to it is a cup of milk and a cup of coffee. The empty mug symbolizes all the state's capacity to handle responsibilities, the milk is the public trust doctrine duties, and the coffee is other state duties. Since the inception of Article IX, Louisiana has been filling its cup up with coffee first and filling in the

160. John C. Dernbach & Marc Prokopchak, *Recognition of Environmental Rights for Pennsylvania Citizens: A Tribute to Chief Justice Castille*, 53 DUQ. L. REV. 336, 344 (2017).

161. *Id.*

leftover space with milk. In this case, there will be leftover milk, symbolizing the many other efforts that could be made for environmental protection and conservation. With this method, the public trust is an addition that is not used to its full potential, because no matter how much milk we started with, we can only pour in enough to reach the brim. We have "protected, conserved and replenished" the natural resources insofar as *practical*, but not "insofar as possible." In contrast, if we pour in the milk first and then add the coffee after, then we're starting with the maximum amount of milk possible and decreasing the volume as necessary for the addition of coffee—thus allowing for milk "insofar as possible." After all, like any drinking vessel, state governments are limited in capacity. Health, safety, education, environmental protection; to increase resources for one area would require shifting resources from another. The only way to prevent this is to acquire more resources—get a bigger cup.

VII. CONSTITUTIONAL AMENDMENT: IS IT POSSIBLE AND SHOULD IT BE DONE?

This brings us to the question: what will it take to strengthen the public trust doctrine? Sure, we can attempt to change the judicial interpretation of Article IX, Section 1 to be read more broadly as to require the state to take a more active role in fulfilling its public trust duties. However, considering Louisiana's status as a civil law jurisdiction, there is a better to way make policy changes such as these.

In contrast their common law counterparts, Louisiana courts do not follow the doctrine of *stare decisis*, but rather the doctrine of *jurisprudence constante*. *Stare decisis* is the principle that asserts that courts "must follow earlier judicial decisions when the same points arise again in litigation."[162] In contrast, *jurisprudence constante* provides that a court "should give great weight to a rule of law that is accepted and in a long line of cases, and should not overrule or modify its own decisions unless clear error is shown and injustice will arise from continuation of a particular rule of law."[163] That is, precedent is to be used as a guide, rather than a mandate of legal interpretation. How strong of a guide, however, is up to the court itself. Even so, judges are known to adhere to judicial precedent, despite their ability to freely ignore it.[164] There is value in

162. BLACK'S LAW DICTIONARY (11th ed. 2019).
163. *Id.*
164. *See* Goodwin, *supra* note 157 at 474.

adhering to custom and precedent.[165] It creates consistency and predictability for everyone. When a lawyer has a case that closely resembles the facts and legal issues in a previous case, he or she can be relatively confident that the judge should rule a specific way. It keeps the fabric of our legal system from unravelling. But what if the tapestry of our legal system is insufficient to address the current demands of society? The linen fibers that once kept you cool do little to protect against the chilling winds of change. And so, sometimes, the weather demands an outfit change—and the best way to do that is to go to the source itself: the state constitution. There are two goals that can be accomplished via constitutional amendment: (1) the establishment of a stronger public trust doctrine and (2) the declaration that the judiciary also possesses public trust duties.

Article IX, Section 1 ostensibly limits the application of the public trust doctrine by the inclusion of the phrase, "insofar as possible." It was based solely on this phrase that Judge Dennis interpreted the provision to have created a rule of reasonableness. An amendment to eliminate this phrase would open the way for broader usage of the doctrine and strengthen the environmental protection mandate. Another change that could do this is the addition of a sentence to extend the applicability of the doctrine to the judiciary. In its current form, the provision places the duty of implementing the doctrine on the legislature: "The legislature shall enact laws to implement this policy." The legislature has done so. With the passage of several environmental statutes that created and authorized new environmental agencies, the legislature has delegated its duty of implementing the public trust doctrine to these agencies—and therefore, the executive branch, which has the responsibility to execute these policies. The only branch that arguably is not bound by the doctrine is the judiciary. One would think that, in a civil law jurisdiction, where the court decisions are persuasive authorities, is not that large of a concern. But as previously mentioned, the body of law surrounding the public trust doctrine is largely comprised of court cases, which means courts are essentially developing and defining the characteristics and parameters of the public trust doctrine. Therefore, it makes sense to have the policy enumerated in Article IX, Section 1 apply to them, which can be done by amending the provision.

---

165. *See* Mary Garey Algero, *Considering Precedent in Louisiana: Balancing the Value of Predictable and Certain Interpretation with the Tradition of Flexibility and Adaptability*, 58 LOY. L. REV. 113, 121–129 (2013) (discussing why Louisiana courts rely on prior decisions and the benefits to doing so).

This concept is not unheard of. Article III, Section 25 of the 1974 Louisiana constitution covers victim's rights and provides victims of a crime with certain rights, such as reasonable notice and the right to appear at critical stages of pre-conviction and postconviction proceedings, as well as the right to seek restitution and the right to confer with the prosecution. The section states, "The evidentiary and procedural laws of this state shall be interpreted in a manner consistent with this Section." This a specific instruction to the courts that they should interpret certain laws in a way that follows the policy set forth by this section. Likewise, a similar addition can be made to Article IX, Section 1 to direct the courts to interpret certain laws in a manner consistent with the public trust doctrine. Another option is to follow the examples of Illinois and Pennsylvania to lessen the barriers to public trust claims and make them easier to enforce.

VIII. CONCLUSION

Louisiana stands on a precipice. The state is often described as being on the frontlines of climate change—a very accurate description. We are facing environmental crises from every direction: our coastline continues to recede while our communities are being battered by increasingly frequent and more powerful storms; the Gulf of Mexico dead zone continues to grow as excess nutrients make their way down the Mississippi River, harming aquatic life and the state's fishing economy; and Lake Pontchartrain continues to experience harmful algal blooms. We are on a path that leads to the degradation and loss of major natural resources. Wetlands, the coast, our rivers—all of these are part of trust of natural resources the state is responsible for protecting, conserving, and replenishing. To do so in the face of climate change, the state should pay closer attention to its public trust duties.

Climate change litigation is making its way across the country, and bit by bit, courts are becoming more familiar with the concept of the public trust doctrine. For Louisiana, the doctrine can be a weapon to be used against it or a tool that can help it further its adaptation and conservation goals. There is no doubt that the Louisiana constitution imposes a public trust duty on the Legislature, which is then delegated to the executive via the passage of statutes and the creation of agencies. If Louisiana chooses to neglect its public trust duties, there is a chance that it would be opening itself to litigation asserting failure to fulfill its trust obligations. Conversely, it could choose to utilize the doctrine as a tool to manage its natural resources to combat the effects of climate change. With

an increased risk federal environmental laws being curtailed, there is a real possibility that responsibilities for environmental protection will fall more and more on the states.[166]

Soon, there may not be a federal statute or agency to set a floor of protection; rather, it may be up to the states to set their own standards and establish what the minimum effort should be. Therefore, it is crucial that states, including Louisiana have a clear understanding of their public trust responsibilities and take action to strengthen them. Our topography is unlike any other, and our culture is unlike any other. To preserve both, there needs to be an acknowledgement of a responsibility to protect our natural resources and clarification as to where that burden lies.

166. *See* W. Virginia v. EPA, 142 S. Ct. 2587 (2022).