

# THE ROLE OF THE COURTS IN GUARDING AGAINST PRIVATIZATION OF IMPORTANT PUBLIC ENVIRONMENTAL RESOURCES

Melissa K. Scanlan\*

## ABSTRACT

*Drinking water, beaches, a livable climate, clean air, forests, fisheries, and parks are all commons, shared by many users with diffuse and overlapping interests. These public natural resources are susceptible to depletion, overuse, erosion, and extinction; and they are under increasing pressures to become privatized. The Public Trust Doctrine provides a legal basis to guard against privatizing important public resources or commons. As such, it is a critical doctrine to counter the ever-increasing enclosure and privatization of the commons as well as ensure government trustees protect current and future generations. This Article considers separation of powers and statutory interpretation in cases involving attempted privatizations of public natural resources. Judges use a wide variety of interpretive tools when ruling on the meaning of a statute or legality of an administrative agency's action. This Article explores the role of the judiciary in protecting the public interest in natural resources when a privatization appears to be underway. It analyzes cases from the United States, India, Uganda, Kenya, and the Philippines to demonstrate the multi-jurisdictional use of what should be recognized as a substantive canon of statutory interpretation for nature's trust, seeking a clear statement from the legislature finding no substantial impact on the public interest before allowing privatization. Such an approach furthers democracy by ensuring elected representatives have publicly considered and expressed their intent to authorize a privatization of nature's trust and that such action is in the public interest. This moves the locus of decision-making away from administrative agencies and back to the democratically elected law making body. And once squarely inside the political branch it requires clarity about the action undertaken and a finding consistent with the trustee's duties to the public. Lastly, it explores the political question doctrine as it relates to controversies about privatizing nature's trust and shows the power of framing the status quo.*

---

\* Melissa K. Scanlan is a Professor of Law and Director of the New Economy Law Center at Vermont Law School. The author thanks the IUCNAEL for inviting her to present this work at their conference in Oslo, Norway, in 2016. She thanks her able research assistant, Susan Scaggs, for her tireless attention to detail.

INTRODUCTION .....	238
I. SHARED COMMONS AND THE PUBLIC TRUST DOCTRINE'S SCOPE IN FIVE COUNTRIES .....	241
A. <i>Scope in the United States</i> .....	241
B. <i>Scope in the Philippines and India</i> .....	246
C. <i>Scope in Kenya and Uganda</i> .....	247
II. PRESUMPTIONS AND BACKGROUND PRINCIPLES IN STATUTORY INTERPRETATION .....	248
A. <i>Substantive Canons Involving Clear Statements</i> .....	249
B. <i>Substantive Canon for Nature's Trust</i> .....	251
III. ROLE OF THE COURTS IN REVIEWING ATTEMPTED PRIVATIZATIONS OF NATURE'S TRUST .....	255
A. <i>Separation of Powers and Judicial Review</i> .....	255
B. <i>Heightened Close Look at Agency Actions and Burden of Proof</i> .....	256
C. <i>Application of Nature's Trust Canon</i> .....	258
1. United States .....	259
i. Arizona .....	259
ii. Alaska .....	261
iii. North Carolina .....	263
iv. Michigan .....	264
v. Maine .....	264
2. India .....	265
3. Kenya .....	270
4. Uganda .....	272
IV. THE POLITICAL QUESTION DOCTRINE AND THE POWER OF FRAMING THE STATUS QUO .....	274
CONCLUSION .....	280

## INTRODUCTION

The public trust doctrine encompasses the concept that the sovereign holds shared or common resources in trust for the public's use and enjoyment. Like private trusts, the public trust has an identified trustee (the government), beneficiaries who do not own the resource but share it (every member of the public), and trust property (the commons).

The public trust doctrine guards against privatizing important public resources or commons. As such, it is a critical doctrine to counter the ever-increasing privatization through enclosure and pollution of the commons such as the climate, air, water, and forests. In his seminal 1970 article, Professor Joseph Sax argued that the courts should take a more exacting review of a government trustee's decisions when a case involves: (1) diffuse public

uses threatened by resource alienation below market value; (2) giving private interests the power to make public resource decisions; or (3) reallocating public uses to private uses.<sup>1</sup> These situations call for skepticism and less deferential judicial review of the government trustee's actions.

Professor Sax identified a judicial presumption that the trustee cannot privatize public resources without a clear statutory directive and analyzed cases in Massachusetts, Wisconsin, and California that showed this in operation.<sup>2</sup> Much of this analysis ties back to the lodestar 1892 case, *Illinois Central*, where the U.S. Supreme Court upheld the Illinois legislature's rescission of a grant to a private railroad corporation of the bed of Lake Michigan in the Chicago Harbor.<sup>3</sup> The Court described Illinois' title to the land under the harbor's water as one held in trust for the people and ruled that attempting to transfer the entire property to the railroad was inconsistent with the state's duty as a trustee.<sup>4</sup> Courts have interpreted *Illinois Central* over time—and in a wide variety of jurisdictions in the United States and elsewhere—as a restriction on the trustee to not substantially impair the public interest in the remaining trust resources when taking action to privatize.<sup>5</sup> Do the lessons of *Illinois Central* teach that the courts will make the legislative and executive branch trustees judicially accountable? And can the courts go beyond a prohibition against substantial impairment to place mandatory obligations on the trustees?

Building on this foundation, this Article argues that the legislative and executive branch trustees should be judicially accountable for managing trust resources. Judges use a wide variety of interpretive tools when ruling on the meaning of a statute or the legality of an administrative agency's action. Greater court scrutiny is necessary when there appears to be a privatization of public trust resources, especially when there is an irreplaceable resource (such as old growth rainforest), a tipping point (such as global climate change), or a less protected public interest (such as the rights of future generations) at stake.

This Article explores the judiciary's role in protecting the public interest in natural resources when a privatization appears to be underway. It

---

1. Joseph L. Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 561-63 (1970). This and many subsequent pieces by Prof. Sax heralded a renewed interest in developing the public trust doctrine by courts, legislatures, and academics, which first centered on the U.S. and then spread to other countries.

2. *See id.* at 491-545.

3. Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 463-64 (1892).

4. *Id.* at 452-53.

5. *See, e.g.*, CWC Fisheries, Inc. v. Bunker, 755 P.2d 1115, 1118 (Alaska 1988); Ariz. Ctr. for Law in Pub. Interest v. Hassell, 837 P.2d 158, 166-67 (Ariz. Ct. App. 1991); Glass v. Goeckel, 703 N.W.2d 58, 62 (Mich. 2005); M.C. Mehta v. Nath, 10 SCR 12, 13-14 (1996).

analyzes cases from countries on three continents to demonstrate that the multi-jurisdictional use of the *Illinois Central* “no substantial impairment” test should be recognized as a substantive canon of statutory interpretation. In short, this Article argues that courts should apply a judicial presumption that the state cannot privatize public trust resources without a clear statutory directive and a legislative finding that the action would not “substantially impair” the public interest. Review of agency action should face a heightened “close look” with the burden of proof on an applicant to show the public interest is protected.

Such a rule of interpretation furthers democracy by ensuring elected representatives have publicly considered and expressed their intent to authorize a privatization of trust resources before it occurs.<sup>6</sup> This moves the locus of decision-making from administrative agencies back to the democratically elected legislature.<sup>7</sup> And once squarely inside the political branch it requires legislative clarity about the action undertaken and a finding consistent with the duties the trustee has to the public.

Following this introduction, the Article proceeds in four parts. Part I opens by discussing shared public resources as “commons” and describes the scope of commons protected by the public trust doctrine in five countries. Part II explains the role of the judiciary in reviewing attempted privatizations and revisits the origins and meaning of the “no substantial impairment” test that courts apply in public trust cases. The Article places this test in the context of other interpretative canons and the role of judges interpreting statutes. Part III argues for recognition of the “no substantial impairment” test as a substantive canon of interpretation related to protected public trust resources. The Article shows how courts in the United States, India, Kenya, and Uganda require a clear statement from the legislature regarding privatizations of important public resources. Part IV explores the political question doctrine as it relates to controversies about privatizing common resources and analyzes cases from the United States and the Philippines to show how the understanding of the status quo impacts the potency of this justiciability issue. The Article concludes that the political question doctrine ceases to be a viable obstacle to adjudicating controversies about privatizing nature’s trust when the court understands its role in the trustee relationships and the status quo as protecting the commons from privatization.

---

6. See Sax, *supra* note 1, at 498-99.

7. See *id.*

## I. SHARED COMMONS AND THE PUBLIC TRUST DOCTRINE'S SCOPE IN FIVE COUNTRIES

We are surrounded by and interact with commons regularly in our lives but may not always recognize it. Some everyday examples include drinking water, and its corollary, sewage; forests; parks; rivers, lakes, and oceans; beaches; fish; air; and climate. These commons are shared. Their uses and users overlap and interconnect. The users are plentiful and have diffuse interests, which makes them difficult to organize. Decisions about their use can cause even greater harm to future generations, who are un- or under-represented in the decision-making process. Meanwhile, the resources are susceptible to depletion, overuse, erosion, or extinction. Some are irreplaceable, such as old growth rainforest. Some involve tipping points, such as the global climate.

In response to challenges posed by sharing the commons, people advocate for actions that tend to fall into three categories: educate, regulate, or privatize. One form of regulation of the commons that has existed for centuries in a variety of countries is use of the public trust doctrine to define the relationships between the trustee, beneficiaries, and the shared commons to be managed by the trustee.

Courts and legislatures have articulated the trust property boundaries over time to reflect resources of importance to the public. Modern public trust doctrine often quotes the Institutes of Justinian from ancient Roman law, which is associated with natural law, the concept of the commons, in the shared air, water, shores below the high tide, and fish.<sup>8</sup> "Under Roman law . . . the great waters and the lands below the highest tide were not only publicly owned, but they were considered in the class of things incapable of private ownership."<sup>9</sup> In England at the time of colonizing America, the monarch's public trust focused on tidal waters and their shores to be used by the commoners.<sup>10</sup>

### A. *Scope in the United States*

When the colonies broke from England and formed the United States, courts similarly described the protected public trust as tidal waters and their shores.<sup>11</sup> As the fledgling United States expanded westward, the Supreme Court expanded the trust's scope to protect the public interest in navigable

---

8. See Sax, at 475; Robert Haskell Abrams, *Walking the Beach to the Core of Sovereignty: The Historic Basis for the Public Trust Doctrine Applied in Glass v. Goeckel*, 40 U. MICH. J.L. REFORM 861, 870-77 (2007).

9. Abrams, *supra* note 8, at 880.

10. See *id.* at 883-84.

11. See *id.* at 884-86.

freshwaters and non-navigable tidal waters.<sup>12</sup> Although today the public trust doctrine varies by state, the scope of the protected trust in some states now includes beaches, groundwater, wetlands, non-navigable tributaries, parks, air, and all public natural resources.<sup>13</sup>

In the blockbuster of all privatizations to date, the global climate is threatened by excessive greenhouse gas emissions that may have already pushed this global commons past tipping points. In 2013, leading climatologist Dr. James Hansen warned the fossil fuel emission rate would need to decrease by 6 percent a year beginning immediately to return to 350 parts per million of atmospheric CO<sub>2</sub> by 2100.<sup>14</sup> In August of 2015, frustrated with lackluster federal action to accomplish this goal, 21 youth plaintiffs and Dr. Hansen sued the federal government for allowing and encouraging increases in carbon emissions over the past fifty years, despite knowledge of global climate change.<sup>15</sup> In *Juliana v. United States*, the plaintiffs claimed the federal government violated their constitutional due process and public trust rights and demanded that the government design and implement a plan to slash carbon emissions.<sup>16</sup>

In November 2016, the Federal District Court of Oregon denied a motion to dismiss and allowed the plaintiffs' case to move forward on their public trust doctrine and substantive due process claims, noting that the action is of a different order than the typical environmental case because it "alleges that defendants' actions and inactions—whether or not they violate any specific statutory duty—have so profoundly damaged our home planet

12. *The Daniel Ball*, 77 U.S. 557, 563-64 (1870) (finding that navigable rivers were public navigable rivers in law); *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 484 (1988) (finding that State interest in non-navigable tidal waters was established at the time of admission to the Union).

13. *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 452-53 (1892) (navigable waters and submerged lands); *City of Berkeley v. Superior Court*, 606 P.2d 362, 363, 380-81 (Cal. 1980) (tidelands); *Nat'l Audubon Soc'y v. Superior Court*, 658 P.2d 709, 727-28 (Cal. 1983) (non-navigable tributaries of navigable waters); *Glass v. Goeckel*, 703 N.W.2d 58, 65-69, 78 (Mich. 2005) (beaches below ordinary high water mark); *Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355, 363-66 (N.J. 1984) (dry sand beaches above high tide); *In re Water Use Permit Applications*, 9 P.3d 409, 467 (Haw. 2000) (groundwater); *Lake Beulah Mgmt. Dist. v. State Dep't of Nat. Res.*, 799 N.W.2d 73, 84-85, 88 (Wis. 2011) (groundwater hydrologically connected to navigable water); *Just v. Marinette Cty.*, 201 N.W.2d 761, 769 (Wis. 1972) (wetlands); *Gould v. Greylock Reservation Comm'n*, 215 N.E.2d 114, 121-22 (Mass. 1966) (state park); *Friends of Van Cortlandt Park v. New York*, 750 N.E.2d 1050, 1053 (N.Y. 2001) (park); HAW. CONST. of 1959, art. XI, § 1 (all public natural resources); TEX. CONST. of 1876, art. XVI, § 59(a) (all natural resources).

14. James Hansen et al., *Assessing "Dangerous Climate Change": Required Reduction of Carbon Emissions to Protect Young People, Future Generations and Nature*, PLoS ONE, Dec. 2013, at 10.

15. *Juliana v. United States*, 217 F. Supp. 3d 1224, 1233 (D. Or. 2016).

16. *Id.*

that they threaten plaintiffs' fundamental constitutional rights to life and liberty."<sup>17</sup> The starting point for the court's analysis was the concept that "'public trust' refers to the fundamental understanding that no government can legitimately abdicate its core sovereign powers."<sup>18</sup> The court further addressed several significant legal questions including: whether the oceans are a public trust asset, whether the federal government has public trust obligations, whether federal statutes have displaced any common-law public trust claims, and whether plaintiffs have a right of action to enforce public trust obligations.<sup>19</sup> The court answered all but the displacement issue in the affirmative.<sup>20</sup>

Although the Oregon District Court did not foreclose the atmosphere being part of the public trust, it focused its decision instead on the question of whether the oceans are a public trust asset. The plaintiffs alleged violations of the public trust doctrine in connection with the territorial sea to which the federal government holds title through ownership of the submerged lands between three and twelve miles from the coastlines of the United States.<sup>21</sup> Because a number of plaintiffs' injuries relate to the effects of ocean acidification and rising ocean temperatures, the court held they have adequately alleged harm to public trust assets—something the court called the "natural resources trust."<sup>22</sup>

On the question of whether the federal government has public trust obligations, the Oregon District Court rejected prior interpretations of the meaning of the Supreme Court's statements in *PPL Montana*, which limited the public trust doctrine to matters of state law. "There is no reason why the central tenets of *Illinois Central* should apply to another state, but not to the federal government."<sup>23</sup> The court found persuasive federal court decisions from the District of Massachusetts and the Northern District of California, which decided that there is a federal public trust. The court concluded that the "federal government, like the states, holds public assets—at a minimum, the territorial seas—in trust for the people."<sup>24</sup>

---

17. *Id.* at 1261.

18. *Id.* at 1252.

19. *See id.*

20. *Id.* at 1259.

21. *Id.* at 1255. The federal government holds title to the submerged lands between three and twelve miles from the coastlines of the United States.

22. *Id.* at 1254.

23. *Id.* at 1256-57.

24. *Id.* at 1258-59 (citing *United States v. 1.58 Acres of Land*, 523 F. Supp. 120, 124 (D. Mass. 1981); *Alameda v. Todd Shipyards Corp.*, 635 F. Supp. 1447, 1450 (N.D. Cal. 1986)).

To the question of whether federal statutes have displaced federal public trust claims, the Oregon District Court answered in the negative and distinguished the public trust from tort claims.<sup>25</sup> Specifically, the court found that “[p]ublic trust claims are unique because they concern inherent attributes of sovereignty” and that the “public trust imposes on the government an obligation to protect the *res* of the trust.”<sup>26</sup> State and federal legislators cannot “legislate[ ] away” that obligation “[b]ecause of the nature of public trust claims.”<sup>27</sup>

Finally, on the right of action question, the Oregon District Court held that the “plaintiffs’ public trust claims are properly categorized as substantive due process claims,” and thus, the Fifth Amendment provides them with a right of action in this case.<sup>28</sup> The Fifth Amendment’s Due Process Clause bars the federal government from depriving a person of “life, liberty, or property” without “due process of law.”<sup>29</sup> The *Juliana* plaintiffs alleged that defendants violated their due process rights by “directly caus[ing] atmospheric CO<sub>2</sub> to rise to levels that dangerously interfere with a stable climate system required alike by our nation and Plaintiffs;” “knowingly endanger[ing] Plaintiffs’ health and welfare by approving and promoting fossil fuel development, including exploration, extraction, production, transportation, importation, exportation, and combustion;” and, “[a]fter knowingly creating this dangerous situation for Plaintiffs, . . . continu[ing] to knowingly enhance that danger by allowing fossil fuel production, consumption, and combustion at dangerous levels.”<sup>30</sup>

A reviewing court applies strict scrutiny “when the government infringes on a “fundamental right” that is protected by the Constitution.<sup>31</sup> “Substantive due process ‘forbids the government to infringe certain “fundamental” liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.’”<sup>32</sup> Because the Oregon District Court concluded that plaintiffs alleged a violation of their fundamental rights, it did not address whether youth or future generations are suspect classifications for equal protection purposes,

---

25. *Juliana*, 217 F. Supp. 3d at 1257 (distinguished from *Am. Elec. Power Co., Inc. v. Connecticut*, 564 U.S. 412 (2011) which involved a claim based on both federal law and nuisance torts).

26. *Id.* at 1260.

27. *Id.*

28. *Id.* at 1261.

29. U.S. CONST. amend. V.

30. *Juliana*, 217 F. Supp. 3d at 1248 (alteration in original) (citation omitted).

31. *Id.*

32. *Id.* at 1248-49 (emphasis omitted) (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993)).

which would have provided a separate basis for strict scrutiny judicial review.<sup>33</sup>

The Oregon District Court examined whether the plaintiffs had a fundamental liberty right in a “climate system capable of sustaining human life.”<sup>34</sup> Referencing the recent Supreme Court case upholding same-sex marriage,<sup>35</sup> the court had “no doubt” that plaintiffs’ liberty right is “fundamental to a free and ordered society.”<sup>36</sup>

The court cautioned that it was not transforming any pollution or climate change into a violation of a fundamental constitutional right.<sup>37</sup> Accordingly, the court restricted its holding to allow a claim for a due process violation “where a complaint alleges governmental action is affirmatively and substantially damaging the climate system in a way that will cause human deaths, shorten human lifespans, result in widespread damage to property, threaten human food sources, and dramatically alter the planet’s ecosystem.”<sup>38</sup> In *Juliana*, the court found that plaintiffs adequately alleged such a claim and may proceed to trial on the issues.<sup>39</sup>

If the plaintiffs win, the court could order the federal government to take specific action to mitigate climate change. Although the Due Process Clause does not typically impose on the government an affirmative obligation to act, here the court held the plaintiffs’ cause of action met the “danger creation” exception; due to the government’s failure to limit third-party CO<sub>2</sub> emissions it “places a person in peril in deliberate indifference to their safety[.]”<sup>40</sup> In order to prevail on the danger-creation due process claim at the summary judgment or trial phase, the plaintiffs will need to show: “(1) the government’s acts created the danger to the plaintiff; (2) the government *knew* its acts caused that danger; and (3) the government with *deliberate indifference* failed to act to prevent the alleged harm.”<sup>41</sup>

Although the case has survived its first major challenge, the litigants have a steep road ahead that will include complicated discovery and questions of proof. *Juliana* will test the judicial role in providing a check on government trustees of nature’s trust, especially in light of the Trump Administration, which has aggressively moved to reject climate science and the

---

33. *Id.* at 1249 n.7.

34. *Id.* at 1250.

35. *Id.* (referring to *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015)).

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 1250-52 (alteration in original) (citation omitted).

41. *Id.* at 1252.

prior administration's policies to reduce greenhouse gases.<sup>42</sup> If ultimately successful, *Juliana* will have recognized an expanded scope of the public trust doctrine in the United States, grounded in the U.S. Constitution, with judicially enforceable federal government trustee duties.

While other countries have less of a judicial history of interpreting the public trust doctrine than the United States, their more recent articulation of the doctrine tends to be more inclusive of all commons or natural resources. In that light, the Oregon District Court's use of "natural resources trust" and grounding in the U.S. Constitution in *Juliana* is catching up with countries in Asia and Africa.

### B. Scope in the Philippines and India

Since the 1990s, Asian supreme courts have grappled with the public trust doctrine and sought to define its scope. Among them, courts in the Philippines and India have dealt with seminal cases defining the doctrine and its scope.

In the Philippines, the protected public trust covers all natural resources: "forest, mineral, land, waters, fisheries, [and] wildlife" are part of the constitutionally protected right to a "balanced and healthful ecology."<sup>43</sup>

Similarly, in India, the public trust encompasses "all eco-systems operating in our natural resources."<sup>44</sup> In *M.C. Mehta v. Nath*, the Indian Supreme Court summarized the public trust doctrine as follows:

Our legal system . . . includes the public trust doctrine as part of its jurisprudence. The State is the trustee of all natural resources, which are by nature meant for public use and enjoyment. [The] [p]ublic at large is the beneficiary of the sea-shore, running waters, airs, forests and ecologically fragile lands. The State as a trustee is under a legal duty to protect the natural resources. These resources meant for public use cannot be converted into private ownership.<sup>45</sup>

The Indian Supreme Court based this all-inclusive natural resources scope of the trust on several findings. First, the Court noted that environmental science provides us with certain laws of nature that cannot be changed by

42. See Michael D. Shear, *Trump Will Withdraw U.S. From Paris Climate Agreement*, N.Y. TIMES (June 1, 2017), <https://www.nytimes.com/2017/06/01/climate/trump-paris-climate-agreement.html>.

43. *Oposa v. The Honorable Fulgencio S. Factoran, Jr.*, G.R. No. 101083, 224 S.C.R.A. 792, 803 (July 30, 1993) (Phil.) (interpreting Philippine Constitution, sections 15 & 16); see also CONST. (1987), art. II, § 16 (Phil.).

44. *M.C. Mehta v. Nath*, 10 SCR 12, 13 (1996).

45. *Id.* at 13.

legislative fiat, and that an “understanding of the laws of nature must therefore inform all of our social institutions.”<sup>46</sup> Second, the public trust doctrine rests on the principle that the “air, sea, waters and the forests have such a great importance to the people as a whole that it would be wholly unjustified to make them a subject of private ownership” and that “being a gift of nature, [t]hey should be made freely available to everyone irrespective of their status in life.”<sup>47</sup>

The Indian courts have had the opportunity to apply the public trust doctrine to a wide variety of public resources: riverbed alteration, a state-owned forest, a public park, groundwater, a beach access path 200 meters from the high tide line, natural gas, and even 2G wireless wavelengths.<sup>48</sup>

### C. *Scope in Kenya and Uganda*

Courts across the African continent have also wielded the public trust doctrine in environmental cases. Decisions from the high courts of Kenya and Uganda illustrate the expanding scope of the doctrine internationally.

In Kenya, the High Court of Nairobi interpreted the constitutional protection of the right to life as a right to a clean and healthy environment, recognizing the government as a trustee of the environment that had a duty to protect water from sewage contamination.<sup>49</sup> Further, Article 62 of the

46. *Id.* at 37 (quoting David B. Hunter, *An Ecological Perspective on Property: A Call for Judicial Protection of the Public's Interest in Environmentally Critical Resources*, 12 HARV. ENVTL. L. REV. 311, 316 (1988)).

47. *Id.* at 38.

48. *Id.* at 15-16 (1997) (state-owned forest); *M.I. Builders Private Ltd. v. Radley Shyam Sahu*, (1999) 6 SCC 464, 466 (India) (public park); *Perumatty Grama Panchayat v. State*, (2004) 1 KLT 731, ¶ 34 (Kerala HC) (India), <https://indiankanoon.org/doc/1161084/> (reversed on appeal by *Hindustan Coca-Cola Beverages v. Perumatty Grama Panchayat*, (2005) 2 KLT 554 (Kerala HC), pending final determination in the Supreme Court of India (groundwater); *W. Bengal v. Kesoram Indus. Ltd.*, AIR 2005 SC 1646, 1743 (2004) (India) (groundwater); *Fomento Resorts & Hotels v. Martins*, (2009) 1 Unreported Judgments 2009, 0411, 0430 (India) (beach access path 200 meters from the high tide line); *Reliance Nat. Res., Ltd. v. Reliance Indus., Ltd.*, (2010) INSC 374, ¶ 97-99 (India) (natural gas); *Ctr. for Pub. Interest Litig. v. Union of India*, (2012) 3 SCR 147 (India) (2G wireless wavelengths). The Center for Public Interest Litigation sued the Union of India for selling various wireless wavelengths on the 2G spectrum on a first-come-first-served basis rather than by auction, as well as to applicants who were “ineligible.” “Natural resources belong to the people but the State legally owns them on behalf of its people.” *Id.* at 161. People must have equal access to natural resources and be adequately compensated for transfers; if the state is transferring a resource, the procedure must be “just, non-arbitrary, and transparent” and it must not “discriminate between similarly placed parties.” *Id.* at 246.

49. *Waweru v. Republic*, (2007) AHRLR 149 (KeHC 2006) (H.C.K.) (Kenya). The 2010 Kenyan Constitution added Article 42, protecting a right to a clean and healthy environment.

Kenyan Constitution describes the national government as the “trustee” of public lands.<sup>50</sup>

Similarly, in Uganda, the High Court of Uganda at Kampala interpreted Article 237(2)(b) of the 1995 Constitution as enshrining the public trust doctrine.<sup>51</sup> That provision recognizes the government as “hold[ing] in trust” and protecting “natural lakes, rivers, wetlands, forest reserves, game reserves, National parks, and any land to be reserved for ecological and tourist purposes for the common good of all citizens.”<sup>52</sup> The court considers these constitutional trust rights “fundamental” constitutional rights.<sup>53</sup>

Thus, as courts in the United States, Philippines, India, Kenya, and Uganda—spread across three continents—show, the scope of protected public trust resources is broad enough to include all natural resources that are a shared commons. This all-inclusive scope of protected trust resources can be called “nature’s trust.”<sup>54</sup> Of course, these same protected resources are claimed for commercial products or private estates for those who would fence out the public or take from the public domain for private commercial production. Further, these commons are regularly used for the private disposal of waste in the form of polluted water, dirty air, and excess greenhouse gases. So what is a court’s role when such enclosures or damages to the commons come before it? What is the role of the legislative or executive trustee? Are there judicially enforceable standards to which the trustee must adhere? Should courts abstain from deciding a public trust doctrine case based on the political question doctrine? How are these questions informed by separation of powers considerations?

## II. PRESUMPTIONS AND BACKGROUND PRINCIPLES IN STATUTORY INTERPRETATION

When courts review statutes they are operating in the context of the checks and balances built into a government of separated powers. In the United States, the judiciary’s role in interpreting the law has been well established since the 1803 Supreme Court decision in *Marbury v. Madison*.<sup>55</sup>

50. CONSTITUTION art. 62 (2010) (Kenya).

51. *Advocates Coal. for Dev. & Env’t v. Attorney Gen. (ACODE)*, (2004) Misc. Cause No. 0100, 14 (Uganda), <https://www.elaw.org/content/uganda-advocates-coalition-development-and-environment-acode-v-attorney-general> (citing CONSTITUTION art. 237(2)(b) (1995) (Uganda)).

52. *Id.* at 14.

53. *See id.* at 11-13 (citing CONSTITUTION art. 50 (1995) (Uganda)).

54. *See Mary Christina Wood, The Nature’s Trust Paradigm for a Sustaining Economy, in LAW AND POLICY FOR A NEW ECONOMY: SUSTAINABLE, JUST, AND DEMOCRATIC* ch. 5 (Melissa K. Scanlan ed., 2017).

55. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

This is not to say the contours of that role have been clearly defined. Over time, judges have gravitated towards different theories of statutory interpretation, from purposivism to textualism and beyond, each giving a different degree of weight to evidence that falls outside the text of the statute. These theories, however, are all rooted in a common attempt to be Congress's faithful agent in interpreting the law.

Interpretive guidelines for statutory construction are well known in judicial review of public law, and have been deeply ingrained in Anglo-American courts for at least a hundred years.<sup>56</sup> Colloquially known as canons, they went into a period of infrequent use after Karl Llewellyn's famous 1950 article, which paired canons that directly contradicted each other.<sup>57</sup> Despite their shortcomings, canons are a standard tool for today's courts to aid statutory interpretation. While the semantic canons focus on grammar and syntax, linguistic inferences, and textual integrity, the substantive canons reflect a set of background principles and presumptions that influence the judiciary's construction of a statute.

### A. *Substantive Canons Involving Clear Statements*

Many of the substantive canons operate as a clear statement of rules or presumptions, for example: "Unless the legislature clearly intends to displace an established background understanding, the court will presume that the understanding is part of the statute."<sup>58</sup> A well-known example of such a canon is constitutional avoidance. This canon reflects the understanding that each branch of government has a duty to uphold the Constitution, so there is a strong presumption that Congress created a law that it intended to be consistent with the Constitution. This canon comes into play if a statute is subject to multiple interpretations, one of which raises serious constitutional problems. Unless Congress has clearly shown it intended the problematic construction, this canon urges courts to construe the statute to avoid an interpretation that raises serious constitutional problems.<sup>59</sup> The

---

56. William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1011 (1989).

57. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Construed*, 3 VAND. L. REV. 395, 401-06 (1950).

58. See Eskridge, *supra* note 56, at 1011; see also William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593 (1992) (cataloguing and discussing various substantive canons of interpretation).

59. See, e.g., *NLRB v. Catholic Bishop*, 440 U.S. 490, 507 (1979); *Jones v. United States*, 526 U.S. 227, 239 (1999); *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 173 (2001) (quoting *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575 (1988): "[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will

leading case for this is *NLRB v. Catholic Bishops*, where the U.S. Supreme Court, concerned about constitutional problems with the First Amendment's religious clauses, declined to interpret expansive statutory language to include Catholic schools within the statute's term "employer" without a clear statement from Congress directing the agency to assert jurisdiction over religious schools.<sup>60</sup>

Of course there are detractors and supporters of this canon, an in-depth treatment of which is unnecessary for this Article. Most agree, however, that the canon shifts power from courts to the legislature.<sup>61</sup> Justice Brandeis's concurring opinion in *Ashwander v. Tennessee Valley Authority*, described a variety of rules of constitutional avoidance all of which have a common focus on promoting judicial restraint.<sup>62</sup> Professor Lisa Kloppenberg writes that "[t]he *Ashwander* formulation arose in part as a response to the activism of the conservative U.S. Supreme Court of the *Lochner* era."<sup>63</sup> The canon reflects the notion that courts should interpret laws narrowly when approaching a constitutional boundary.<sup>64</sup> The clear statement requirement advanced in *Catholic Bishops* goes beyond judicial restraint, however, and places a greater emphasis on Congress's responsibility to affirmatively address and clarify text that raises constitutional issues.<sup>65</sup> The clear statement formulations have gathered momentum and now appear in a variety of canons beyond avoiding constitutional problems, including lenity in criminal cases, avoiding federal infringement on traditional state sovereignty, and others.

In sum, the clear statement canons focus attention on the legislature and demand clear statutory language.<sup>66</sup> They heed separation of powers and federalism concerns, and tamp down charges of judicial activism in the law-making as opposed to the law-interpreting realm. In one view, the substan-

---

construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.'").

60. *NLRB*, 440 U.S. at 507.

61. See Lisa A. Kloppenberg, *Does Avoiding Constitutional Questions Promote Judicial Independence?*, 56 CASE WESTERN RES. L. REV. 1031 (2006). But see Michelle R. Slack, *Avoiding Avoidance: Why Use of the Constitution Avoidance Canon Undermines Judicial Independence—A Response to Lisa Kloppenberg*, 56 CASE WESTERN RES. L. REV. 1057 (2006).

62. *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring) (providing seven rules under which the Court has avoided constitutional questions. "4. . . if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter.").

63. Kloppenberg, *supra* note 61, at 1033-34.

64. Eskridge, *supra* note 56, at 1020-21.

65. Robert W. Scheef, *Temporal Dynamics in Statutory Interpretation: Courts, Congress, and the Canon of Constitutional Avoidance*, 64 U. PITT. L. REV. 529, 540-44 (2003).

66. *Id.* at 534, 344.

tive canons reflect presumptions about Congressional intent. In another view, these canons advance specific values the courts have determined are important regardless of the Congressional preference of the day. For instance, safeguarding areas of traditional state sovereignty against federal incursion. As the U.S. Supreme Court stated in *Gregory v. Ashcroft*, “[i]n traditionally sensitive areas . . . the requirement of a clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.”<sup>67</sup> Is the sovereign’s trustee status a traditionally sensitive area that warrants a clear statement from the legislature before a court will interpret the law in a way that privatizes nature’s trust? In jurisdictions where the public trust doctrine is protected by the constitution, is this a variation on the constitutional avoidance canon?<sup>68</sup>

### B. *Substantive Canon for Nature’s Trust*

Is there a substantive interpretive canon for nature’s trust? One approach, proffered by Professor William Araiza, argues for subject matter exceptionalism in favor of creating an interpretive canon for situations that involve the application of the public trust doctrine to non-aquatic resources.<sup>69</sup> This section describes his proposal, important insights to be borrowed from it, and why this is unnecessarily theoretical. Then it articulates the “no substantial impairment” clear statement approach to statutory interpretation that can be discerned from the overall pattern of court decisions from multiple countries involving attempted privatizations of nature’s trust. This approach has such a wide and longstanding use that it should be recognized as a substantive canon of interpretation when public natural resources are threatened with privatization.

Professor Araiza proposed the public trust doctrine as an interpretive canon to mediate the tensions that arise around non-aquatic public trust resources.<sup>70</sup> These tensions stem from broadly shared “instincts about the relationship of government to the nation’s natural resource heritage” cast against “an incompletely theorized doctrinal foundation and anxiety about judicial policy-making on technically complex and socially important is-

---

67. *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991) (quoting *Will v. Michigan Dep’t of State Police*, 491 U.S. 58, 65 (1989)).

68. *E.g.*, The Constitution of South Carolina provides, “All navigable waters shall forever remain public highways free to the citizens of the State and the United States.” S.C. CONST. art. XIV, § 4.

69. William D. Araiza, *The Public Trust Doctrine as an Interpretive Canon*, 45 U.C. DAVIS L. REV. 693, 696 (2012).

70. *Id.*

sues.”<sup>71</sup> He clarifies that this interpretive canon would only apply to “judicial interpretation of positive law enactments, such as statutes, administrative regulations and interpretations of those regulations.”<sup>72</sup> He formulates his argument for a public trust canon as follows: “[T]he principle underlying the public trust doctrine—that ‘social’ uses of natural resources generate benefits that merit protection—is so important that it warrants consideration when courts construe laws or review government actions that affect those uses.”<sup>73</sup> As such, he articulates “a background principle, or canon, against which public laws should be construed.”<sup>74</sup>

Professor Araiza’s construction of this canon continues in a broad vein: it “might be understood as placing a thumb on the scale in favor of the public trust value, in whatever form the underlying legal rule prescribes.”<sup>75</sup> But his proposal would not apply to aquatic resources.<sup>76</sup> He also does not base it on existing public trust law, despite a rich body of cases in which judges have already been applying substantive presumptions—albeit often unarticulated as such—through their public trust jurisprudence.<sup>77</sup>

Importantly, Professor Araiza grounds the public trust canon in a fundamental problem with protecting a commons: the diffuse nature of the interests involved. Values protected by the public trust doctrine, such as conservation and public use, tend to be systematically undervalued in the political process because they accrue to the public generally.<sup>78</sup> This problem of diffuse interests challenges the traditional notion that in a democracy the political process can be trusted to reflect the public’s preferences; instead suggesting a problem of diffuse majorities. Mancur Olson, Jr. described the concept of diffuse majorities in his 1965 book on public goods and collective action, which challenged the concept that the greatest concern in a democracy was the tyranny of the majority.<sup>79</sup> He brought to the fore the problem of concentrated benefits for the few and diffuse costs for the many. In this foundational book Olson delves into the academic and judicial history of the concept. Then as recounted by Araiza:

[Bruce] Ackerman called for courts to recognize the relative political weakness suffered not by “discrete and insular” minorities, as

---

71. *Id.* at 697.

72. *Id.* at 698 (noting interpretive canons fit uneasily with common law adjudications).

73. *Id.* at 704.

74. *Id.* (citation omitted).

75. *Id.* at 719.

76. *Id.* at 699.

77. *Id.* at 698.

78. *Id.* at 716.

79. See generally MANCUR OLSON, JR., *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1965).

the [Carolene Products] formula originally stated, but by *diffuse* minorities, which he argued suffer special handicaps when organizing politically. Similarly, in its path-breaking decision in *Citizens to Preserve Overton Park v. Volpe*, the Supreme Court acknowledged the ease with which publicly-held assets, such as parkland, would be sacrificed when the alternative was impairment of privately held assets.<sup>80</sup>

Thus, diffuse interests in the commons are easily at risk of being undervalued in political and administrative processes where focused commercial or private interests are represented. Awareness of this dynamic of diffuse majorities as related to nature's trust should be at the forefront of any public trust interpretive canon.

When there appears to be a privatization of nature's trust underway, courts tend to use a judicial presumption that the trustee cannot privatize public resources without a clear statutory directive and a legislative finding that the action would not "substantially impair" the remaining public trust resources or the public interest.<sup>81</sup> This formulation is based on the U.S. Supreme Court's decision in the now famous *Illinois Central Railroad v. Illinois*.<sup>82</sup> The Supreme Court held that when a state receives title to tidelands and lands beneath navigable waterways within its borders at the time of its admission to the Union, it receives such land "in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties."<sup>83</sup> The Court noted that the state is entitled to convey such lands to private parties, only under very limited circumstances.<sup>84</sup> The Court's formulation of the test for situations where a state may privatize trust property is where the privatized resources "are used in promoting the interests of the public" or "can be disposed of without any substantial impairment of the public interest in the lands and waters remaining."<sup>85</sup> The Wisconsin Supreme Court interpreted this to mean the legislature may make grants of public trust property, but must delineate that the property may only be used for public purposes.<sup>86</sup> The Arizona

---

80. Araiza, *supra* note 69, at 717 (citations omitted).

81. See, e.g., Sax, *supra* note 1, at 494-96; *Gould v. Greylock Reservation Comm'n*, 215 N.E.2d 114, 121-24 (Mass. 1966); Araiza, *supra* note 69, at 704.

82. *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 452 (1892).

83. *Id.*

84. *Id.* at 453-54.

85. *Id.* at 452-53.

86. See *Prieue v. Wis. State Land & Improvement Co.*, 79 N.W. 780, 781-82 (Wis. 1899); see also *City of Milwaukee v. State*, 214 N.W. 820, 826 (Wis. 1927) (upholding a conveyance of submerged Lake Michigan land to a private company because it was "part and

Court of Appeals interpreted this as an “ancient doctrine of common law [that] restricts the sovereign’s ability to dispose of resources held in public trust.”<sup>87</sup>

In short, the *Illinois Central* test of a privatization is that the common-pool resources must be used to promote the public interest or that the privatization will cause no substantial impairment of the public interest in the remaining resources. That is a very high bar, given the public trust responsibility that trustees protect present and future generations.<sup>88</sup> It appears that courts have applied the public trust no substantial impairment test as they do other substantive canons of statutory interpretation that require a clear statement from the legislature. For example, applying the constitutional avoidance canon, as explained above, courts narrowly construe a statute in order to avoid constitutional doubts unless the legislation clearly states otherwise.<sup>89</sup> Likewise, for public trust cases, courts look for a clear statement from the legislature that the use of the commonly-held resources promotes the public interest or there is no substantial impairment of the public interest in the remaining resources. If these conditions are not met, the privatization fails. For over one hundred years courts throughout the United States have applied *Illinois Central* to adjudicate privatizations of nature’s trust. Other countries around the world, such as India, have similarly borrowed the foundations established in *Illinois Central* and adapted it to their public trust jurisprudence.<sup>90</sup> The public trust “no substantial impairment” test has been so widely applied in multiple jurisdictions, in a way that shifts the focus to the legislature in search of a clear statement, that it should be understood as a substantive canon of interpretation for nature’s trust.

---

parcel of a larger scheme,” entirely public in nature, “designed to enable the city to construct its outer harbor in aid of navigation and commerce”).

87. *Ariz. Ctr. for Law in Pub. Interest v. Hassell*, 837 P.2d 158, 166 (Ariz. Ct. App. 1991).

88. *See, e.g., id.* at 170. The Arizona Court of Appeals declared that any dispensation of public trust lands must satisfy the state’s “special obligation to maintain the trust for the use and enjoyment of present and future generations.” *Id.* In India, the Supreme Court articulated this concept in *Fomento Resorts & Hotels v. Martins*, (2009) 1 Unreported Judgments 2009, 0411, 0451-56 (India). In the Philippines, the Supreme Court articulated this concept in *Oposa v. The Honorable Fulgencio S. Factoran, Jr.*, G.R. No. 101083, 224 S.C.R.A. 792, 817-18 (July 30, 1993) (Phil.).

89. *See, e.g., NLRB v. Catholic Bishop*, 440 U.S. 490, 504 (1979); *Jones v. United States*, 526 U.S. 227, 239 (1999); *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 173 (2001).

90. *See M.C. Mehta v. Nath*, (1996) 10 SCR 12, 38-39 (India).

The next section provides examples of the nature's trust canon from jurisdictions in the United States, India, Uganda, and Kenya, to show how courts are implementing it in a variety of social and economic contexts.

### III. ROLE OF THE COURTS IN REVIEWING ATTEMPTED PRIVATIZATIONS OF NATURE'S TRUST

Part III of the Article discusses the role courts have played in various jurisdictions in reviewing attempted privatizations of nature's trust. First, this part provides background into the constitutional powers and limitations that impact courts' roles. Then, it establishes the boundaries to agency discretion as created under the heightened close look standard for nature's trust cases. From there, the Article looks into the manner in which courts across the globe apply the nature's trust canon of "no substantial impairment." Although constitutional powers and agency deference varies throughout the world, courts have played an essential role in protecting nature's trust from privatization.

#### A. *Separation of Powers and Judicial Review*

At the outset, judicial review needs to be understood in light of separation of powers and the fundamental need to strengthen democratic legitimacy in government institutions. In 1991, litigants asked the Arizona Court of Appeals to review the validity of legislation that attempted to relinquish state title in all navigable waterways to private landowners.<sup>91</sup> The court framed the role of the judiciary within a constitutional commitment to the checks and balances of a government of divided powers; it concluded the delegates to the Arizona Constitutional Convention "understood and assumed the courts would exercise judicial review" and that they intended this function as "an additional check on legislative and executive abuse."<sup>92</sup>

Separation of powers in the public trust context adds weight to the judicial role vis-à-vis the political branches. As with a private trust, with the public trust there are trustees (the political branches of the legislature and the executive, and agencies with delegated trustee duties), trust property (which ranges from navigable waters to all natural resources), and beneficiaries (present and future generations). The role of the judiciary in the public trust context is to protect the beneficiaries' interests. The Arizona Court of Appeals noted that "[j]ust as private trustees are judicially accountable to their beneficiaries for dispositions of the *res* . . . so the legislative and

---

91. *Hassell*, 837 P.2d at 161.

92. *Id.* at 168 (quoting John D. Lesby, *The Making of the Arizona Constitution*, 20 ARIZ. ST. L.J. 1, 74-75 (1988)).

executive branches are judicially accountable for their dispositions of the public trust.”<sup>93</sup>

Judicial review is heightened in public trust cases because the beneficiaries of the public trust are not only diffuse majorities that are typically under-represented, but include future generations who do not yet have the right to vote. The *res* at issue, whether as narrow as navigable waters or as broad as the global climate, is susceptible to overuse, erosion, and irreparable harm or extinction. Thus, as the Arizona Court of Appeals suggested, judicial review needs to provide “a level of protection against improvident dissipation of an irreplaceable *res*.”<sup>94</sup>

### B. Heightened Close Look at Agency Actions and Burden of Proof

The “close look” standard of review is a familiar term of art for assessing the level of scrutiny a court gives to an agency action. However, in nature’s trust cases, some jurisdictions are using a more exacting standard—call it a “heightened close look”—to indicate it is one step up in terms of intensity of review. Here cases from two very different contexts, Idaho and Hawai’i, are illustrative. In *Kootenai Environmental Alliance v. Panhandle Yacht Club*, the Idaho Supreme Court explained that “decisions made by non-elected agencies rather than by the legislature itself will be subjected to closer scrutiny than will legislative decisionmaking.”<sup>95</sup> It described the judicial role in adjudicating public trust disputes related to an agency or legislative action:

Final determination whether the alienation or impairment of a public trust resource violates the public trust doctrine will be made by the judiciary. This is not to say that this court will [substitute] its judgment for that of the legislature or agency. However, it does mean that this court will take a “close look” at the action to determine if it complies with the public trust doctrine and it will not act merely as a rubber stamp for agency or legislative action.<sup>96</sup>

At first blush, the Idaho Supreme Court’s description of a “close look” standard of review does not seem irregular; but they actually applied a higher level of scrutiny involving a wide variety of factors.<sup>97</sup> It is important to note, that the existence of a heightened close look does not dictate the out-

---

93. *Id.* at 169 (citation omitted).

94. *Id.*

95. *Kootenai Envntl. All. v. Panhandle Yacht Club*, 671 P.2d 1085, 1091 (Idaho 1983).

96. *Id.* at 1092.

97. Factors the Idaho Supreme Court thought relevant for a close look include:

come of a decision. In the Idaho case, the court ultimately upheld the agency decision to allow an encroachment into the commons by a private yacht club.<sup>98</sup>

Similarly, the Hawaiian Supreme Court explained that cases involving the public trust doctrine require a heightened close look that is more exacting than the typical standards for agency action.<sup>99</sup> The Hawaiian Supreme Court reasoned that the “special public interests in trust resources demand that this court observe certain qualifications of its standard of review” and that this “requires additional rigor.”<sup>100</sup> Since the public trust in Hawai’i is guaranteed by the state constitution, “ultimate authority to interpret and defend the public trust in Hawai’i rests with the courts of this state.”<sup>101</sup>

While agencies typically need to support their decisions with evidence, when an agency performs as a public trustee it is duty bound to demonstrate that it has properly exercised the discretion vested in it by the constitution and the statute. In matters impacting public trust resources “clarity in the agency’s decision is all the more essential.”<sup>102</sup> The Hawaiian courts expect more from agencies based on proposed uses of the commons. The agency “should apply a high level of scrutiny” if the requested use is “private or commercial” because those are not protected public trust uses.<sup>103</sup> This

---

[T]he degree of effect of the project on public trust uses, navigation, fishing, recreation and commerce; the impact of the individual project on the public trust resource; the impact of the individual project when examined cumulatively with existing impediments to full use of the public trust resource, *i.e.* in this instance the proportion of the lake taken up by docks, moorings or other impediments; the impact of the project on the public trust resource when that resource is examined in light of the primary purpose for which the resource is suited, *i.e.* commerce, navigation, fishing or recreation; and the degree to which broad public uses are set aside in favor of more limited or private ones.

*Id.* at 1092-93.

98. *Id.* at 1096.

99. *Kauai Springs, Inc. v. Planning Comm’n of Kauai*, 324 P.3d 951, 974-75 (Haw. 2014). The typical standard of review for Hawaiian agency actions is arbitrary and capricious for an exercise of discretion and clearly erroneous for findings of fact or mixed questions of law and fact. *Id.* at 974.

100. *Id.* (quoting *In re Water Use Permit Applications (Waiahole I)*, 9 P.3d 409, 445 (2000)).

101. *Id.* at 975 (quoting *Waiahole I*, 9 P.3d at 445).

102. *Id.* at 983-84 (quoting *Waiahole I*, 9 P.3d at 470).

103. *Id.* at 984. The court distilled Hawai’i’s public trust doctrine and expectations of the agency trustee as follows:

- a. The agency’s duty and authority is to maintain the purity and flow of our waters for future generations and to assure that the waters of our land are put to reasonable and beneficial use.
- b. The agency must determine whether the proposed use is consistent with the trust purposes:

level of scrutiny puts a greater burden on the private or commercial use applicant to demonstrate the proposed use does not conflict with protected uses of the public trust resource.<sup>104</sup> In Hawai'i, an absence of evidence is insufficient and ultimately weighs against a private or commercial applicant because a reviewing court is unable to find the level of clarity it needs to permit uses of public trust resources.<sup>105</sup>

The court plays a critical role with judicial review of agency actions involving nature's trust. While a heightened close look is not outcome determinative, it should provide a higher level of scrutiny to ensure the interests of the diffuse majority are protected.

### C. *Application of Nature's Trust Canon*

There are a variety of circumstances in which a court will be called upon to adjudicate claims related to the administration of nature's trust. Some involve review of agency actions; others involve mandamus actions to order the trustee to take protective actions, and yet others involve demanding a clear statement and legislative finding of "no substantial impairment."

- 
- i. the maintenance of waters in their natural state;
  - ii. the protection of domestic water use;
  - iii. the protection of water in the exercise of Native Hawaiian and traditional and customary rights; and
  - iv. the reservation of water enumerated by the State Water Code.
  - c. The agency is to apply a presumption in favor of public use, access, enjoyment, and resource protection.
  - d. The agency should evaluate each proposal for use on a case-by-case basis, recognizing that there can be no vested rights in the use of public water.
  - e. If the requested use is private or commercial, the agency should apply a high level of scrutiny.
  - f. The agency should evaluate the proposed use under a "reasonable and beneficial use" standard, which requires examination of the proposed use in relation to other public and private uses.

Applicants have the burden to justify the proposed water use in light of the trust purposes.

- a. Permit applicants must demonstrate their actual needs and the propriety of draining water from public streams to satisfy those needs.
- b. The applicant must demonstrate the absence of a practicable alternative water source.
- c. If there is a reasonable allegation of harm to public trust purposes, then the applicant must demonstrate that there is no harm in fact or that the requested use is nevertheless reasonable and beneficial.
- d. If the impact is found to be reasonable and beneficial, the applicant must implement reasonable measures to mitigate the cumulative impact of existing and proposed diversions on trust purposes, if the proposed use is to be approved.

*Id.* at 984-85 (citation omitted).

104. *Id.* at 984-85.

105. *Id.* at 983-84.

In this section, the Article discusses examples of courts in multiple jurisdictions closely scrutinizing trustee action that appears to permit private actors to diminish, pollute, or otherwise privatize the commons. In these cases, courts in the United States, India, Kenya, and Uganda exhibit a high degree of vigilance in protecting the public interest in shared resources against the threats of privatization, often calling for a clear statement from the legislature before allowing a privatization.

## 1. United States

Legislative attempts at large-scale privatizations of nature's trust are common fodder for judicial review in the United States. Some jurisdictions, such as Hawai'i, have clarified that "the public trust has never been understood to safeguard rights of exclusive use for private commercial gain."<sup>106</sup> Similarly, Wisconsin courts maintain that any grant of public trust resources for purely private purposes is void.<sup>107</sup> An application to use common pool resources for private or commercial purposes requires an intense level of scrutiny to ensure that such use is consistent with promoting the public interest or that there is "no substantial impairment" to the public interest in the remaining resources.<sup>108</sup> This intensity of judicial review is advanced by requiring the legislature to affirmatively craft a clear statement and a legislative finding of "no substantial impairment" to the public interest. State courts across the United States, such as those in Arizona, Alaska, North Carolina, Michigan, and Maine, illustrate this growing trend.

### i. Arizona

In *Arizona Center for Law in Public Interest v. Hassell*, the Arizona Court of Appeals reviewed and rejected a statute that appeared to privatize all of the navigable rivers in the state.<sup>109</sup> Under the Equal Footing Doctrine, Arizona "acquired title to the lands below the high-water mark in all navigable watercourses" when it became a state in 1912.<sup>110</sup> With the land and water came obligations such as the state duty to administer the property consis-

---

106. *Id.* at 983 (quoting *Waiahole I*, 9 P.3d at 450).

107. *City of Milwaukee v. State*, 214 N.W. 820, 830 (Wis. 1927); *Priewe v. Wis. State Land & Improvement Co.*, 79 N.W. 780, 781-82 (Wis. 1899).

108. *Kauai Springs, Inc.*, 324 P.3d at 984. In applying this stricter public trust review of an agency decision, the Supreme Court of Hawai'i upheld the local Planning Commission's decision to deny the permits for a spring water bottling facility because, among other things, the applicant had not met its burden of showing the commercial use of water was consistent with public trust protections of water. *Id.* at 989-90.

109. *Ariz. Ctr. for Law in Pub. Interest v. Hassell*, 837 P.2d 158, 162, 173 (Ariz. Ct. App. 1991).

110. *Id.* at 162; *see also Pollard v. Hagan*, 44 U.S. 212, 223, 229-30 (1845).

tent with trust purposes.<sup>111</sup> Yet, until 1985, the state did not assert any property interests in these waterways with the exception of the Colorado River.<sup>112</sup> Once state officials started asserting public rights, there was a strong backlash from private individuals and corporations that had for years exercised control over, made improvements to, and paid taxes upon these lands underlying navigable waters.<sup>113</sup>

In 1987, the Arizona Legislature enacted H.B. 2017 to relinquish the state's claims to these trust lands.<sup>114</sup> The legislature's stated statutory purpose was:

to avoid a lengthy, difficult and expensive fact-finding effort and to resolve this state's claim by recognizing the titleholders' accrued equity in taxes, improvements and family and social ties and confirming titles of private parties and political subdivisions to lands in the beds of waters other than the Colorado river and to compensate this state for relinquishing the claim in those areas where the state's claim may be more viable. Monies received by this state as compensation will be used to acquire riparian lands for public benefit. This act also provides for public recreational use of surface water in navigable watercourses.<sup>115</sup>

Thus, the Arizona Legislature explicitly acknowledged that it was attempting to relinquish its claim in these trust lands to address the backlash that occurred after officials began asserting public rights. But, drawing on *Illinois Central*, the Arizona Court of Appeals found that the state's responsibility to manage public trust waterways for the public benefit was an "inabrogable attribute of statehood."<sup>116</sup> Quoting from *Illinois Central*, the court reiterated: "control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining."<sup>117</sup> Therefore, the Arizona lawmakers could not simply legislate away the state's duties to administer trust assets to appease some constituents.

Further, in order to assess whether there was "no substantial impairment," the Arizona Court of Appeals drew on Idaho law and examined fac-

---

111. Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 475 (Miss. 1988); Defs. of Wildlife v. Hull, 18 P.3d 722, 728-29 (Ariz. Ct. App. 2001).

112. Defs. of Wildlife, 18 P.3d at 726.

113. See *id.* at 727.

114. Hassell, 837 P.2d at 161.

115. *Id.* at 162 (quoting Ariz. H.B. 2017 § 1(B) (1987)).

116. *Id.* at 168.

117. *Id.* at 167 (quoting Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 453 (1892)).

tors including “the degree of effect of the project on public trust uses,” “the impact of the individual project on the public trust resource,” “the impact of the individual project when examined cumulatively with existing impediments to full use of the public trust resource,” “the impact of the project on the public trust resource when that resource is examined in light of the primary purpose for which the resource is suited,” and “the degree to which broad public uses are set aside in favor of more limited or private ones.”<sup>118</sup> Applying these factors, the Arizona Court of Appeals held that the statute was invalid because the legislature established no basis to assess the value as a public resource of the parcels that it relinquished wholesale.<sup>119</sup> Hence, there was no clear legislative finding that the statute would not substantially impair the public interest in the state’s navigable waterways.

In response to the *Hassell* decision, the Arizona Legislature passed a new law that established a commission to make navigability determinations and adjudicate claims.<sup>120</sup> The Arizona Court of Appeals reviewed this new attempt to privatize trust lands and again rejected it, this time holding that the legislation used a navigability determination that was not as favorable to public trust rights as the federal test of navigability established by the Supreme Court in *The Daniel Ball*.<sup>121</sup> The court held that the navigability determination provided for by the state statute was invalid and unconstitutional because it was pre-empted by federal law.<sup>122</sup> It prefaced this holding by saying the court does not lightly conclude a statute is unconstitutional.<sup>123</sup> The court could find no reasonable alternative reading of the statute to avoid the constitutional question, and reiterated, “because it is our responsibility to give potential public trust forfeitures ‘a close look,’ we must not merely rubberstamp the legislature’s decision.”<sup>124</sup>

## ii. Alaska

The first Alaskan Supreme Court decision on the public trust doctrine also involved the state legislature passing a statute that allowed for state-wide privatization of public trust property.<sup>125</sup> The Alaskan Legislature had

---

118. *Id.* at 170-71 (quoting *Kootenai Env'tl. All., Inc. v. Panhandle Yacht Club, Inc.*, 671 P.2d 1085, at 1092-93 (1983)).

119. *Id.* at 172.

120. *Defs. of Wildlife v. Hull*, 18 P.3d 722, 727 (Ariz. Ct. App. 2001).

121. *Id.* at 736 (citing *The Daniel Ball*, 77 U.S. 557 (1870)). *The Daniel Ball* navigability test provides that a body of water is considered to be navigable if on the date of statehood the watercourse, in its natural and ordinary condition, either was used or was susceptible to being used for travel or trade in any customary mode used on water. *Id.* at 730.

122. *See id.* at 737.

123. *Id.*

124. *Id.* (quoting *Hassell*, 837 P.2d at 171).

125. *CWC Fisheries v. Bunker*, 755 P.2d 1115, 1116-18 (Alaska 1988).

delegated to the Department of Natural Resources the authority to grant patents of tidelands to private owners.<sup>126</sup> The tideland patent at issue in the case expressly reserved to the State of Alaska the mineral rights and prohibited taking herring spawn, but was silent about public trust rights.<sup>127</sup> The dispute arose when the patent holder of the tidelands tried to stop someone from fishing for salmon.<sup>128</sup>

In *CWC Fisheries v. Bunker*, the Alaskan Supreme Court applied the “no substantial impairment” test to determine whether the privatization of public tidelands furthered some specific public trust purpose or could be made without substantial impairment to the trust asset.<sup>129</sup> The Alaskan Supreme Court explained that if “either of these questions can be answered in the affirmative, conveyance free of the public trust would be permissible.”<sup>130</sup>

In determining whether or not such a conveyance would be permissible, the Alaskan Supreme Court did not look to the patent holder’s use of the property, but instead searched for the legislative intent in the plain language of the statute.<sup>131</sup> The legislative intent to convey tidelands free of the public trust “must be clearly expressed or necessarily implied in the legislation authorizing the transfer,” because “[i]f any interpretation of the statute which would retain the public’s interest in the tidelands is reasonably possible, we must give the statute such an interpretation.”<sup>132</sup>

Accordingly, the Alaskan Supreme Court held that the legislature conveyed the tidelands subject to a perpetual public trust easement because the statute did not expressly state that the conveyance of tidelands “were given in aid of navigation and commerce” or that the “lands in question would be conveyed free of the public trust.”<sup>133</sup> Further, the court found the legislative intent to eliminate public trust rights could not be implied because Article VIII, Section 3 of the Alaskan Constitution was in effect when the legislature enacted the statute, and it explicitly provides that “wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use.”<sup>134</sup> The Alaskan Supreme Court will not presume the legislature intended an action, which on its face, is inconsistent with the plain language of the Alaskan Constitution. Thus, the Alaskan Supreme Court concluded that it was “not persuaded that this conveyance was made ‘in

---

126. *See id.*

127. *Id.*

128. *Id.* at 1117.

129. *Id.* at 1118.

130. *Id.* at 1119.

131. *Id.*

132. *Id.* (citation omitted).

133. *Id.*

134. *Id.* at 1120.

furtherance of trust purposes' such as would free the property from any continuing public trust obligations."<sup>135</sup>

Similarly, the Alaskan Supreme Court rejected the patent holder's argument that extinguishing the public trust easement would not be a "substantial impairment" of public rights because the patent holder's property was so small.<sup>136</sup> The court instead looked at the fact that the statute applied to all tidelands in the state and held that if the patents extinguished public rights this would be a substantial impairment.<sup>137</sup> Thus, private owners of tideland are "prohibited from any general attempt to exclude the public from the property by virtue of their title."<sup>138</sup>

### iii. North Carolina

In another ocean-facing state, this time on the Atlantic Ocean, the North Carolina courts have honored the public trust doctrine and limited privatization of ocean beaches to instances where clear legislative intent can be found. In *Gwathmey v. Department of Environment, Health, and Natural Resources*, the North Carolina Supreme Court explained how the public trust doctrine operates as a rule of construction and creates presumptions the court uses when interpreting legislative intent. Without calling it the nature's trust canon, the Supreme Court said: "Unless clear and specific words state otherwise, terms are to be construed so as to cause no interference with the public's dominant trust rights, for the presumption is that the sovereign did not intend to alienate such rights."<sup>139</sup> Thus, although the state legislature may convey ownership of public trust land to a private party, the state trustee must do so expressly and clearly.<sup>140</sup>

For North Carolina, public trust rights include the "right to freely use and enjoy the State's ocean and estuarine beaches and public access to the beaches."<sup>141</sup> Under North Carolina's Public Trust Statute, the state legislature defined ocean beaches to which the public has rights to include dry sand areas, even some that are owned privately.<sup>142</sup> In *Nies v. Town of Emerald Isle*, the North Carolina Court of Appeals reviewed a challenge by pri-

---

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* at 1121.

139. *Gwathmey v. Dep't of Env't, Health, & Nat. Res.*, 464 S.E.2d 674, 684 (N.C. 1995) (quoting *RJR Technical Co. v. Pratt*, 453 S.E.2d 147, 149 (1995)).

140. *Id.*

141. *Nies v. Town of Emerald Isle*, 780 S.E.2d 187, 194 (N.C. App. 2015) (quoting *Friends of Hatteras Island Nat'l Historic Mar. Forest Land Tr. for Pres., Inc. v. Coastal Res. Comm'n*, 452 S.E.2d 337, 348 (1995)).

142. *Id.* at 195 (citing N.C. GEN. STAT. ANN. § 1-45.1).

vate property owners who wished to exclude the public from the dry sand portion of the beach to which they held private title. The court in *Nies* opined that this was never in the “bundle of rights” they purchased, because the ocean beaches of North Carolina “are subject to public trust rights unless those rights have been expressly abandoned by the State.”<sup>143</sup> Specifically, the court in *Nies* held that a local ordinance that allowed driving on the privately-owned dry sand portion of the beach was advancing a protected public trust right and so could not be a “taking” of private property without just compensation by the government.<sup>144</sup>

#### iv. Michigan

Michigan courts have similarly applied the “no substantial impairment test.” In *Glass v. Goeckel*, the Michigan Supreme Court was called upon to determine whether a woman trespassed when she walked on a Lake Huron beach on property to which the Goeckel family held a deed.<sup>145</sup> The Michigan Supreme Court found no clear statement from the legislature extinguishing the traditional public trust right of passage accompanied by a finding of “no substantial impairment,” and so it held the public trust easement continues and rejected the trespassing claim for beach walking.<sup>146</sup> Again, as articulated in Arizona, Alaska, and North Carolina, if the legislature does not make its intention clear in express statutory terms, the presumption is that the public trust rights continue unimpeded by the private deed. This is the nature’s trust canon in operation.

#### v. Maine

While this series of cases from Arizona, Alaska, North Carolina, and Michigan, all resulted in rejecting an attempted privatization of trust resources, the opposite result is also possible. The application of a clear statement canon that demands a legislative finding of “no substantial impairment” is not determinative of the result. Rather it is a tool judges use to ensure they are properly interpreting legislative intent. For instance, in a case with facts similar to those discussed above, the Supreme Court of Maine upheld a statute privatizing intertidal lands that had been filled and treated as privately owned.

The Supreme Court of Maine described its standard of review regarding legislative dispensations of state natural resources as “high and demand-

---

143. *Id.* at 197.

144. *Id.* at 198.

145. *Glass v. Goeckel*, 703 N.W.2d 58, 75 (Mich. 2005).

146. *Id.*

ing.”<sup>147</sup> Over the years, private landowners abutting the ocean had filled many of Maine’s tidal lands and treated them as privately owned.<sup>148</sup> In an effort to clarify title and public trust rights, the Maine legislature enacted a statute the court reviewed in *Opinion of the Justices*.<sup>149</sup> The Supreme Court of Maine justified its heightened review of public trust resources: “we believe that any legislation giving up any such public rights must satisfy a particularly demanding standard of reasonableness.”<sup>150</sup> Then it proceeded to review a wide variety of legislative findings related to the impact on the public interest and was ultimately satisfied with the legislative findings that the public interest in the remaining intertidal and submerged lands would not be impaired by legislation recognizing private title in intertidal lands filled before a certain date.<sup>151</sup> Thus, while the interpretive canon seeking a clear statement and legislative finding will often provide a higher level of court scrutiny and require more clarity from the political branches, the use of nature’s trust canon is not determinative of the result.

## 2. India

In its first public trust doctrine case, the Indian Supreme Court in *M.C. Mehta v. Nath* defined the scope of the doctrine to include “all eco-systems operating in our natural resources.”<sup>152</sup> The Indian Supreme Court sees the public trust doctrine as “a tool for exerting long-established public rights over short-term public rights and private gain.”<sup>153</sup> The Court later clarified that all natural resources are “held by the State as a trustee on behalf of the people and especially the future generations.”<sup>154</sup>

In *M.C. Mehta v. Nath*, the Supreme Court of India considered the legality of a classic example of a government agency official favoring a narrow private interest and attempting to privatize riverbed, floodplain, and forest resources that had been a public commons.<sup>155</sup> Specifically, the Court considered whether Span Resort, which developed a tourist resort in Kullu-Manali Valley, could dredge, blast, and otherwise block the flow of the Beas

---

147. *Op. of Justices*, 437 A.2d 597, 607 (Me. 1981).

148. *Id.* at 598-99.

149. 12 ME. REV. STAT. ANN. tit. 12, § 559(1) (1981).

150. *Op. of Justices*, 437 A.2d at 607.

151. *Id.* at 610.

152. *M.C. Mehta v. Nath*, (1996) 10 SCR 12, 13 (India).

153. *Ass’n for Env’t Prot. v. Kerala*, (2013) 7 SCC 226, 232 (India).

154. *Id.* at 231-32 (quoting *Fomento Resorts & Hotels Ltd. v. Martins*, (2009) 1 Unreported Judgments 2009, 0411 (India)).

155. *M.C. Mehta*, 10 SCR at 12.

River and create a new channel to divert the river to at least one kilometer downstream, as well as build in a state forest.<sup>156</sup>

The Minister of Environment and Forests, Kamal Nath, approved the project after developers initiated it without permission. In a rebuke of the Minister, the Court reported that the resort development project aimed to carry out “Kamal Nath’s dream of having a house on the bank of the Beas in the shadow of the snow-capped Zanskar ranges.”<sup>157</sup> The Court found that Kamal Nath’s family members had business interests in the development company.<sup>158</sup>

The Court ultimately held that the Span Resort project violated the public trust doctrine. It voided the prior approvals and leases and ordered restoration of the resources. Given that the leases to the company for “purely commercial purposes” involved a “large area of the bank of the River Beas which is part of a protected forest,” “ecologically fragile land,” and “part of the riverbed,” the court had no hesitation in holding that the Himachal Pradesh Government committed a patent breach of the public trust held by the state government.<sup>159</sup>

In reaching this holding, the Supreme Court of India referenced U.S. law and specifically cited *Illinois Central*<sup>160</sup> before it applied something akin to a nature’s trust canon, which put the onus on the elected law-making body to provide a clear statement of intent when public natural resources are leased to narrower commercial interests:

The resolution of this conflict in any given case is for the legislature and not the courts. If there is a law made by Parliament or the State Legislature the courts can serve as an instrument of determining legislative intent in the exercise of its powers of judicial review under the Constitution. But in the absence of any legislation, the executive acting under the doctrine of public trust cannot abdicate the natural resources and convert them into private ownership, or for commercial use.<sup>161</sup>

By looking for a clear statement from the “Parliament or State Legislatures” before upholding a privatization of trust resources, the Supreme Court of India shifted the locus of decision-making into a more public forum than is found at the agency level. Power is also more diffuse at the

---

156. *Id.* at 16-17.

157. *Id.* at 16.

158. *Id.* at 16-19.

159. *Id.* at 45.

160. *See id.* at 38-39.

161. *Id.* at 45.

Parliament or Legislative branch than an individual Minister of Environment and Forests, who in this case had a personal and business interest in the development project.<sup>162</sup> This removes from agency discretion decisions to privatize that have not been clearly expressed in legislation approved by elected officials.

Interestingly, this example did not involve a court interpreting a statute, but an absence of legislation. In essence, the Court in *M.C. Mehta* is saying the status quo is to guard public rights in the government-protected trust of all natural resources and any decision to alter the status quo and privatize the commons requires legislation.

In *M.C. Mehta* and subsequent cases, the Indian Supreme Court favorably quoted Professor Sax to describe the court's role in public trust cases: "When a State holds a resource . . . for the free use of the general public, a court will look with considerable scepticism upon any governmental conduct which is calculated either to relocate that resource to more restricted uses or to subject public uses to the self-interest of private parties."<sup>163</sup> The Indian Supreme Court cited the U.S. *Mono Lake* case for the related principle that the public trust "is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust."<sup>164</sup> Echoing *Illinois Central's* "no substantial impairment" test, in *M.C. Mehta v. Nath*, the court stated:

The esthetic use and the pristine glory of the natural resources, the environment and the eco-systems of our country cannot be permitted to be eroded for private, commercial or any other use unless the courts find it necessary in good faith, for the public goods and in public interest to encroach upon the said resources.<sup>165</sup>

Thus, the Indian Supreme Court has effectively established a presumption against privatization that can only be rebutted if the Court is convinced that the parliament or state legislature clearly expressed an intention to privatize and found it did not substantially impair the public interest.

---

162. *Id.*

163. *Id.* at 39; *M.I. Builders Private Ltd. v. Radhey Shyam Sahu*, (1999) 6 SCC 464, 518 (India); see *Intellectuals Forum, Tirupathi v. State of A.P.*, (2006) 3 SCC 549, 554-55, 575 (India).

164. *M.C. Mehta*, 10 SCR at 43 (quoting *Nat'l Audubon Soc'y v. Superior Court of Alpine Cty*, 33 Cal. 3d 419 (1983)).

165. *Id.* at 45.

Building on this foundation, the Indian Supreme Court explained in *Intellectuals Forum, Tirupathi v. State of A.P. & Ors.* that the state trustee's duty to "protect the people's common heritage" requires a "more demanding" level of judicial scrutiny of government actions than required for "the government's general obligation to act for the public benefit."<sup>166</sup> This controversy arose in the drought-prone region of Rayala Seema.<sup>167</sup> The Supreme Court was called upon to review a decision by Tirupathi Urban Development Authority (TUDA), a state agency, to alienate lands that had been used as "tank beds"—systems of water storage that allow surface water to be used for drinking, irrigating crops, and percolating down to replenish the groundwater supply.<sup>168</sup> The development of these lands for rental housing for government employees, a public interest, was in direct conflict with the public interest of protecting scarce water resources in an area that was rapidly gaining population; as the water table dropped, the concentration of toxic salts and fluorides increased.<sup>169</sup>

Not only did the Court reference Indian cases, but it also noted the responsibility of the state to protect the environment is found in international law.<sup>170</sup> Specifically, the Court referenced the United Nations Conference on the Human Environment's Stockholm Convention, to which India was a party, which declares: "The natural resources of the earth . . . must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate."<sup>171</sup>

The Court oriented its analysis of the conflict over these public trust resources by shifting the focus to the legislature and refusing to allow an administrative agency in the executive branch to privatize resources in the absence of legislation directing it to do so.<sup>172</sup> The Court declared, "there is no doubt about the fact that there is a responsibility bestowed upon the Government to protect and preserve the tanks."<sup>173</sup> The Court merged public trust concepts, starting with *Illinois Central*, with sustainable development concepts to support the Court's search for development that fully integrates environmental protection and does not compromise the resource needs of future generations.<sup>174</sup> In balancing the need for housing against the need for water protection, the Court was persuaded by a variety of factors,

---

166. *Intellectuals Forum, Tirupathi*, 3 SCC at 575.

167. *Id.* at 556.

168. *Id.* at 558.

169. *Id.* at 557, 576-77.

170. *Id.* at 572.

171. *Id.* (citing Stockholm Convention, ¶ 2 (1972)).

172. *Id.* at 571-72 (quoting *M.C. Mehta v. Nath*, (1996) 10 SCR 12, 14 (India)).

173. *Id.* at 572.

174. *Id.* at 574-75.

including that the housing was for middle and upper incomes so the absence of it would leave no one homeless, and an expert report on methods to revitalize the water storage capacity of the tanks.<sup>175</sup> The Court's order rejecting further housing development, but not ordering existing buildings to be removed, reflected these recommendations.<sup>176</sup>

While *Intellectuals Forum* shows how the court balances sustainable development concerns, the *Union of India v. Center for Public Interest Litigation* shows the breadth of India's concept of public natural resources. There, the Center for Public Interest Litigation sued India for selling wireless wavelengths on the 2G spectrum on a first-come-first-served basis rather than by auction.<sup>177</sup> The Supreme Court of India reviewed whether the "government has the right to alienate, transfer or distribute natural resources/national assets" in a manner that is not fair and transparent, and ultimately quashed the licenses the agency had issued because they did not comport with these standards.<sup>178</sup> The case is of interest here because of the Supreme Court's definition of natural resources and the Court's discussion of the method of resource alienation.

The Court defined "natural resources" as elements of the natural environment that are "renewable or nonrenewable," "provide economic and social services to human society, and are considered valuable in their relatively unmodified, natural, form."<sup>179</sup> The Court held that internet spectrum is a natural resource, and as such is held in trust for the people of India.<sup>180</sup>

As discussed, the Indian Supreme Court in *M.C. Mehta* held that natural resources are vested in a government-held trust.<sup>181</sup> Thus it is the government's duty "to protect the national interest and natural resources must always be used in the interests of the country and not private interests."<sup>182</sup> Like the *Illinois Central* "no substantial impairment" test, Indian jurisprudence has not prohibited the privatization of natural resources categorically; instead, it maintains that when alienating "scarce natural resources like spectrum" the state has a burden "to ensure that a nondiscriminatory method is adopted for distribution and alienation, which would necessarily result in

---

175. *Id.* at 578-79.

176. *Id.* at 579-80.

177. *Ctr. for Pub. Interest Litig. v. Union of India*, (2012) 3 SCR 147, 147-48, 232-33 (India).

178. *Id.* at 177. The court referenced the Equality Clause of the Indian Constitution as the basis for a fair and transparent method. *Id.*

179. *Id.* at 241.

180. *Id.* at 243-46.

181. *M.C. Mehta v. Nath*, (1996) 10 SCR 12, 13 (India).

182. *Ctr. for Pub. Interest Litig.*, 3 SCR 147 at 42 (describing the holding in *M.C. Mehta*, 10 SCR 12).

protection of national/public interest.”<sup>183</sup> This distribution process must be guided by constitutional principles including the doctrine of equality and ensure no action is detrimental to the larger public interest.<sup>184</sup>

The Court declared that *Illinois Central* is “part of the Indian jurisprudence” and the heart of the public trust doctrine is that it places duties on the government trustee to make decisions that protect future generations.<sup>185</sup> The Supreme Court described this duty as extending to the Court to exercise jurisdiction to ensure the state is protecting the public interest, indicating a higher level of scrutiny in its judicial review, before rejecting the spectrum licenses the agency had issued.<sup>186</sup>

### 3. Kenya

One way the commons is privatized is by allowing private entities to pollute and degrade that which is shared by many. A river that is a shared source of drinking water and other domestic uses, but also a recipient of polluted wastes, is an example of this. When such a situation presented itself in Kenya, the High Court of Kenya applied the public trust doctrine, among other laws, to ultimately order the Ministry of Water, the Nairobi Water Services Board, and the Olkejuado County Council to construct sewage treatment facilities.<sup>187</sup>

In *Waweru v. Republic*, the case originated as a criminal charge against owners of private plots in the Kiserian Township who were charged with discharging raw sewage into a public river.<sup>188</sup> These owners were developers of residential and commercial buildings who were supposed to manage the waste by use of septic tanks, but who placed overflow pipes on these tanks

---

183. *Id.* at 245-46.

184. *Id.* at 241-42, 248.

As natural resources are public goods, the doctrine of equality, which emerges from the concepts of justice and fairness, must guide the State in determining the actual mechanism for distribution of natural resources. In this regard, the doctrine of equality has two aspects: first, it regulates the rights and obligations of the State vis-à-vis its people and demands that the people be granted equitable access to natural resources and/or its products and that they are adequately compensated for the transfer of the resource to the private domain; and second, it regulates the rights and obligations of the State vis-à-vis private parties seeking to acquire/use the resource and demands that the procedure adopted for distribution is just, non-arbitrary and transparent and that it does not discriminate between similarly placed private parties.

*Id.* at 246.

185. *Id.* at 243-44.

186. *Id.* at 255-56.

187. *Waweru v. Republic*, (2007) AHRLR 149 (KeHC 2006) (H.C.K.) (Kenya).

188. *Id.* at 149-50.

and discharged raw sewage.<sup>189</sup> The Court discovered the government agencies that were responsible for building a sewage treatment facility had not done so and instead the land acquired for that purpose had been put to private use.<sup>190</sup>

The Court was concerned about how raw sewage would harm the use of the river by people and livestock downstream.<sup>191</sup> It interpreted the Kenyan Constitution's right to life, Section 71, in an expansive manner to include the right to a clean and healthy environment, based in part, on natural law.<sup>192</sup> Although the decision included international customary law on sustainable development, precautionary principle, and polluter pays, it also involved the public trust doctrine: "the essence of the public trust is that the state, as trustee, is under a fiduciary duty to deal with the trust property, being the common natural resources, in a manner that is in the interests of the general public."<sup>193</sup>

After this summation of the public trust doctrine, the Court favorably cited two Pakistani cases that similarly interpreted national constitutional provisions guaranteeing a right to life to include a right to a clean environment to be managed as a public trust.<sup>194</sup> Then the court reasoned that the Water Ministry and the County Council were responsible for establishing sewage treatment facilities based on statutory and public trust duties, because "[i]n the case of land resources, forests, wetlands and waterways to give some examples the government and its agencies are under a public trust to manage them in a way that maintains a proper balance between the economic benefits of development with the needs of a clean environment."<sup>195</sup> Before ordering the government entities to build sewage treatment facilities, the court opined that "water was given to us by the Creator and in whatever form it should never ever be the privilege of a few—the same applies to the right to a clean environment."<sup>196</sup>

After this case, Kenya adopted a new Constitution in 2010, which expressly incorporated the right to a clean and healthy environment and public trust principles.<sup>197</sup> Article 26 still contains the right to life, but now Article 42 contains the right to a clean and healthy environment for present

---

189. *Id.* at 151-52.

190. *Id.* at 152.

191. *Id.* at 155-56.

192. *Id.* at 156.

193. *Id.* at 158.

194. *Id.*

195. *Id.* at 160.

196. *Id.* at 163.

197. *See* CONSTITUTION (2010) (Kenya).

and future generations.<sup>198</sup> Additionally, Article 62 states that the national government owns public lands “in trust for the people of Kenya and [they] shall be administered on their behalf by the National Land Commission.”<sup>199</sup> Taken together, these constitutional provisions provide the Kenyan courts a strong basis to scrutinize trustee actions when a privatization appears to be underway and demand a clear statement from the legislature that a privatization has “no substantial impairment” to the public interest.

#### 4. Uganda

In Uganda, the High Court of Uganda applied a constitutionally-based public trust doctrine to protect a forest reserve from privatization by a sugar plantation. In *Advocates Coalition for Development and Environment v. Attorney General*, the High Court of Uganda reviewed the legality of a 50-year land use permit to allow the Kakira Sugar Works, an Asian company, to turn the Butamira Forest Reserve into a sugar plantation.<sup>200</sup>

Established in 1929 by the national government (at that time Busoga Kingdom Government), the Butamira Forest Reserve, that spanned 5.4 square miles, was a classic commons, a forest that local communities depended on for their livelihood through agroforestry and as a water supply.<sup>201</sup> Kakira Sugar Works had previously leased the forest property to obtain firewood, but the lease had not allowed the company to turn the forest reserve into a sugar plantation.<sup>202</sup> In 1997, Kakira Sugar Works again applied to the Ugandan Forestry Department for a permit to convert the forest reserve into their private sugar plantation, and this time the agency issued the permit.<sup>203</sup> After the local communities that used the forest protested, the Forest Minister took the issue to Parliament, which passed a motion to allow Kakira Sugar Works to convert the forest to a private sugar plantation.<sup>204</sup>

The Court reviewed the legislation and held that it violated the public trust doctrine as enshrined in Uganda’s Constitution. Article 237(2)(b) of the Ugandan Constitution provides the government “shall hold in trust for

---

198. *Id.* arts. 26, 42.

199. *Id.* arts. 62, 42, 21; *see also id.* art. 69 (containing environmental provisions related to government management and equitable sharing).

200. *Advocates Coal. for Dev. & Env’t v. Attorney Gen. (ACODE)*, (2004) Misc. Cause No. 0100, 14 (Uganda), <https://www.ecolex.org/details/court-decision/advocates-coalition-for-development-and-environment-acode-v-attorney-general-606187d3-09b8-4fbf-8859-5e2face91652/>.

201. *Id.* at 4-6.

202. *Id.*

203. *Id.* at 5-6.

204. *Id.* at 7.

the people” a wide variety of natural resources, including “forest reserves.”<sup>205</sup> The court held that it is clear that the “Butamira Forest Reserve is land which the government of Uganda holds in trust for the people of Uganda to be protected for the common good of the citizens.”<sup>206</sup> In accordance with a statute carrying out the constitutional provisions, the government can issue permits to use trust lands; however, in addition to approval by Parliament, this statute requires consent from the local community in the area around the reserved land.<sup>207</sup> In this case the Court had evidence that the government trustees had approved the permit in spite of local protests against the permit.<sup>208</sup> Accordingly, the Court in *Advocates Coalition* held this was a breach of the public trust doctrine because the local community did not approve, and rescinded the permit.<sup>209</sup>

Unlike the other public trust cases in this Article, the Uganda example gives voice to the beneficiaries of the trust and requires their consent before allowing a privatization. The High Court of Uganda rejected the Parliament’s and the Forestry Minister’s approval of the permit on the basis that a third essential party, the beneficiaries, did not consent to a permit that would have allowed a private corporation to destroy the forest reserve they relied on for food, fuel, and water.

In sum, the pattern of the cases from the United States, India, Kenya, and Uganda, show the significant role the judicial branch plays in protecting nature’s trust from privatization. The judicial review in these cases is exacting and can involve ordering the government trustees to take actions. When statutory interpretation is part of the case, the application of a substantive canon demanding a clear statement from the legislature that they intend to privatize the commons and that it is either in the public interest or there is “no substantial impairment” ensures the court is accurately interpreting legislative intent consistent with a presumption of protection. The interests of the diffuse majority of trust beneficiaries is furthered by the courts ensuring the political branch is fully engaged in a transparent process to assess the public’s interests in any privatization of nature’s trust. Beneficiaries’ interests are furthered even more by Uganda’s approach, which despite clarity from the Parliament in favor of privatization, required local beneficiary approval.

---

205. *Id.* at 14 (citing CONSTITUTION art. 237(2)(b) (1995) (Uganda)).

206. *Id.*

207. *Id.* at 16.

208. *Id.*

209. *Id.* at 16, 23.

#### IV. THE POLITICAL QUESTION DOCTRINE AND THE POWER OF FRAMING THE STATUS QUO

U.S. Supreme Court Justice Neil Gorsuch expressed a classic conservative critique of using courts to resolve policy questions, even those that are rooted in an interpretation of the Constitution: “As a society, we lose the benefit of the give-and-take of the political process and the flexibility of social experimentation that only the elected branches can provide.”<sup>210</sup> Justice Gorsuch maintains that politicization of the judiciary diminishes its legitimacy, and treats judges as “little more than politicians with robes.”<sup>211</sup> Recognition of a substantive canon for nature’s trust should be welcomed by those who oppose the politicization of the judiciary, as it shifts the judicial focus to the legislature in search of a clear statement and finding of “no substantial impairment” of the public interest when privatizing nature’s trust.

Further, the concern about politicizing the judiciary manifests in deciding whether a case is properly before the court, or justiciable. The principle that courts should not adjudicate political questions stems primarily from adhering to the separation of powers, and maintaining the distinct roles of the judiciary and the political branches of government. But merely characterizing a case as political should not render it immune from judicial scrutiny. Courts regularly adjudicate claims that are politically charged, such as the 2017 interpretation of the Trump Administration’s first travel ban.<sup>212</sup> As Alexis de Tocqueville observed, “[t]here is hardly any political question in the United States that sooner or later does not turn into a judicial question.”<sup>213</sup>

In the United States, deciding whether a claim is justiciable depends, in part, on whether the case requires the court to answer questions that are better directed to the legislative or executive branches of government.<sup>214</sup> If it is a political question, the court lacks subject matter jurisdiction.<sup>215</sup> Courts apply the political question doctrine to extricate themselves from questions that involve policy choices and value determinations constitutionally committed to the political branches of the legislature and executive. The test the U.S. Supreme Court announced in *Baker v. Carr* involves six

210. Neil Gorsuch, Liberals ‘N’ Lawsuits, *THE NAT’L REV.* (Feb. 7, 2005), <http://www.nationalreview.com/article/213590/liberalsnlawsuits-joseph-6>.

211. *Id.*

212. Exec. Order 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017).

213. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 441 (Liberty Fund 2012), [oll.libertyfund.org/titles/2284](http://oll.libertyfund.org/titles/2284).

214. *See Kanuk v. State Dep’t of Nat. Res.*, 335 P.3d 1088, 1096 (Alaska 2014).

215. *Id.*

elements, one or more of which will be “prominent on the surface” of any case involving a political question:

[(1)] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [(2)] a lack of judicially discoverable and manageable standards for resolving it; or [(3)] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [(4)] the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [(5)] an unusual need for unquestioning adherence to a political decision already made; or [(6)] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.<sup>216</sup>

If one of the *Baker* elements is “inextricable” from the case, dismissal on political question grounds is appropriate.<sup>217</sup>

Although the political question doctrine and clear statement canons are animated by separation of powers concerns, and result in requiring a decision from the political branches, the argument that a court should abstain from adjudicating based on the political question doctrine is the inverse of the clear statement canon for nature’s trust. The critical juncture is determining the status quo. If the starting point presumption is the trustees have a duty to the beneficiaries and nature’s trust cannot be privatized without a clear statement from Congress demonstrating the action is in the public interest, then the court must closely scrutinize trustee action to ensure the duties are upheld. Here, the political question doctrine cannot be a barrier to adjudication. The court should adjudicate and determine whether the political branches have provided sufficiently clear statements and findings demonstrating their action is in the public interest. By contrast, if the status quo is to allow privatization of the commons and in order to stop a privatization, the legislature or executive needs to act, then the court may find it should not adjudicate because it is a political question better left to the discretion of the political branches.

Two cases involving litigants asserting the government has a duty to protect the public trust in the atmosphere or climate demonstrate the power of framing the status quo. In *Kanuk v. State Department of Natural Resources*, when U.S. litigants asked the Supreme Court of Alaska to hold that Alaska’s public trust duty included protecting the atmosphere and that the level of

---

216. *Baker v. Carr*, 369 U.S. 186, 217 (1962) (classifying the political question doctrine as an issue of justiciability).

217. *Id.*

protection be dictated by the best available science, the Supreme Court of Alaska punted based on the political question doctrine.<sup>218</sup> Instead, the court held that the “limited institutional role of the judiciary supports a conclusion that the science- and policy-based inquiry here is better reserved for executive-branch agencies or the legislature.”<sup>219</sup> The court went on to acknowledge that when it comes to interpreting the state constitution and questions about the existence of a public trust related to protecting the atmosphere, the court has a constitutional mandate to ensure compliance with the constitution.<sup>220</sup> But because the court had already decided, based on political question, that it could not grant relief to the plaintiffs, it declined to decide whether the state had a public trust duty and had breached its fiduciary duties to protect the atmosphere from greenhouse gases.<sup>221</sup> Additionally, the court noted that its past application of the public trust doctrine has “been as a restraint on the State’s ability to restrict public access to public resources, not as a theory for compelling regulation of those resources.”<sup>222</sup> If the Alaskan Supreme Court’s starting point had instead been that its role is to scrutinize the political branches’ duties to protect nature’s trust (including the atmosphere), it would be abdicating an essential oversight function by failing to find it had subject matter jurisdiction.

By contrast, soon after the U.S. Presidential election of 2016, the U.S. District Court for the District of Oregon ruled in a major public trust and constitutional due process case to address climate disruption.<sup>223</sup> In addition to the findings discussed in Part I, the *Juliana* court ruled against the United States’ motion to dismiss based on arguments that the case raised non-justiciable political questions, among other arguments.<sup>224</sup> It found nothing approaching a clear reference to the subject matter of this case in the text of the Constitution committing the issue exclusively to another branch.<sup>225</sup> The court found the first *Baker* element inapplicable because climate change policy is “not a fundamental power on which any other power allocated exclusively to other branches of government rests.”<sup>226</sup> If the court’s proper role is to provide an avenue for beneficiaries of the trust to assert legally-protected

---

218. *Kanuk*, 335 P.3d at 1098-99.

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.* at 1102.

223. *See* *Juliana v. United States*, 217 F. Supp. 3d 1224 (D. Or. 2016).

224. *Id.* at 1234.

225. *Id.* at 1238. (“[T]he question is whether adjudicating a claim would require the Judicial Branch to second-guess decisions committed exclusively to another branch of government.”).

226. *Id.*

rights and grant relief when the government trustee fails to carry out its duties, the first *Baker* element should not be an obstacle in a nature's trust case.

The court found the second and third elements inapplicable, reasoning that it is within the court's competence to determine what emissions level would be sufficient to redress their injuries and that the court can answer the questions at issue without considering competing economic and other interests.<sup>227</sup> The court cautioned that just because a case is complex does not make it non-justiciable.<sup>228</sup> Further, the plaintiffs are seeking a court declaration that U.S. environmental policy infringes their "fundamental rights" and that directs the "agencies to conduct a consumption-based inventory of United States CO<sub>2</sub> emissions, and use that inventory to 'prepare and implement an enforceable national remedial plan to phase out fossil fuel emissions and draw down excess atmospheric CO<sub>2</sub> so as to stabilize the climate system and protect [ ] vital resources.'" <sup>229</sup> The court could provide this relief.<sup>230</sup> The court was also not persuaded that because the case concerns constitutional as opposed to statutory violations the court lacks any legal standards; courts regularly decide constitutional due process claims.<sup>231</sup>

The court found the fourth through sixth factors inapplicable and concluded that it could grant the plaintiffs' relief without expressing disrespect for the political branches.<sup>232</sup> Nor did the court see evidence of an "unusual need for unquestioning adherence to a political decision already made" or any 'potentiality of embarrassment from multifarious pronouncements by various departments on one question.'<sup>233</sup> The court concluded that "[a]t its heart, this lawsuit asks this Court to determine whether defendants have violated plaintiffs' constitutional rights. That question is squarely within the purview of the judiciary."<sup>234</sup> The court was particularly persuaded by the fact that youth plaintiffs "must depend on others to protect their political interests" and that their claims are rooted in a "diminishment of their voice in representational government."<sup>235</sup> Thus, in a nature's trust case, the understanding of separation of powers is informed by the judiciary's proper role as supervising the political branches carrying out trust duties; and that

---

227. *Id.*

228. *Id.* at 1239.

229. *Id.* (citation omitted).

230. *Id.*

231. *Id.*

232. *Id.* at 1240-41.

233. *Id.* at 1241 (quoting *Baker v. Carr*, 269 U.S. 186, 217 (1962)).

234. *Id.*

235. *Id.* (citation omitted).

role is heightened in the context of youth and future generations who are part of a vote-less diffuse majority.

Those concepts are also present in the now famous public trust case in the Philippines, *Oposa v. The Honorable Fulgencio S. Factoran, Jr.*<sup>236</sup> In *Oposa*, children brought a class action challenging the Department of Environmental and Natural Resources' issuance of timber licenses.<sup>237</sup> The petitioners claimed the acts of the agency misappropriated or impaired the Philippine rainforests and the vital life support systems they supply.<sup>238</sup> They alleged that in the twenty five years prior to bringing the case, the rainforests in the Philippines went from 53% to only 2.8% of the country's land mass, and that the government had issued licenses to commercial logging of more than the total remaining forests.<sup>239</sup>

The government argued the issue of not renewing or granting timber license agreements for clear-cutting was a political question for the legislature or executive.<sup>240</sup> The Supreme Court of the Philippines disagreed that policy formulation was an issue in the case.<sup>241</sup> It went on to explain that even if policy were an issue, the Philippine Constitution gives the judicial branch the power "to settle actual controversies involving rights which are legally demandable and enforceable, and to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government."<sup>242</sup> Unlike the U.S. Constitution, the Philippine Constitution, as interpreted by the Supreme Court of the Philippines, allows judicial review—even of political questions—if there has been a "grave abuse of discretion" by a political branch.<sup>243</sup>

The Supreme Court of the Philippines held in 1993 that the right to a balanced and healthful ecology is grounded in the national constitution, but that "these basic rights need not even be written in the Constitution for they are assumed to exist from the inception of humankind."<sup>244</sup> These rights carry with them "the correlative duty to refrain from impairing the

236. *Oposa v. The Honorable Fulgencio S. Factoran, Jr.*, G.R. No. 101083, 224 S.C.R.A 792, 803-04 (July 30, 1993) (Phil.).

237. *Id.* at 795-96.

238. *Id.* at 796-98.

239. *Id.* at 798.

240. *Id.* at 810-11.

241. *Id.* at 804-05.

242. *Id.* at 803-04 (quoting CONST. (1987), art. VIII, § 1 (Phil.)).

243. *Id.* (quoting CONST. (1987), art. VIII, § 1 (Phil.)).

244. *Id.* at 804 (citing CONST. (1987), art. II, §§ 15-16 (Phil.): "SEC. 16. The State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature."; "SEC. 15. The State shall protect and promote the right to health of the people and instill health consciousness among them.").

environment.”<sup>245</sup> The rights give rise to a cause of action. In a first of its kind ruling, the Court held that the plaintiffs can sue on behalf of future generations, based on the concept of “intergenerational responsibility” to protect the next generation’s constitutional right to a balanced and healthful ecology.<sup>246</sup>

In the Philippines, the scope of the public trust includes all natural resources.<sup>247</sup> The constitutional right involves “the judicious disposition, utilization, management, renewal and conservation of the country’s forest, mineral, land, waters, fisheries, wildlife, off-shore areas and other natural resources to the end that their exploration, development and utilization be equitably accessible to the present as well as future generations.”<sup>248</sup>

The *Oposa* Court reviewed Philippine President Corazon C. Aquino’s Executive Order identifying the primary trustee of these natural resources and the need for intergenerational responsibility.<sup>249</sup> That executive order expressly mandates that the Department of Environment and Natural Resources “shall be the primary government agency responsible for the conservation, management, development and proper use of the country’s environment and natural resources. . . to ensure equitable sharing of the benefits derived therefrom for the welfare of the present and future generations of Filipinos.”<sup>250</sup> Thus, the Supreme Court held the plaintiffs had a valid cause of action to attempt to cancel logging licenses in order to protect the remaining rainforests for existing and future generations, and that the court had jurisdiction because this was not a political question.<sup>251</sup> Like in *Juliana*, the court in *Oposa* was animated by protecting the rights of those with a muted political voice, and understood the status quo to be protecting public rights in nature’s trust, which requires the political branch trustees to adhere to judicially enforceable duties.

In cases involving nature’s trust, the judicial branch plays a critical role in ensuring the political branch trustees are protecting the beneficiaries’ interests. When the rights of future generations are at stake, who of course have no political representation, a bar to the courts based on political question grounds is misplaced. When the status quo is to keep nature’s trust in the commons and protect against privatizations, the court adjudicates and determines whether the political branches have provided sufficiently clear

---

245. *Id.* at 805.

246. *Id.* at 802-03.

247. *Id.* at 806.

248. *Id.* at 807.

249. *Id.* at 806.

250. *Id.* (quoting ADMINISTRATIVE CODE, § 4, Exec. Ord. No. 192 (Phil.)).

251. *Id.* at 809-12.

statements and findings demonstrating their action or inaction is in the public interest.

### CONCLUSION

Drinking water, beaches, a livable climate, clean air, forests, fisheries, and parks are all commons, shared by many users with diffuse and overlapping interests. These public natural resources are susceptible to depletion, overuse, erosion, and extinction, and they are under increasing pressures to privatize and keep out the public. The public trust doctrine provides a legal basis to guard against privatizing important public resources. As such, nature's trust is a critical doctrine to counter the ever-increasing enclosure and privatization of the commons as well as to order government trustees to take action that protects the diffuse majority of current and future generations. The judiciary's role in nature's trust is to guard the public interest and ensure the political branches are accountable trustees. Judicial skepticism when privatization of the commons is underway has manifested into something that should now be recognized as a substantive canon of statutory interpretation that looks for a clear statement from the legislature and finding of "no substantial impairment" of the public interest and a heightened close look at agency action. Such an approach furthers democracy by ensuring elected representatives in the legislature have publicly considered and expressed their intent to authorize a privatization of nature's trust backed by findings that it is in the public interest. This moves the locus of decision-making away from administrative agencies and back to the democratically-elected legislature. When the court understands its role in the trustee relationships and the status quo as protecting the commons from privatization, the political question doctrine should not be a viable obstacle to adjudicating controversies about privatizing nature's trust.