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Constitutionalizing the Public Trust Doctrine in Chile

Michael Blumm
Lewis & Clark Law School, blumm@lclark.edu

Matthew Hebert
Lewis & Clark Law School

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Michael C. Blumm*
Matthew Hebert**

Chile, whose public has experienced widespread dissatisfaction with Chilean environmental policies, seems poised to use the ongoing redrafting of its constitution to entrench the public trust doctrine in its fundamental charter. The ancient doctrine, emanating from Roman law and reflected in the 13th century Spanish treatise, *Las Siete Partidas*, offers the promise of making publicly enforceable commitments to environmental protection that under current Chilean law have been discretionary, and therefore unfulfilled. This paper explains what the public trust doctrine would mean to Chileans if the constitutional drafting process, scheduled for completion in 2022, includes the public trust doctrine, as advocated by an interdisciplinary white paper sponsored by the Chile California Conservation Council in 2021. The white paper drew on language from the Pennsylvania Constitution in making its recommendations. The proposed constitutional revisions would enable Chile to meet the environmental challenges ahead while accommodating the country's commitment to private property.

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Introduction

A widespread perception exists among Chileans that current government institutions are failing to protect the environment.[1] In a 2019 survey, eighty percent of Chileans stated that the environment was in a bad or very bad state.[2] It is no surprise that environmental protection has become an important issue in the ongoing constitutional reform taking place in Chile: in a plebiscite held on October 25, 2020, seventy-eight percent of Chilean voters decided that a new constitution was warranted.[3] Support was even greater in areas of the country with a high concentration of polluting industries, where eighty-nine percent of voters supported constitutional reform.[4]

Although the current constitution nominally "promote[s] the preservation of nature,"[5] it has proven ineffective, as the government often prioritizes private property rights over the protection of natural resources.[6] More than merely just being too weak, some think the current constitution inhibits environmental protection,[7] due to its overprotection of private property and the limits it imposes on the regulatory authority. For example, the government both grants and vigorously protects private rights in water use, rather than protecting water as a public resource.[8]

*Jeffrey Bain Faculty Scholar & Professor of Law, Lewis and Clark Law School.
**2L at Lewis & Clark Law School.

[1] CARL BAUER ET AL., THE PROTECTION OF NATURE AND A NEW CONSTITUTION FOR CHILE 8 (2021) [hereafter CHILEAN WHITE PAPER]. As explained *infra* note 9, the White Paper was a product of several scholars commissioned by the Chile California Conservation Exchange.

[2] Carolina Suez, *Chile Es el Pais En Que Mas Ha Crecido la Preocupacion por el Cambio Climatico*, IPSOS (Dec. 12, 2019) https://www.ipsos.com/es-cl/chile-es-el-pais-en-que-mas-ha-crecido-la-preocupacion-por-el-cambio-climatico. Seventy percent of Chileans surveyed also felt it was more important to prioritize the environment than economic growth. *Id.*

[3] CHILEAN WHITE PAPER, *supra* note 1, at 3.

[4] *Id.*

[5] CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] art. 19, No. 8(1), available in translation at https://constituteproject.org/countries/Americas/Chile?lang=en.

[6] *See infra* Part II, Section B.

[7] *See infra* Part II.

[8] *See* text accompanying *infra* notes 82–87.

Because of the ongoing constitutional reform, Chile has an opportunity to ensure that government produces greater environmental protection. One means of doing so, as advocated by the Chile California Conservation Exchange (CCCX),[9] would be to incorporate the public trust doctrine into the constitutional text. Adopting constitutional trust principles would impose a duty on the government to protect natural resources both for the present public and future generations, a duty absent in the current constitutional framework.[10] A constitutional public trust doctrine would obligate both the Chilean legislature and other branches of government to take action to protect the environment, and would also give courts a standard by which to judge the government's performance of this duty. Constitutionalizing the public trust doctrine would elevate public rights and provide the increased environmental protection that Chileans seek.[11]

The public trust, an ancient doctrine dating at least to the Roman Empire,[12] was imported into Spanish civil law through *Las Siete Partidas*, a 13th century Castilian treatise of Spanish law that contained language from the from the Justinian Institutes, endorsing what we now call the public trust doctrine.[13] The doctrine has a long history in the American-Anglo common law, where it has become "one of the most important and far-reaching doctrines of American property law."[14]

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[9] The CCCX organizes conferences for California and Chilean public officials, academics, and non-governmental organization staff to exchange information on environmental issues of mutual interest. THE WHITE PAPER, *supra* note 1, at 3. The third conference took place just as civil unrest was breaking out in Chile. *Id.* With travel restrictions preventing a conference in 2020, CCCX took the opportunity to explore the public trust doctrine as an option for reform in the constitutional process. *Id.*

[10] *See infra* Part II, Section B.

[11] Worth noting is that private rights will not be totally displaced. There is a strong tradition of accommodating private rights in the public trust doctrine jurisprudence. *See generally* Michael C. Blumm, *The Public Trust Doctrine and Private Property: The Accommodation Principle*, PACE ENVTL. L. REV. 649 (2010) (illustrating that the public trust doctrine's effect on private property rights has not been to eliminate private property).

[12] *See* J. INST., 2.1.1 (T. Sandars trans., 4th ed. 1867).

[13] *Compare* J. INST., 2.1.1 (T. Sandars trans., 4th ed. 1867), *with* LAS SIETE PARTIDAS, 3.28.3 (Robert I. Burns, S.J., ed., Samuel Parsons Scott, trans., 2001); *see* Paul A. Barresi, *The Right to an Ecologically Unimpaired Environment as a Strategy for Achieving Environmentally Sustainable Human Societies Worldwide*, 6 MACQUARIE J. INTL & COMP. ENVTL. L. 3, 21 (2009) (explaining that Las Siete Partidas incorporated the concept of *res communis* as restated by Justinian).

[14] DAVID C. SLADE, PUTTING THE PUBLIC TRUST DOCTRINE TO WORK 5 (2d ed. 1997); *see* Harrison C. Dunning, *The Public Trust: A Fundamental Doctrine of American Property Law*, 19 ENVTL. L. 515, 516 (1989) ("The public trust is a fundamental doctrine in American property law and should be recognized much more widely than it is today").

The doctrine maintains that natural resources are held in trust by the sovereign for the benefit of the people, including future generations.[15]

Chile is not the only South American country seeking increased environmental protection through constitutional reform. On September 28, 2008 the Ecuadorian electorate overwhelmingly affirmed a new constitution,[16] establishing a right of people to "benefit from the environment and the natural wealth . . . to enjoy the good way of living."[17] And in 2018, the Colombian Supreme Court, without using the term public trust, concluded that the Colombian government had a sovereign duty to protect the Amazon forest for future generations.[18] Both Colombia and Ecuador recognize constitutional rights of nature, rights possessed by an ecosystem—declaring that "[n]ature has the right to be restored."[19] Rights of nature reflect an indigenous tradition of seeing ecosystems as connected, and humans as a part of the ecosystem they inhabit.[20] Rights of nature are ecocentric, not anthropocentric. The movement to protect environmental rights constitutionally in Colombia[21] and Ecuador[22] provides some context for the movement in Chile.

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[15] *See* Mary Christina Wood, *Advancing the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations (Part I)*, 39 ENVT'L L. 43, 67 (2009) ("[T]he beneficiaries are citizens, both present and future generations").

[16] Alexandra Valencia, *UPDATE 6-Ecuador's Correa Wins New Powers in "Historic" Vote*, REUTERS (Sep. 28, 2008) (initial results showed "63 percent of voters backed Correa's proposed constitutional reforms . . ."), https://www.reuters.com/article/ecuador-correa/update-6-ecuadors-correa-wins-new-powers-in-historic-vote-idUSN2834023520080929.

[17] CONSTITUCIÓN POLÍTICA DE ECUADOR, art. 74 (2008), *available in translation at* https://pdba.georgetown.edu/Constitutions/Ecuador/english08.html.

[18] Future Generations v. Colombia Ministry of Government and others, Corte Suprema de Justica [C.S.J.] [Supreme Court], STC4360-2018 (April 4, 2018), *translation and excerpts available at http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2018/20180405_11001-22-03-000-2018-00319-00_decision-1.pdf*.

[19] CONSTITUCIÓN POLÍTICA DE ECUADOR, art. 72; Corte Constitucional [C.C.] [Constitutional Court], noviembre 10, 2016, Sentencia T-622/16, Relatoria de la Corte Constitucional [R.C.C.] (§ 10.2) (Colom.), translated in Dignity Rts. Project, Del. L. Sch., Judgment T-622/16 (The Atrato River Case) 110 (2019), https://delawarelaw.widener.edu/files/resources/riveratratodecisionenglishdrpdellaw.pdf.

[20] *See* David Takacs, *We Are the River*, 2021 U. ILL. L. REV. 545, 552–53 (2021) (chronicling the rights of nature movement and providing examples from around the world).

[21] CONSTITUCIÓN POLÍTICA DE COLOMBIA DE 1991, art. 79–80, *available in translation at https://www.constituteproject.org/constitution/Colombia_2015.pdf?lang=en*.

[22] CONSTITUCIÓN POLÍTICA DE ECUADOR, art. 74.

In this article we explore the benefits of constitutionalizing a Chilean public trust doctrine. Part I provides background information about civil unrest in Chile, the process of drafting a new Chilean constitution, and constitutional language suggested by the CCCX. Part II describes the shortcomings of environmental constitutional protection now in Chile, beginning with a description of the precipitating environmental events and explaining why the existing constitutional language inadequately protects the environment. Part III briefly explains the roots of the public trust doctrine, starting with its ancient Roman roots and incorporation into *Las Siete Partidas*, and describes its basic elements. Part IV supplies examples of the public trust doctrine in U.S. law, focusing on the constitutions of Pennsylvania and Hawaii that Chile might emulate. Part V explores the potential effect of a constitutional public trust doctrine in Chile. Two likely effects are the imposition of an enforceable duty on the government to take affirmative action to protect the environment and a requirement to prioritize environmental protection over private property rights. Part VI compares the enforcement mechanisms of Chile and the U.S., including Chilean environmental courts which could play an important role in early enforcement of the public trust doctrine. The article concludes by arguing for clear constitutional language to promote legislative and executive action to protect the environment and judicial review by Chilean courts to review legislative and executive efforts.

I. Background

Not long ago, Chile was considered one of the most stable democracies in Latin America.[23] However, late in 2019 Chile experienced violent civil unrest not seen since democracy was restored to the country in 1990.[24] In November 2019, Chile's political parties reached an agreement

[23] CHILEAN WHITE PAPER, *supra* note 1, at 5.
[24] *Id.* From 1973 to 1990, Chile was governed by a military junta lead by Augusto Pinochet. Pinochet came to power when the military executed a coup d'état to overthrow President Salvador Allende. The 1980 constitution is an

to restore stability, promising constitutional reform legislation.[25] The ensuing legislation established a three-stage process.[26]

The first step was a plebiscite, held on October 25, 2020, in which seventy-eight percent of Chilean voters supported a constitutional convention to draft a new constitution.[27] Support was even greater in the so-called environmental "sacrifice zones," that is, areas of the country with a high concentration of polluting industries.[28] Approval of the convention in these zones was eighty-nine percent, eleven percent higher than the general vote.[29]

Step two occurred in May 2021, when Chileans elected delegates to the convention.[30] The process required gender parity and the inclusion of indigenous people.[31] The convention is responsible for drafting a new constitution, and will hopefully have a draft by July 2022,[32] after which it will be dissolved.[33] The text must be approved by two-thirds of the delegates.[34]

Once approved, the third and final step will be a second plebiscite: Chilean citizens will vote before the end of 2022 to either approve or reject the new constitution.[35] If approved, the new

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enduring legacy of the military rule, and was heavily influenced by the neoliberal ideology of the Chicago Boys—a group of economists educated in free market and monetarist economic theories at the University of Chicago. CARL BAUER, AGAINST THE CURRENT: PRIVATIZATION, WATER MARKETS AND THE STATE IN CHILE 5,12–13 (1998).

[25] CHILEAN WHITE PAPER, *supra* note 1, at 5.

[26] *Id.*

[27] Pascale Bonnefoy, *'An End to the Chapter of Dictatorship': Chileans Vote to Draft a New Constitution*, NEW YORK TIMES (Oct. 25, 2020), https://www.nytimes.com/2020/10/25/world/americas/chile-constitution-plebiscite.html?searchResultPosition=6.

[28] THE WHITE PAPER, *supra* note 1, at 5.

[29] *Id.*

[30] Javier Sajuria & Julieta Suarez-Cao, *Chile Elected Delegates to Draft a New Constitution—and It's Not Tilted Toward the Elites*, WASHINGTON POST (Jun. 24, 2021), https://www.washingtonpost.com/politics/2021/06/24/chile-elected-delegates-draft-new-constitution-its-not-tilted-toward-elites/.

[31] The convention is made up of 77 female delegates and 78 male delegates; 17 of the 155 seats were reserved for indigenous people elected by indigenous citizens. *Id.*

[32] *See* Somini Sengupta, *Chile Writes a New Constitution, Confronting Climate Change Head On*, NEW YORK TIMES (Dec. 28, 2021) ("[Dr. Dorador, a Convention Member,] explains the timeline: a draft constitution by July") https://www.nytimes.com/2021/12/28/climate/chile-constitution-climate-change.html.

[33] CHILEAN WHITE PAPER *supra* note 1, at 5.

[34] *Id.*

[35] Bonnefoy, *supra* note 27.

constitution will take the place of the military junta's 1980 constitution.[36] If rejected, the 1980 constitution will remain in place.[37]

Scholars from Chile and the United States, organized by the CCCX, produced a May 2021 report examining the public trust doctrine and evaluating its potential role in the new Chilean constitution.[38] The report, concluding that the public trust doctrine would provide an important legal tool for environmental protection in Chile, suggested that the constitutional text should:

> (1) establish a duty on the part of the State and its subordinate agencies to protect nature (including the integrity of terrestrial, marine, and freshwater ecosystems) for the health and benefit of the public including future generations and (2) provide that when it is in the public interest to allow the private appropriation of natural resources the State has a duty to assure that such private use does not substantially diminish public rights and is in the public interest.[39]

The report emphasized that the duty created by the constitutional public trust doctrine must be enforceable by citizens.[40] Because the process is ongoing, whether these recommendations will be followed by the delegates is unknown.

II. Chile and the Environment

Demand for better environmental protection has been growing in Chile since 2004, when contamination from a nearby pulp mill led to a massive die-off of black necked swans at the Carlos Anwandter Sanctuary.[41] The swan population was virtually wiped out. Before the pulp mill, there were more than 5,000 swans in the sanctuary; within a year that number declined to just four.[42] Autopsies revealed that the swans died of high concentrations of iron and other metals in the

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[36] CHILEAN WHITE PAPER, *supra* note 1, at 5.
[37] *Id.*
[38] *Id.* A multidisciplinary group of academics in the United States, video conferencing from April to September 2020, produced a white paper on the public trust doctrine, which examined its history, judicial development, applications, and current constitutional expressions. *Id.* The white paper was used to produce the report, which addressed challenges and benefits of including the public trust doctrine in the new Chilean constitution. *Id.*
[39] *Id.* at 25.
[40] *Id.* at 24 ("For such a clause to be effective the Constitution must also enable citizens to enforce the public trust in courts and administrative agencies").
[41] *Id.* at 5.
[42] Steve Anderson, *Celco Trashes Chile River Yet Again, Shuts Down Plant*, PATAGONIA TIMES (Jun. 2007), http://www.patagoniatimes.cl/content/view/114/26/ [https://web.archive.org/web/20071021025259/].

water.[43] This tragedy produced widespread protests and substantially changed the Chilean public's awareness of environmental issues.[44]

A. Inadequacy of Institutional Change

Public sentiment on environmental issues after the black swan die-off affected presidential programs, court rulings, institutional changes, and the emergence of environmental campaigns.[45] Among the latter was the *Patagonia Sin Represas* (Patagonia Without Dams) campaign, which successfully halted construction of the HidroAysén project.[46] Chilean courts more frequently ruled in favor of the environment after the swan die-off.[47] For example, in 2009 the Supreme Court of Chile invalidated a permit for a coal-fired power plant[48] because the plant was located in an area restricted to recreational and green uses.[49] Institutional change included creating the Ministry of the Environment and the Superintendency of the Environment in 2010.[50] And in 2012, the Chilean legislature created specialized environmental courts.[51]

Despite these institutional changes, public demand for the government to do more to protect the environment has persisted.[52] From 2004 through 2018, news articles identified at least

[43] *Id.*
[44] CHILEAN WHITE PAPER, *supra* note 1, at 5.
[45] *Id.*
[46] *Id.* The HidroAysén would have built five dams on the Baker and Pascua rivers in Patagonia. *Id.* The project would have provided one-third of the country's electricity but would have flooded 15,000 acres of land. *Chilean Power Firm Colbun Puts Project on Ice*, BBC NEWS (May 31, 2012) https://www.bbc.com/news/business-18278167.
[47] CHILEAN WHITE PAPER, *supra* note 1, at 5.
[48] Correa v. Commission Regional Del Medio Ambiente of Valparasio, Supreme Court, No. 1219-09 issued on July 22, 2009 at www.poderjudicial.cl; THE WHITE PAPER, *supra* note 1, at 6.
[49] Rodrigo Ropert, *The Campiche Case: Legal or Ideological Factors?*, 37 ECOLOGY L.Q. 789, 789–90 (2010) (citing the zoning plan, Decree No. 116/87 issued by the Housing and Urban Ministry on Aug. 5, 1987) (arguing that the decision can be best explained as a reaction to the historical environmental problems in the area).
[50] CHILEAN WHITE PAPER, *supra* note 1, at 6.
[51] Law No. 20600, June 18, 2012 (Chile) https://www.bcn.cl/leychile/navegar?idNorma=1041361. For more information on Chile's environmental courts, see text accompanying *infra* notes 248–54.
[52] *See supra* note 2.

283 socio-environmental conflicts created by investment projects.[53] The *Instituto Nacional de Derechos Humanos*, estimates over 120 ongoing environmental conflicts.[54] A 2019 survey named Chile among countries in the world with the worst public perception of the health of the environment, with eighty percent of the Chilean public believing that the environment was in a bad or very bad state.[55]

In 2015, former Chilean President Michelle Bachelet initiated a process to draft a new constitution, initiating a series of self-convened meetings, known as *cabildos* and *encuentros*, at the local, provincial, and national level, but the process ended unsuccessfully in 2017.[56] Still, over 200,000 citizens met to discuss constitutional issues, after which social scientists issued a report[57] concluding that environmental protection was among the highest of public priorities.[58]

B. The Inadequacy of Current Constitutional Language

Protecting the environment remains a high priority in the constitutional reform process, reflecting the limits on environmental protection imposed by the current constitution.[59] Although the constitution does contain environmental language, including an express fundamental right to

[53] Carranza et al., *Socio-environmental conflicts: An Underestimated Threat to Biodiversity Conservation*, 110 ENV'L SCIENCE & POL. 46, 47–48 (2020) (defining socio-environmental conflicts as "[e]nvironmental conflicts that also include economic and/or social aspects . . .").
[54] *Map of Socio-Environmental Conflicts in Chile*, INSTITUTO NACIONAL DE DERECHOS HUMANOS, https://mapaconflictos.indh.cl/#/ (last visited Oct. 24, 2021).
[55] *See supra* note 2.
[56] Sergio Verdugo & Jorge Contesse, *The Rise and Fall of a Constitutional Moment: Lessons from the Chilean Experiment and the Failure of Bachelet's Project*, INT'L J. CONST. L. BLOG 1–2 (Mar. 13, 2018), http://www.iconnectblog.com/2018/03/the-rise-and-fall-of-a-constitutional-moment-lessons-from-the-chilean-experiment-and-the-failure-of-bachelets-project.
[57] *Id.* The report, issued to President Bachelet, was made by quantifying the number of mentions each issued received in the *cabildos* and *encuentros*.
[58] *See* CHILEAN WHITE PAPER, *supra* note 1, at 6 ("[P]rotection of the environment emerged as one of the highest priority [sic] and most selected concepts in the unsuccessful constitutional process initiated during the last Bachelet Adminitration"). Environmental protection emerged as a high priority even in the absence of an organized campaign.
[59] During the social unrest in October 2019, 65% of the self-convened councils across the country listed the environment as a priority issue. *Id.*

live in an unpolluted environment,[60] environmental protection is discretionary, often thwarted by the Chilean legislature, and fails to incorporate a public dimension of environmental protection.

The principal environmental protection in the Chilean constitution is a declared right to live in an unpolluted environment.[61] Article 19, No. 8(1) guarantees all persons "the right to live in an environment free of contamination. It is the duty of the State to ensure that this right is not jeopardized and to promote the preservation of nature."[62] The constitutional remedy for this individual right is found in Article 20, No. 2, often referred to as *recurso de protección*,[63] giving citizens recourse to the courts "when the right to live in a pollution-free environment is affected by an unlawful act or omission attributable to a particular authority or person."[64] However, Article 19, No. 8 anticipates potential conflicts between environmental and other fundamental rights, stating that "[t]he law may establish specific restrictions on the exercise of certain rights or freedoms to protect the environment,"[65] essentially authorizing the legislature to create exemptions to the constitutional environmental right.

Property rights and the right to carry out economic activity are among the rights which may be restricted to prevent environmental contamination. Article 19, No. 24, states: "Only the law can set the mode of acquiring property, of using, enjoying and disposing of it, and the limitations and obligations that derive from its social function. This [social function] includes . . . the public utility and health and the preservation of the environment . . . ."[66] The Chilean government may impose this limitation, the so-called "social function of property,"[67] without compensation, for the

[60] CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] art. 19, No. 8(1), available in translation at https://constituteproject.org/countries/Americas/Chile?lang=en; *see* text accompanying *infra* note 62.
[61] CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] art. 19, No. 8(1).
[62] *Id.*
[63] CHILEAN WHITE PAPER, *supra* note 1, at 6.
[64] CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] art. 20, No. 2.
[65] *Id.* art. 19, No. 8.
[66] *Id.* art. 19, No. 24.
[67] *Id.*

conservation of the environment.[68] The government has not invoked this provision enough to satisfy the Chilean public.

Two critical weaknesses with the constitution's environmental protection provisions are that they are discretionary, and they do not incorporate a public dimension of environmental protection. Although Article 19, No. 8(1) seems to impose a duty that the state "promote the preservation of nature," that clause has proved to be too vague, and Chilean courts have given it limited application,[69] applying only to the state, not to private actions, and only to the natural elements of the environment.[70] In practice, the state incorporates environmental protection only when statutes and regulations impose specific obligations or duties.[71] Moreover, the social function limitation on private property merely authorizes state action. The relevant language states that "[o]nly the law *can* set the mode of acquiring property, of using, enjoying and disposing of it";[72] this language imposes no duty on the government to act, which explains why this provision has not successfully curtailed the activities of private actors exercising individual rights adverse to environmental health.[73]

The lack of a public dimension in environmental protection is a serious weakness of the Chilean constitution. A public dimension would provide a collective, general interest, rather than just an individual interest.[74] Under the current constitution, only individuals can make

[68] CHILEAN WHITE PAPER, *supra* note 1, at 7. The Chilean constitution recognizes a right to compensation when property has been expropriated. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] art. 19, No. 24(3).
[69] CHILEAN WHITE PAPER, *supra* note 1, at 7.
[70] *Id.*
[71] *Id.*
[72] CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] art. 19, No. 24(2) (emphasis added). The translation provided by the report makes this point even more clear, "[o]nly the law *may* establish the manner by which property may be . . . used." CHILEAN WHITE PAPER, *supra* note 1, at 7 (emphasis added).
[73] Even when it has been applied, this limitation has been controversial and has not established a widely accepted legal theory to protect the environment by limiting individual economic rights. CHILEAN WHITE PAPER, *supra* note 1, at 7.
[74] *Id.*

environmental rights claims, and they can only do so if they have a personal interest that has been directly affected.[75]

The constitution also prioritizes economic freedom and private property rights over environmental rights,[76] establishing the "public economic order," a short list of fundamental economic principles that have operated to restrict environmental protection.[77] The 1980 constitution aimed to encourage a free market economy by "expanding private economic rights and liberties [and] tightly restricting state economic activity and regulatory authority . . . ." [78] Article 19, No. 23 guarantees the freedom to acquire ownership over all types of property,[79] a broad guarantee establishing free appropriation as a general constitutional principle. Article 19's language is limited by an exclusion in the subsequent clause—"except [that property] which nature has made common to all men or which should belong to the entire Nation and the law so declares"[80]—but the exclusion extends only to *public* natural resources, which the legislature is free to define.[81]

Water, for example, is not a declared public natural resource by the constitution.[82] Water rights are instead regulated by the Water Code, which announces that water is a "national good for

[75] *See* CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] art. 20 (establishing a cause of action for an individual whose rights have been affected).
[76] *See* BAUER, *supra* note 24, at 18 (explaining that Article 19, No. 8 "is not usually considered an 'economic' right, and it has weaker judicial protection than [other] economic rights . . .").
[77] *See id.* at 12, 17 (the public economic order "consists of broad private economic rights accompanied by tight limits on state economic activities and regulatory powers"). The heart of the economic order is found in Article 19, No. 21–26. *Id.* at 17.
[78] *Id.* at 12.
[79] CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] art. 19, No 23 ("The constitution guarantees all persons: Freedom to acquire ownership of all kinds of assets . . .").
[80] CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] art. 19, No. 23.
[81] *Id.* ("a law passed by qualified quorum *may* establish limitations or requirements for acquiring ownership over specific property.") (emphasis added).
[82] CHILEAN WHITE PAPER, *supra* note 1, at 8. In contrast, mineral resources are specifically protected by Article 19, No. 24(6), giving the state "absolute, exclusive, inalienable and imprescriptible dominion of all mines." CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] art. 19, No. 24(6). However, the legislature may allow individuals to use and exploit mineral resources through "mining concessions." *Id.* art. 19, No. 24(7).

public use."[83] However, the designation as a good for public use is undermined in practice, because while one cannot own the water itself, one can own the use of water.[84] And the constitution explicitly protects rights to use water once they have been privatized by the state.[85] Article 19, No. 24 provides that "[t]he rights of individuals over the waters, recognized or constituted in accordance with the law, will grant their holders the property over them."[86] So, once the legislature has granted a water use right, that right is constitutionally protected property, requiring compensation if taken by the state.[87]

Chile recognizes a doctrine of public ownership,[88] referring to goods or resources that are held by the state and excluded from private property.[89] The doctrine requires the state to manage these resources under a distinct legal regime.[90] But, the public ownership doctrine is not explicitly established in the Chilean constitution.[91] Under the current constitution the legislature is free to determine which goods or resources may be excluded from private ownership.[92] The legislature can even decide to revoke a public designation after previously recognizing it.[93]

III. History and Elements of the Public Trust Doctrine

Although the common law concept of a trust has no counterpart in Spanish law,[94] the root of the public trust doctrine is the same in both the English common law and Spanish civil traditions. Incorporating the public trust doctrine into the Chilean constitution would be as

[83] *See* BAUER, *supra* note 24, at 34 ("Waters are defined as 'national property for public use'").
[84] *Id.* at 35.
[85] CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] art. 19, No. 24(11).
[86] *Id.*
[87] *See id.* art. 19, No. 24(3)–(5) (guaranteeing compensation if a person's property is expropriated).
[88] THE WHITE PAPER, *supra* note 1, at 18.
[89] BAUER, *supra* note 24, at 34.
[90] THE WHITE PAPER, *supra* note 1, at 18.
[91] *Id.*
[92] *Id.*
[93] *Id.*
[94] *Id.* at 10.

consistent with the Spanish civil law tradition as recognizing the doctrine in U.S. law was with the English common law tradition. Understanding the doctrine's history, and its basic elements will help explain how it can remedy the ill effects of the current Chilean constitution.

A. Origins of the Public Trust Doctrine

The public trust doctrine is ancient, dating at least to the Roman Empire and the Institutes of Justinian. Book II of the Institutes announced that the air, running water, the sea, and the shores of the sea are, by the law of nature, common to all humankind.[95] The Institutes stipulated that "[n]o one, therefore is forbidden to approach the seashore, provided that he respects habitations, monuments, and the buildings, which are not, like the sea, subject only to the law of nations."[96] These recognized public rights—referred to as *res communis*—to access and make use of the sea formed the basis of the modern public trust doctrine.

Las Siete Partidas, a 13th century Spanish compilation of Roman civil law, imported the trust language from the Institutes of Justinian into Spanish law[97] by incorporating much of the *res communis* concept restated by Justinian.[98] Compiled during the reign of King Alfonso X of Castile,[99] the *Partidas* echoed Justinian, stating that the air, running water, and the sea and its shores "belong in common to the creatures of this world . . . ,"[100] adding rainwater to the list of property which belongs in common to all creatures.[101] Similar to the Institutes, the *Partidas* recognized that everyone has a right to use this common property, the *res communis,* so long as private property, such as a house or other edifice, was not damaged.[102]

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[95] J. INST., *supra* note 13, at 2.1.1.
[96] *Id.*
[97] LAS SIETE PARTIDAS, *supra* note 13, at 3.28.3.
[98] Barresi, *supra* note 13, at 21.
[99] *See* Laura Manzano Baena, CONFLICTING WORDS: THE PEACE TREATY OF MÜNSTER (1648) AND THE POLITICAL CULTURE OF THE DUTCH REPUBLIC AND THE SPANISH MONARCHY 68 n.5 (2011).
[100] LAS SIETE PARTIDAS, *supra* note 13, at 3.28.3.
[101] *Id.*
[102] *Id.*

A trust concept was incorporated into English common law after the Magna Carta, as reported by the treatise writer, Sir Mathew Hale in the 17th century.[103] English common law recognized public rights in tide and submerged lands owned by the king for the benefit of the people to navigate and fish.[104] The king had a duty to protect these public rights, according to Hale.[105]

The public trust doctrine made its way to America from English common law, where today it is "one of the most important and far-reaching doctrines of American property law."[106] A seminal American case was *Arnold v. Mundy*,[107] which involved a dispute over oyster harvesting on the Raritan River.[108] The New Jersey Supreme Court concluded that "the navigable rivers . . . the ports, the bays, the coasts of the sea, including both the water and the land under the water . . . are common to all the citizens, and that each has a right to use them according to his necessities . . ."[109] The court concluded that the state, as sovereign, could not divest citizens of their common right.[110] This principle, articulated by the New Jersey court, was soon adopted by the U.S. Supreme Court.[111]

[103] MATTHEW HALE, DE JURE MARIS (1670) *reprinted in* A HISTORY OF THE FORESHORE AND THE LAW RELATING THERETO 370, 374 (1888).
[104] *See* SLADE, *supra* note 14, at 5.
[105] HALE *supra* note 103, at 374.
[106] *See* SLADE, *supra* note 14, at 5.; Dunning, *supra* note 14.
[107] Arnold v. Mundy, 6 N.J.L. 1 (1821).
[108] *Arnold*, 6 N.J.L. at 38. Arnold sued the Mundy group for trespass. *Id.* at 9.
[109] *Id.* at 76–77.
[110] *Id.* at 78.
[111] Martin v. Waddell's Lessee, 41 U.S. 367, 420 (1842) (overturning the lower court decision in favor of Waddell, who traced his title to seventeenth century grants from the King of England (the state cannot "make a direct and absolute grant of the waters of the state, divesting all the citizens of their common right"); Illinois Cent. R.R. Co. v. Illinois (*Illinois Central*), 146 U.S. 387, 456 (1892) (endorsing *Arnold v. Mundy* and *Martin v. Waddell's Lessee*).

B. Elements of the Public Trust Doctrine

A trust has three components: the *res*, the trustee, and the beneficiary.[112] The *res* is the property, asset, or resource subject to the trust.[113] In the public trust doctrine, the *res* is the natural resource subject to protection.[114] The trustee is the entity responsible for managing the *res* for the benefit of the beneficiary.[115] Under the public trust doctrine, the trustee is the government.[116] The beneficiary is the person or entity benefiting from the property.[117] The public trust doctrine establishes the public, including future generations, as the beneficiary.[118]

Traditionally, the doctrine applied to the beds of navigable waters.[119] However, as Professor Joe Sax recognized decades ago, there was no reason the doctrine should not also apply to air pollution, the dissemination of pesticides, the location of rights of way for utilities, and strip mining or wetland filling.[120] Professor Mary Christina Wood has argued for an expanded scope of the doctrine because "the entire workings of nature operate together as a system."[121] Over the last 50 years, the public trust *res* has in fact expanded to include ecological protection.[122] For example, the constitution of Hawaii imposes a duty on the state to "conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources . . . ."[123]

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[112] HESS ET AL., BOGERT'S THE LAW OF TRUSTS AND TRUSTEES § 1 (2021).
[113] *Id.*
[114] Wood, *supra* note 15, at 78.
[115] HESS ET AL., *supra* note 112.
[116] Wood, *supra* note 15, at 68 (citing *Geer v. Connecticut*, 161 U.S. 519 (1896)).
[117] HESS ET AL., *supra* note 112.
[118] Wood, *supra* note 15.
[119] *See Illinois Central*, 146 U.S. 387 (1892) (applying the public trust doctrine to the lakebed of Lake Michigan to invalidate a grant made by the Illinois legislature, which attempted to convey to a railroad over 1000 acres of the lakebed of Chicago harbor).
[120] Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 557 (1970)
[121] Wood, *supra* note 15, at 83 ("Recognizing this, it is difficult to find any resource that can be summarily excised from public trust treatment").
[122] CHILEAN WHITE PAPER, *supra* note 1, at 10; *see* Wood, *supra* note 15, at 80.
[123] HAW. CONST. art. XI, § 1 (amended 1978). For further discussion of the Hawaiian constitution, see *infra* Part IV, Section D; see also In re Water Use Permit Applications (*Waiahole Ditch*), 9 P.3d 409, 448-49 (Haw. 2000). ("[W]e

The Pennsylvania constitution imposes a similar duty on that state.[124] In 2012, the Pennsylvania Supreme Court concluded that the constitution's trust language restricted the legislature's ability to promote natural gas fracking by preempting a local zoning ordinance,[125] and in 2017, the court struck down a legislative funding scheme that diverted trust money from natural resources conservation to balance the state budget.[126]

Central to understanding how the trust operates are the concepts of *jus publicum* and *jus privatum*. Title to trust property is split into two estates, one dominant and the other subservient.[127] The dominant title, *jus publicum*, held by the state, is the public's right to "fully use and enjoy trust lands and waters for commerce, navigation, fishing, bathing and other related public purposes."[128] The subservient title, *jus privatum*, is the private right to use or possess trust land.[129] Although the state can convey the *jus privatum* to a private owner, such a conveyance does not terminate the public's right to use the land.[130] The dominant *jus publicum* continues to be held by the state for the benefit of the public after a conveyance of the *jus privatum* to a private party.[131]

As an attribute inherent in sovereignty[132] the public trust doctrine is like the police power in that it cannot be abdicated.[133] But while the police power authorizes state action to protect the

see little sense in adhering to artificial distinctions [between surface and ground water] neither recognized by the ancient system nor borne out in the present practical realities of this state").

[124] PA. CONST., art. 1 § 27.

[125] Robinson Township v. Commonwealth, 83 A.3d 901, 978 (Pa. 2013) ("[W]e are constrained to hold that, in enacting this provision of Act 13, the General Assembly transgressed its delegated police powers which, while broad and flexible, are nevertheless limited by constitutional commands, including the Environmental Rights Amendment"). For further discussion of the Pennsylvania constitution, see *infra* Part IV.

[126] Pennsylvania Env'l Defense Foundation v. Commonwealth, 640 Pa. 55, 94 (2017). For further discussion of Pennsylvania's public trust doctrine, see *infra* Part IV, Section C.

[127] SLADE, *supra* note 14, at 6.

[128] *Id.*

[129] *Id.*

[130] *Id.*

[131] *Id.*

[132] CHILEAN WHITE PAPER, *supra* note 1, at 10; *Illinois Central*, 146 U.S. 387, 453 (1892).

[133] *Illinois Central*, 146 U.S. at 453 ("The state can no more abdicate its trust over property in which the whole people are interested . . . than it can abdicate its police powers . . .").

health, safety, and welfare of the public, the public trust doctrine imposes an obligation on the government to use its power and authority to protect natural resources.[134] Enforcement of this obligation requires independent judicial review to ensure the government is adequately protecting trust resources.[135] Including explicit trust language in the constitution serves to bind all state actors—the legislature and the executive in addition to the courts—so that trustee obligations extend to all levels of government.[136]

IV. Examples of Public Trust Doctrine from U.S. Law[137]

As a fundamental element of American property law,[138] the public trust doctrine has had widespread effects. Application of the doctrine has: 1) prevented a state from abdicating the duties imposed upon it, either by selling trust resources or regulating contrary to the trust; 2) ensured that the doctrine cannot be supplanted by legislation; 3) imposed trust duties on all levels of government, including local governments; 4) required that trust resources be managed for the preservation of the trust, not for the public interest generally; and 5) subjected private uses of trust resources to heightened judicial scrutiny to ensure against "substantial impairment" of trust resources. Comparing the breadth of these results of these cases may be useful to Chileans in terms of what a Chilean public trust doctrine might mean. This section explains some practical results of the application of the public trust doctrine in the U.S.

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[134] CHILEAN WHITE PAPER, *supra* note 1, at 10.
[135] *See* Sax, *supra* note 120, at 490 ("When a state holds a resource which is available for the free use of the general public, a court will look with considerable skepticism upon any governmental conduct which is calculated either to reallocate that resource to more restricted uses or to subject public uses to the self-interest of private parties").
[136] CHILEAN WHITE PAPER, *supra* note 1, at 10.
[137] For international examples of the application of the public trust doctrine, see Michael C. Blumm & Rachel D. Guthrie, *Internationalizing the Public Trust Doctrine: Natural Law and Constitutional and Statutory Approaches to Fulfilling the Saxion Vision*, 45 U.C.D. L. REV. 741 (2012).
[138] *See* Dunning, *supra* note 14.

A. The Non-Alienation Principle

The preeminent public trust case in the U.S. is *Illinois Central Railroad v. Illinois,*[139] involving a 1869 conveyance by the Illinois state legislature of over 1000 acres of the Lake Michigan lakebed along the central business district of Chicago to a railroad.[140] Four years later, the state legislature repealed the 1869 grant.[141] The Supreme Court eventually[142] concluded that an expansive grant of a public natural resource was necessarily revokable because the ownership of the lakebed was a subject of public concern.[143] Because the state held these lands in trust, they could not be alienated.[144]

The *Illinois Central* court ruled that the trust, "which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property."[145] The court made clear that the state was not free to abdicate its role as trustee; it could not leave trust resources "entirely under the use and control of private parties."[146] Moreover, the state may not allow "substantial impairment" of the public interest in trust resources,[147] giving the trust doctrine an environmental dimension.

[139] *Illinois Central,* 146 U.S. 387 (1892) (affirming the circuit court for the northern district of Illinois and concluding that the Illinois state legislature could revoke a grant to Illinois Central Railroad of a large portion of the bed of lake Michigan). Professor Sax considered this case as the "lodestar" of the doctrine in American law. Sax, *supra* note 120, at 489.
[140] Sax, *supra* note 120, at 489.
[141] *Id.; Illinois Central,* 146 U.S. at 449.
[142] It took some two decades for the case to reach the Supreme Court, as explained in Joseph D. Kearney & Thomas W. Merrill, *The Origins of the American Public Trust Doctrine: What Really Happened in Illinois Central*, 71 U. Chi. L. Rev. 799, 913–19 (2004).
[143] *Illinois Central,* 146 U.S. at 455.
[144] *Id.* Although, the court made clear that small concessions might be acceptable, so long as the public interest is not harmed. *Id.* at 455-56.
[145] *Id.* at 453.
[146] *Id.*
[147] *Id.*

B. The Obligations of the Trustee

In 1983, the California Supreme Court decided an important public trust doctrine case in *National Audubon Society v. Superior Court of Alpine County* (Mono Lake).[148] Mono Lake is a terminal desert lake located on the eastern side of the Sierra Nevada Mountains.[149] The saline lake has no outlet, losing water only through evaporation.[150] As the water evaporates, natural salts are left behind.[151] The lake is fed by several streams, to which the City of Los Angeles began acquiring water rights in the early 1900s.[152] In 1940, the city applied to the state water board for the right to appropriate water from the tributaries.[153] The board approved the diversion, believing it lacked the authority to deny the application, stating "[i]t is indeed unfortunate that the City's proposed development will result in decreasing the aesthetic advantages of Mono Basin but there is apparently nothing that this office can do to prevent it."[154] The city proceeded to increase its export of water in the 1970s by building a second aqueduct, consistent with its 1940 water right.[155] By October 1979, the lake had shrunk from an area of 85 square miles to 60.3 square miles, dropping 43 feet in elevation from its pre-diversion level and portending ecological disaster.[156]

The State Water Board claimed that it lacked the authority to protect the lake when it permitted the diversions in 1940, a proposition rejected by the California Supreme Court[157] because the public trust doctrine had always existed in the state and the scope of the doctrine

[148] Nat'l Audubon Soc'y v. Superior Ct. (*Mono Lake*), 33 Cal.3d 419 (1983) (reversing the lower court decision and held that the public trust doctrine applied to tributaries of a navigable water body).
[149] THE WHITE PAPER, *supra* note 1, at 11.
[150] *Mono Lake*, 33 Cal.3d at 429.
[151] *Id.*
[152] THE WHITE PAPER, *supra* note 1, at 11.
[153] *Mono Lake*, 33 Cal.3d at 427.
[154] *Id.* at 428.
[155] *Id.*
[156] *Id.* at 429.
[157] *Id.* at 447–48.

extended beyond the navigable waters to include non-navigable tributaries.[158] The court concluded that the state had a trust duty to protect "the people's common heritage of streams, lakes, marshlands and tidelands."[159] The court described this affirmative state obligation as a continuous supervisory duty.[160] The state fulfilled this directive by promulgating a 1994 plan to restore about half of the lake's water level, but climate change-induced drought has limited the effects of the plan.[161]

C. The Distinction Between a Trustee and a Proprietor

Pennsylvania's constitutional public trust doctrine[162] was ratified by a 1971 public referendum by a margin of nearly four to one.[163] The constitution recognizes the right of the people to clean air, pure water, and "to the preservation of the natural, scenic, historic and esthetic values of the environment."[164] Further, "Pennsylvania's natural resources are the common property of all the people, including generations yet to come."[165] The constitution establishes that the state, as the trustee, is obligated to conserve and maintain trust resources for the benefit of the public.[166]

The Supreme Court of Pennsylvania recently interpreted this constitutional language in *Robinson Township v. Commonwealth*[167] and *Pennsylvania Environmental Defense Foundation v.*

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[158] *Id.* at 437. The court explained that the purpose of the doctrine has changed over time, from protecting the triad of uses—navigation, commerce, and fishing—to including the preservation of trust lands in their natural state. *Id.* at 343.
[159] *Id.* at 441.
[160] *Id.* at 437 ("In the following review of the authority and obligations of the state as administrator of the public trust, the dominant theme is the state's . . . duty to exercise continued supervision over the trust"); *see also id.* at 447 ("Once the state has approved an appropriation, the public trust imposes a duty of continuing supervision over the taking and use of the appropriated water").
[161] Amend. of the City of Los Angeles' Water Right Licenses for Diversion of Water from Streams Tributary to Mono Lake, Cal. State Water Resources Control Bd. Decision 1631, 2–3 (1994) (ordering restrictions of water exports to restore the water level of Mono Lake to an elevation of 6,391 feet over the course of 20 years). However, the current elevation of Mono Lake is 6,379.9 feet, 11 feet below the restoration goal. *State of the Lake,* MONO LAKE COMMITTEE (last visited Jan. 29, 2022) https://www.monolake.org/learn/stateofthelake/.
[162] PA. CONST., art. 1 § 27.
[163] Pennsylvania Env'l Defense Foundation v. Commonwealth, 640 Pa. 55, 64 (2017).
[164] PA. CONST., art. 1 § 27.
[165] *Id.*
[166] *Id.*
[167] Robinson Township v. Commonwealth, 83 A.3d 901 (Pa. 2013).

Commonwealth.[168] In 2013, in *Robinson Township*, a plurality of the Supreme Court of Pennsylvania struck down as unconstitutional a statute promoting natural gas extraction through hydraulic fracking by preempting local zoning laws.[169] The court decided that the local government was a trustee, and eliminating local control over trust resources violated the public trust doctrine.[170] The court stated, "[P]ublic trustee duties were delegated concomitantly to all branches and levels of government in recognition that the quality of the environment is a task with both local and statewide implications."[171] This delegation was to "ensure that all government neither infringed upon the people's rights nor failed to act for the benefit of the people. . . ."[172] So, in Pennsylvania, all branches of government are trustees, even local governments.[173]

In 2017, in *Pennsylvania Environmental Defense Foundation*, the Supreme Court of Pennsylvania reaffirmed *Robinson Township* and held that rental payments from leases used to extract oil and gas could fall within the corpus of the trust.[174] The money from these leases was to go to the Department of Conservation and Natural Resources, under the Conservation and Natural Resources Act.[175] However, legislative amendments between 2008 and 2014 had redirected $335 million from conservation to the state's general fund.[176] The court ruled that although the legislature had broad and flexible police powers, those powers were "expressly limited by fundamental rights reserved to the people in Article I of [the state] Constitution."[177] Among the fundamental rights reserved to the people in Article I were the rights announced in the 1971

[168] *Pennsylvania Env'l Defense Foundation*, 640 Pa. at 55.
[169] *Robinson Township*, 83 A.3d at 1000.
[170] *Id.* at 913.
[171] *Id.* at 963.
[172] *Id.*
[173] *Id.* at 913.
[174] Pennsylvania Env'l Defense Foundation v. Commonwealth, 640 Pa. 55, 96 (2017).
[175] *Id.* at 71.
[176] *Id.* at 78 (citing John C. Dernbach, *The Potential Meanings of a Constitutional Public Trust,* 45 ENVT'L L. 463, 488 (2015)).
[177] *Id.* at 88.

constitution.[178] Therefore, the police powers of the state could not override the public trust doctrine obligations enshrined in the constitution.[179]

The Pennsylvania court rejected the state's argument that proceeds from the sale of natural resources do not fall within the corpus of the trust, stating "the Commonwealth improperly conceives of itself as a mere proprietor of those public natural resources, rather than a trustee."[180] The state was not free to sell off trust assets for any purpose that might benefit the public in some way; it had to fulfill its fiduciary obligation to preserve trust resources.[181] The court concluded that when a trust asset is sold, all revenue received in exchange for that asset must return to the trust as part of its corpus.[182] Fulfillment of the public trust doctrine obligations is narrower than simply acting in the public interest.

D. The Principle of Heightened Judicial Scrutiny

Hawaii has also codified the public trust doctrine in its constitution.[183] The Hawaii Supreme Court interpreted the state's constitutional public trust doctrine in the *Waiahole Ditch* case,[184] involving a transbasin diversion of groundwater[185] for large-scale agricultural uses harming native Hawaiian users.[186] The court "reaffirm[ed] that . . . the public trust doctrine applies

[178] *Id.* (citing PA. CONST., art. I, § 27).
[179] *See id.* ("As forcefully pronounced in Section 25, the rights contained in Article I are 'excepted out of the general powers of government and shall forever remain inviolate'").
[180] *Id.* at 94.
[181] *Id.*
[182] *Id.*
[183] HAW. CONST., art. XI § 1 states:

> For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State. All public natural resources are held in trust by the State for the benefit of the people.

[184] *Waiahole Ditch*, 9 P.3d 409 (Haw. 2000).
[185] *Id.* at 422–23.
[186] *Id.* at 423–24.

to all water resources without exception or distinction."[187] Moreover, use of this trust resource extended beyond the traditional triad of fishing, navigation, and commerce to include recreation, protection of ecology, domestic use, and traditional Hawaiian uses.[188] The court rejected the state's argument that the public trust doctrine had been supplanted by the water code because the trust exists independent of any statute—both constitutionally and as an inherent attribute of sovereignty.[189] The court concluded that private uses, like groundwater exports that interfere with trust uses, are subject to a higher level of judicial scrutiny, and that commercial use is not among the public purposes protected by the trust.[190]

The public trust doctrine can provide robust environmental protection because it imposes a duty on the state not merely to act in the public interest, but to preserve trust resources for the benefit of current and future generations. This duty cannot be abdicated by the state, nor can the trust be supplanted by legislation. The doctrine is inherently anti-monopolization, limiting privatization and subjecting private commercial uses of trust resources to heighted judicial scrutiny. The public trust requires the state trustee to protect trust resources against substantial impairment of the public's interest in those resources.

V. The Potential Effect of a Constitutional Public Trust Doctrine in Chile

The 1980 constitution has failed to adequately protect the Chilean environment and nature.[191] The ongoing constitutional drafting process offers an opportunity to incorporate constitutional protection of the environment.[192] Constitutionalizing the public trust doctrine would empower the Chilean government to regulate natural resources without the threat of a

[187] *Id.* at 445.
[188] *Id.* at 449.
[189] *Id.* at 442–445.
[190] *Id.* at 450.
[191] THE WHITE PAPER, *supra* note 1, at 17.
[192] *Id.*

compensatory taking. The public trust doctrine would also impose an obligation on the state trustee to protect the environment.

A. The Rule of No Compensation

Where private rights exist in public trust resources, the state's *jus publicum* enables regulation without paying compensation.[193] Although the U.S. Constitution prohibits government taking of private property for public use without payment of just compensation,[194] the U.S. Supreme Court in *Lucas v. South Carolina Coastal Council*[195] held that no compensation is required if a regulation mirrors an inherent limit in private title through a restriction "that background principles of the State's law of property and nuisance" already place upon land ownership.[196] The public trust doctrine is such a background principle that exempts state regulation of trust resources from takings claims.[197]

Chilean law has a constitutional provision that authorizes the government to expropriate property for public use, but like takings in U.S. law not involving background principles, expropriation requires compensation.[198] Moreover, absent an agreement, compensation must be made in cash, and in response to a complaint about the justifiability of the expropriation, a judge

[193] *Id.*
[194] U.S. CONST. amend. V.
[195] Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).
[196] *Id.* at 1029. The law or regulation must do no more than duplicate the outcome that could have been achieved by adjacent landowners suing in court. *Id.*
[197] *See* Michael C. Blumm & Rachel G. Wolfard, *Revisiting Background Principles in Takings Litigation*, 71 FLA. L. REV. 1165, 1183–84 (2019) (explaining recent case law).
[198] CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] art. 19, No. 24(3), available in translation at https://constituteproject.org/countries/Americas/Chile?lang=en.

> No one can, in any case, be deprived of his property, the assets affected or any of the essential faculties or powers of the domain, but by virtue of a general or special law that authorizes expropriation for public utility or national interest, qualified by the legislator. The expropriated may protest the legality of the expropriation act before the ordinary courts and shall always have the right to be compensated for the patrimonial damage effectively caused, which will be determined by agreement or by a sentence dictated in accordance with the law by the said courts. *Id.*

may suspend the expropriation.[199] The public trust doctrine would not require compensation when regulating consistently with the trust.

B. National Goods for Public Use and the Social Function of Property

Two provisions of the current Chilean constitution fulfill functions similar to the public trust doctrine: 1) "national goods for public use"[200] and 2) limitations on private property based on the "social function" of the property.[201] The doctrine of public ownership (*dominio público*) is like the public trust doctrine in that both refer to resources held by the state for particular purposes.[202] Public ownership excludes these assets from compensable private property obligations and requires the state to manage the assets under a distinct legal regime.[203] The government cannot dispose of publicly owned resources, but instead must manage them so they continue to fulfill their public purpose.[204] However, *dominio público* is not recognized in the Chilean constitution.[205] The current constitution does reference goods that necessarily belong to the entire nation,[206] but this provision is merely an exception to the rule that all goods are free for appropriation.[207] There is also no existing constitutional obligation imposed on the government to protect nature; the government is simply authorized to do so.[208] The Chilean government has not pursued that option aggressively under the current framework, and the Chilean public is demanding change.

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[199] *Id.* art. 19, No. 24(4)–(5).
[200] CHILEAN WHITE PAPER, *supra* note 1, at 17.
[201] *Id.*
[202] *Id.* at 18.
[203] *Id.*
[204] *Id.*
[205] *Id.*
[206] CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] art. 19, No. 23(1) ("[E]xcept for [property] which nature has made common to all men or which should belong to the whole nation and the law so declares"). However, since the constitution does not define which property is common to all, this clause has little effect on the actions of the Chilean government.
[207] CHILEAN WHITE PAPER, *supra* note 1, at 18*; see also* text accompanying *supra* notes 88–93.
[208] CHILEAN WHITE PAPER, *supra* note 1, at 18.

Nor does the constitution define which assets are in public ownership.[209] The legislature is free to determine which resources are in public ownership and can even rescind that designation.[210] Mineral resources are an exception; they are constitutionally assigned to public ownership—government mineral ownership is constitutionally "declared absolute, exclusive, inalienable, and imprescriptible."[211] Despite this constitutional proclamation, Chilean mining law authorizes the government to grant concessions to private parties that, once granted, are constitutionally protected private property.[212]

The social function of private property, similar to the public trust doctrine, provides the government with a defense against takings.[213] Two modifications to private property may be made under the Chilean constitution: expropriation and limitation.[214] As discussed previously,[215] expropriation allows the state to take property from an individual for public use with payment of compensation.[216] Property serving a social function, on the other hand, enables the government to impose limitations and obligations on that property without compensation.[217] However, restrictions based on social function are severely limited by the "principle of equal distribution of public burdens,"[218] and may still be declared unconstitutional if violative of that principle.[219] Significantly, the social function doctrine operates only defensively, imposing no affirmative obligation on the government to regulate.[220]

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[209] CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] art. 19, No. 23(1).
[210] CHILEAN WHITE PAPER, *supra* note 1, at 18.
[211] CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] art. 19, No. 24(6).
[212] *Id.* art. 19, No. 24(7), (9); *See also supra* Part II.
[213] CHILEAN WHITE PAPER, *supra* note 1, at 19.
[214] CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] art. 19, No. 24.
[215] *See supra* note 198 and accompanying text.
[216] CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] art. 19, No. 24(3).
[217] BAUER ET AL, *supra* note 1, at 19; CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] art. 19, No. 24(2).
[218] CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] art. 19, No. 20.
[219] CHILEAN WHITE PAPER, *supra* note 1, at 19. The principle of equal distribution of public burdens is like a regulatory taking U.S. law. *Id.*
[220] *Id.*

The public trust doctrine, on the other hand, imposes an affirmative duty on the government to protect the environment—a duty enforceable by the public. Because Chile is a country with a civil law tradition, constitutionalizing the trust could have two beneficial outcomes: 1) it would require the legislature and administrative bodies to adopt measures to protect the environment;[221] and 2) it would give courts a standard by which to measure state efforts to implement the trust.[222]

VI. Enforcing the Public Trust Doctrine in Chile

Legislative action in Chile is slow and uncertain.[223] The Chilean water code, for example, has scarcely changed since its 1981 enactment, despite widespread agreement that it needs reform.[224] Constitutional restrictions, such as the requirement for qualified quorums for the legislature to regulate the basic organization of the public administration and define the powers of the courts, have contributed to delayed legislative action.[225] Another cause is the constant threat of intervention by the Constitutional Court, a court that has restrictively interpreted the scope of the Constitution, especially on economic matters.[226] Although the U.S. Congress is also slow to act, federalism allows a release-valve at the state level. State legislatures can be fairly active in environmental issues and in land use planning.[227] The unitary nature of the Chilean government means that no similar release valve exists to side-step the legislative inactivity of the national

[221] *Id.*
[222] *Id.*
[223] *Id.* at 21.
[224] *Id.* If not addressed by the constitutional convention, it does seem the water code is likely to face reform soon. *See* Dave Sherwood, *Chile's Dictatorship-era Water Code Is Getting a Makeover*, REUTERS (Aug. 4, 2021), https://www.reuters.com/world/americas/chiles-dictatorship-era-water-code-is-getting-makeover-2021-08-05/.
[225] THE WHITE PAPER, *supra* note 1 at 21 (citing CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] art. 38, 77). Additionally, article 19, No. 23 requires a law of qualified quorum to establish limitations on certain property. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] art. 19, No. 23(2).
[226] CHILEAN WHITE PAPER, *supra* note 1, at 21.
[227] *E.g.*, Oregon Land Use Act, S.B. 100 (1973) (mandating comprehensive land use plans for cities, counties, and the state).

congress.[228] Therefore, vague, general language will not be quickly implemented by the Chilean legislature, but a clear constitutional standard could provide political incentives to take action.[229]

Like the U.S., Chile has a presidential system of government.[230] Although the Chilean president has greater influence over the legislative process than the American president,[231] both systems struggle to enact legislation when the legislature and the presidency are controlled by different political parties.[232] Chilean presidential power is stronger than under the U.S. system,[233] but independent regulatory power is rarely invoked and has been interpreted narrowly by the courts.[234] The Constitutional Court has narrowly interpreted the regulatory power of the Chilean president through the "reservation of law" doctrine, which reserves certain types of regulation to statutory law.[235] Moreover, the Comptroller General of the Republic must also approve administrative regulations before they can be promulgated.[236] This requirement has imposed a kind of veto, leaving little room for experimentation and innovation.[237] Thus, regulatory power in Chile is much weaker than its system of government might suggest.[238]

Chile has no agencies that are independent of the president, and most agencies are run by political appointees of the president.[239] Public service lacks stability, professionalism, and training, and there is little incentive to develop a career in administrative agencies.[240] Thus, there is a high

[228] CHILEAN WHITE PAPER, *supra* note 1, at 21.
[229] *Id.*
[230] *Id.*
[231] *See* CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] art. 32 (outlining the special powers of the Chilean president).
[232] THE WHITE PAPER, *supra* note 1, at 21.
[233] *Id.*
[234] *Id.* at 22.
[235] *Id.*
[236] *Id;* CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] art. 98 ("[T]he Comptroller General of the Republic shall exercise control over the legality of the accts of the Administration").
[237] THE WHITE PAPER, *supra* note 1, at 22.
[238] *Id.*
[239] *Id.*
[240] *Id.*

degree of turnover.[241] All of these factors contribute to an administrative system that is comparatively weaker than its U.S. counterpart.[242] However, a clear constitutional directive incorporating the trust could spur regulatory authority,[243] especially if citizens are able to use the trust doctrine to insist that the government assume an active duty to protect nature through regulatory agencies.[244]

Chile has adopted a system of specialized courts—some have jurisdiction over labor, some over family disputes, some over environmental issues.[245] These lower courts are subject to review by respective Courts of Appeal, which are in turn subject to review by the Supreme Court.[246] There is also a separate Constitutional Court, with jurisdiction distinct from the Supreme Court.[247]

Chile has three specialized environmental courts, with jurisdiction split geographically over the north, center, and south of the country.[248] These environmental courts can order the restoration of environmental damage and invalidate illegal administrative actions.[249] However, their jurisdiction is limited to claims 1) for the reparation of environmental damage against executive decrees in specified matters, 2) against directives of the superintendency of the environment, 3) against authorizations within the environmental impact assessment system for investment projects, and 4) against other administrative acts related to the environment.[250] But the

[241] *Id.*
[242] *Id.*
[243] *Id.* The Chilean Constitutional Court has restricted the "adjudicative, standard setting, and sanctioning powers of administrative agencies in the fields of consumer protection, water use enforcement and urban planning . . . ." *Id.* A constitutional public trust doctrine would alleviate these restrictions because regulatory agencies, when acting pursuant to the trust, would be fulfilling their constitutional responsibilities. *Id.*
[244] *Id.*
[245] *Id.* at 23.
[246] *Id.*
[247] *Id.*
[248] *Id.*
[249] *Id.*
[250] *Id.*

jurisdiction of the environmental courts does not extend to conflicts over the application of regulations generally, even regulations pertaining to public waters, forests, and coastal areas.[251]

The Chilean public generally has a positive perception of these courts, especially in trials related to environmental damage.[252] Environmental courts could become the primary enforcers of the public trust doctrine.[253] By expanding their jurisdiction to include natural resource management, these courts could play an important role in enforcing the constitutional public trust doctrine, if the constitution clearly imposes a duty on the government to protect the environment.[254]

Conclusion

With clear and specific language, constitutionalizing the public trust doctrine could encourage and empower the Chilean legislature and executive to implement and administer the trust, and enable Chilean courts to review the performance of the other branches. The Chilean White Paper sponsored by the CCSX proposed the Pennsylvania constitutional language as a model.[255] The language should impose an active duty on the government to protect the environment for the benefit of the public, including future generations.[256] Importantly, citizens

[251] *Id.* Jurisdiction only extends to these regulations if related to situations of environmental damage or to an administrative instrument of environmental management. *Id.*
[252] *Id.*
[253] *Id.*
[254] *Id.*
[255] *See id.* at 25 ("We have seen that the Public Trust Doctrine has been an important tool for protecting nature in the United States, and has been specifically written into the constitutions of some states—notably Pennsylvania and Hawaii. . . . Therefore, notwithstanding the significant institutional and cultural differences between Chile and the United States, this report recommends . . . the inclusion of a clause in the new Constitution that is inspired by the Public Trust Doctrine").
[256] This duty should be enforceable by citizens. The CCCX report suggests the following principles:

> [A] constitutional clause for the protection of nature that is inspired by the Public Trust Doctrine should (1) establish a duty on the part of the State and its subordinate agencies to protect nature including the integrity of terrestrial, marine, and freshwater ecosystems for the health and benefit of the public including future generations and (2) provide that when it is in the public interest to allow the private appropriation of natural resources the State has a duty to assure that such private use does not substantially diminish public rights and is in the public interest. For such a clause

must be empowered to enforce the public trust doctrine both in courts and administrative agencies,[257] so that implementation of the public trust doctrine is not discretionary.

The public trust doctrine is fully consistent with Chilean legal doctrines like the social function of property and with the Spanish civil tradition codified in *Las Siete Partidas*.[258] Because a constitutional public trust doctrine would override existing constitutional protections of private property,[259] adoption of the doctrine would elevate the social function of property from a mere factor, enforced at the legislature's discretion, to a fundamental doctrine in Chilean private property law.[260] The public trust doctrine is capable of protecting the Chilean environment while still accommodating private property,[261] yet will provide the Chilean government with a powerful directive to confront current and future environmental challenges.

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to be effective the Constitution must also enable citizens to enforce the public trust in courts and administrative agencies. *Id.* at 24.

[257] *Id.*

[258] The public trust doctrine would also be consistent with rights of nature recognized in other Latin American countries, see text accompanying *supra* notes 19–20.

[259] *See supra* Part II, Section B.

[260] THE WHITE PAPER, *supra* note 1, at 24.

[261] Blumm, *supra* note 11, at 650 ("The doctrine actually functions to mediate between public and private rights").