

# ARTICLES

## CONSTITUTIONALIZING THE PUBLIC TRUST DOCTRINE IN CHILE

BY

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*The Chilean public, which has expressed widespread dissatisfaction with Chile's environmental policies, recently rejected a new constitution that would have entrenched the public trust doctrine in the country's fundamental charter. The rejection had little to do with the public trust provisions in the proposed constitution, and Chile's president has promised a revised constitution will be drafted for a second referendum soon. This Article maintains that the revision should continue to include the public trust provisions.*

*The ancient public trust doctrine, which emanated from Roman law and was 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. An interdisciplinary white paper sponsored by the Chile California Conservation Council in 2021 drew on language from the Pennsylvania Constitution in recommending that the convention drafting the constitution include the public trust doctrine. The convention did in fact include public trust principles in the proposed constitution that was rejected. This Article explains what the public*

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*trust doctrine would mean to Chileans if future iterations of the constitution retain public trust doctrine language, arguing that such revisions will better position Chile to meet the environmental challenges ahead while accommodating the country's commitment to private property.*

I.	INTRODUCTION .....	650
II.	BACKGROUND .....	653
III.	CHILE AND THE ENVIRONMENT .....	656
	A. <i>Inadequacy of Institutional Change</i> .....	656
	B. <i>The Inadequacy of Current Constitutional Language</i> .....	658
IV.	HISTORY AND ELEMENTS OF THE PUBLIC TRUST DOCTRINE.....	661
	A. <i>Origins of the Public Trust Doctrine</i> .....	661
	B. <i>Elements of the Public Trust Doctrine</i> .....	663
V.	EXAMPLES OF THE PUBLIC TRUST DOCTRINE FROM U.S. LAW.....	665
	A. <i>The Non-Alienation Principle</i> .....	665
	B. <i>The Obligation of the Trustee</i> .....	666
	C. <i>The Distinction Between a Trustee and a Proprietor</i> .....	667
	D. <i>The Principle of Heightened Judicial Scrutiny</i> .....	669
VI.	THE POTENTIAL EFFECT OF A CONSTITUTIONAL PUBLIC TRUST DOCTRINE IN CHILE.....	670
	A. <i>The Rule of No Compensation</i> .....	670
	B. <i>National Goods for Public Use and the Social Function of Property</i> .....	671
VII.	ENFORCING THE PUBLIC TRUST DOCTRINE IN CHILE .....	673
VIII.	CONCLUSION .....	675
	APPENDIX .....	677

## I. INTRODUCTION

The Chilean people have expressed widespread concern that current government, operating under the dictatorship constitution of 1980, has failed to protect the environment.<sup>1</sup> In a 2019 survey, eighty percent of Chileans stated that the environment was in a bad or very bad state.<sup>2</sup> It was therefore no surprise that environmental protection was an important issue in the constitutional reform process which recently took place. In a plebiscite held in October 2020, seventy-eight percent endorsed a new constitution.<sup>3</sup> Support was even greater in areas

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

<sup>2</sup> Carolina Suez, *Chile es el país en que más ha crecido la preocupación por el cambio climático*, IPSOS (Dec. 12, 2019), <https://perma.cc/7RLL-TLBB>. Seventy percent of Chileans surveyed also felt it was more important to prioritize the environment than economic growth. *Id.*

<sup>3</sup> CHILEAN WHITE PAPER, *supra* note 1, at 3.

of the country with a high concentration of polluting industries, where eighty-nine percent of voters supported constitutional reform.<sup>4</sup>

Although the 1980 Chilean Constitution nominally “promote[s] the preservation of nature,” it has proven ineffective, as the government often prioritizes private property rights over the protection of natural resources.<sup>5</sup> The current constitution inhibits environmental protection not only due to its overprotection of private property, it also imposes limits on regulatory authority.<sup>6</sup> For example, the government both grants and vigorously protects private rights in water use, rather than protecting water as a public resource.<sup>7</sup>

The recent constitutional reform effort gave Chile an opportunity to require that the government provide greater environmental protection. One means of doing so, as recommended by the Chile California Conservation Exchange (CCCX), would be to incorporate the public trust doctrine into the constitutional text.<sup>8</sup> Adopting constitutional trust principles would have imposed a duty on the government to protect natural resources both for the present public and future generations, a duty absent in the 1980 constitutional framework.<sup>9</sup> 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 have given courts a standard by which to judge the government’s performance of that duty.<sup>10</sup> Constitutionalizing the public trust doctrine would have elevated public rights and provided the increased environmental protection Chileans have been seeking.<sup>11</sup>

The public trust, an ancient doctrine dating back at least to the Roman Empire, was imported into Spanish civil law through *Las Siete Partidas*, a 13th Century Castilian treatise on Spanish law that contained language from the 6th Century Justinian Institutes,

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<sup>4</sup> *Id.*

<sup>5</sup> CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] art. 19, No. 8, *translated in Chile’s Constitution of 1980 with Amendments Through 2021* (Apr. 27, 2022, 11:36), <https://perma.cc/S3XM-W6PP>; *see infra* Part III, Section B (explaining how the Constitution prioritizes private property rights over environmental rights by establishing a list of “fundamental economic principles” that have restricted environmental protection).

<sup>6</sup> CHILEAN WHITE PAPER, *supra* note 1, at 8.

<sup>7</sup> *See infra* notes 78–83 and accompanying text.

<sup>8</sup> CHILEAN WHITE PAPER, *supra* note 1, at 2. 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. *Id.* at 3. The third conference took place just as civil unrest was breaking out in Chile in 2019. *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.*

<sup>9</sup> *See* discussion *infra* Part III, Section B.

<sup>10</sup> *See infra* Part VI, Section B.

<sup>11</sup> Worth noting is that private rights would not actually be displaced, for there is a strong tradition of accommodating private rights in public trust doctrine jurisprudence. *See generally* Michael C. Blumm, *The Public Trust Doctrine and Private Property: The Accommodation Principle*, 27 PACE ENV’T. L. REV. 649 (2010) (illustrating that the public trust doctrine’s effect on private property rights has not been to eliminate private property).

endorsing what we now call the public trust doctrine.<sup>12</sup> The doctrine has a long history in the Anglo-American common law, where it has become “one of the most important and far-reaching doctrines of American property law.”<sup>13</sup> The doctrine maintains that natural resources are held in trust by the sovereign for the benefit of the people, including future generations.<sup>14</sup>

Chile is not the only South American country to seek increased environmental protection through recent constitutional reform. In 2008, the Ecuadorian electorate overwhelmingly affirmed a new constitution, establishing a right of people to “benefit from the environment and the natural wealth . . . to enjoy the good way of living.”<sup>15</sup> 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.<sup>16</sup> Both Colombia and Ecuador recognize constitutional rights of nature, rights possessed by an ecosystem—declaring that “[n]ature has the right to be restored.”<sup>17</sup> Rights of nature reflect an indigenous tradition of seeing all ecosystems as connected, and humans as a part of the ecosystem they inhabit.<sup>18</sup> The

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<sup>12</sup> See THE INSTITUTES OF JUSTINIAN, 2.1.1 (Thomas Collette Sandars trans., 5th ed. 1867). Compare THE INSTITUTES OF JUSTINIAN, 2.1.1 (Thomas Collette Sandars trans., 5th 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. INT’L & COMPAR. ENV’T L., 3, 21 (2009) (explaining that Las Siete Partidas incorporated the concept of *res communis*, as restated by Justinian).

<sup>13</sup> DAVID C. SLADE ET AL., 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 ENV’T 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.”).

<sup>14</sup> See Mary Christina Wood, *Advancing the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations (Part I): Ecological Realism and the Need for a Paradigm Shift*, 39 ENV’T L. 43, 67 (2009) (“[T]he beneficiaries are citizens, both present and future generations.”) (internal citation omitted).

<sup>15</sup> Alexandra Valencia, *UPDATE 6-Ecuador’s Correa Wins New Powers in “Historic” Vote*, REUTERS (Sept. 28, 2008), <https://perma.cc/ZR6V-9HSE> (initial results showing “63 percent of voters backed Correa’s proposed constitutional reforms”); CONSTITUCIÓN POLÍTICA DE ECUADOR, art. 74 (2008), translated in *Republic of Ecuador Constitution of 2008*, Georgetown University: Political Database of the Americas (Jan. 31, 2011), <https://perma.cc/63HJ-L87A>.

<sup>16</sup> Corte Suprema de Justicia [C.S.J.] [Supreme Court], abril 4, 2018, Luiz Armando Tolosa Villabona, 11001-22-03-000-2018-00319-01. Translated in *Future Generations v. Ministry of the Environment and Others*, CLIMATE CASE CHART: CASE DOCUMENTS (2018), <https://perma.cc/3PXW-XMFZ>.

<sup>17</sup> CONSTITUCIÓN POLÍTICA DE ECUADOR, art. 71–72 (2008); See 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 *Judgment T-622/16 (The Atrato River Case)*, Dignity Rts. Project, Del. L. Sch. 110 (2019), <https://perma.cc/G6YU-QAG8> (“The Atrato River . . . will be recognized as an entity subject to rights of protection, conservation, maintenance, and restoration.”).

<sup>18</sup> 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); see also *Rights of Nature Timeline*, CTR. FOR DEMOCRATIC & ENV’T RIGHTS, <https://https://perma.cc/3QEW-BFBW> (last visited Nov. 11, 2022) (describing the development of rights of nature worldwide).

movement to constitutionally protect environmental rights in Colombia and Ecuador provides some context for the movement in Chile.<sup>19</sup>

This Article explores the benefits of constitutionalizing a Chilean public trust doctrine. Part II provides background information about recent civil unrest in Chile, the process of drafting a new Chilean constitution, the constitutional language suggested by the CCCX, and the results of the recent referendum. Part III describes the shortcomings of the current environmental protection in the Chilean constitution, beginning with a description of the precipitating environmental events, explaining why the existing constitutional language inadequately protects the environment. Part IV briefly explains the roots of the public trust doctrine, starting with its ancient Roman roots and its incorporation into *Las Siete Partidas*, and describes its basic elements. Part V supplies examples of the public trust doctrine in U.S. law. Part VI explores the potential effect of a constitutional public trust doctrine in Chile. Two likely effects are: (1) the imposition of an enforceable duty on the government to take affirmative action to protect the environment; and (2) a requirement that the government provide environmental protection while accommodating private property rights. Part VII compares the enforcement mechanisms of Chile and the United States, including Chilean environmental courts which could have played an important role in early enforcement of the public trust doctrine. The Article concludes by arguing for inclusion of the language drafted by the constitutional convention in future iterations of the Chilean constitution. This language would prompt legislative and executive action to protect the environment and provide Chilean courts a standard to review legislative and executive efforts.

## II. BACKGROUND

Not long ago, Chile was considered one of the most stable democracies in Latin America.<sup>20</sup> In late 2019, however, Chile experienced violent civil unrest not seen since the restoration of democracy in 1990.<sup>21</sup> In November 2019, Chile's political parties reached

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<sup>19</sup> CONSTITUCIÓN POLÍTICA DE COLOMBIA, art. 70–80, *translated in Colombia's Constitution of 1991 with Amendments through 2015*, <https://perma.cc/U6CJ-NZW9>; CONSTITUCIÓN POLÍTICA DE ECUADOR, art. 74 (2008).

<sup>20</sup> CHILEAN WHITE PAPER, *supra* note 1, at 5.

<sup>21</sup> *Id.* at 7. From 1973 to 1990, Chile was governed by a military junta lead by Augusto Pinochet. CARL J. BAUER, *AGAINST THE CURRENT: PRIVATIZATION, WATER MARKETS AND THE STATE IN CHILE* 4 (1998). Pinochet came to power when the military executed a coup d'état to overthrow President Salvador Allende. *Id.* The 1980 constitution is an 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. *Id.* at 5, 12–13. The civil unrest in 2019 started as a response to a four-cent subway fare increase. Amanda Taub, *‘Chile Woke Up’: Dictatorship’s Legacy of Inequality Triggers Mass Protests*, N.Y. TIMES (Nov. 18, 2019), <https://perma.cc/WSN8-MQ24>. In protest to the rate increase, high school students began jumping turnstiles at metro stations. Ernesto Londoño, *What You Need to Know About the Unrest in Chile*, N.Y. TIMES (Oct. 21, 2019), <https://perma.cc/7AHV-QWXU>. As fare

an agreement to restore stability, promising constitutional reform legislation.<sup>22</sup> The ensuing legislation established a three-stage process.<sup>23</sup>

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.<sup>24</sup> Support was even greater in the so-called environmental “sacrifice zones,” that is, areas of the country with a high concentration of polluting industries.<sup>25</sup> Approval of the convention in these zones was eighty-nine percent, eleven percentage points higher than the general vote.<sup>26</sup>

Step two occurred in May 2021, when Chileans elected delegates to the convention.<sup>27</sup> The process required gender parity and the inclusion of Indigenous people.<sup>28</sup> Also in May 2021, scholars from Chile and the United States, organized by the CCCX, produced a report examining the public trust doctrine and evaluating its potential role in the new Chilean constitution.<sup>29</sup> The report concluded that the public trust doctrine would provide an important legal tool for environmental protection in Chile, and 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

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dodging increased, some metro stations closed and “police cracked down violently on passengers who had jumped over turnstiles,” leading to large scale street protests. *Id.* Then President Sebastián Piñera deployed the military to restore order and canceled the fare increase. Taub, *supra* note 21. However, canceling the fare was ineffective for restoring peace because “[w]hat began as an act of civil disobedience . . . turned into a broad reckoning about inequality.” Londoño, *supra* note 21. Many Chileans were upset “with the rising cost of utilities, stagnant wages . . . , and paltry pensions,” economic inequality, and political corruption—including a scandal involving President Piñera evading property taxes on an estate he owned for several years. *Id.*

<sup>22</sup> CHILEAN WHITE PAPER, *supra* note 1, at 5.

<sup>23</sup> *Id.*

<sup>24</sup> Pascale Bonnefoy, *An End to the Chapter of Dictatorship: Chileans Vote to Draft a New Constitution*, N.Y. TIMES (Oct. 25, 2020), <https://perma.cc/H9F3-V7NA>.

<sup>25</sup> CHILEAN WHITE PAPER, *supra* note 1, at 3.

<sup>26</sup> *Id.*

<sup>27</sup> Javier Sajuria & Julieta Suarez-Cao, *Chile Elected Delegates to Draft a New Constitution—and It’s Not Tilted Toward the Elites*, WASH. POST (June 24, 2021), <https://perma.cc/9ZJ2-Z7L3>.

<sup>28</sup> *Id.* (noting the convention was made up of seventy-seven female delegates and seventy-eight male delegates and that seventeen of the 155 seats were reserved for Indigenous people elected by Indigenous citizens).

<sup>29</sup> CHILEAN WHITE PAPER, *supra* note 1, at 3. 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 the challenges and benefits of including the public trust doctrine in the new Chilean constitution. *Id.*

assure that such private use does not substantially diminish public rights and is in the public interest.<sup>30</sup>

The report emphasized that the duty created by the constitutional public trust doctrine must be enforceable by citizens.<sup>31</sup>

These recommendations were favorably received by the convention, which drafted a proposed constitution that announced “[n]atural common goods” as “elements or components of nature over which the State has a special duty of custody in order to secure the rights of the nature and interest of present and future generations.”<sup>32</sup> When the government permits private appropriation of natural common goods, “the duty of custody of the State implies the power to regulate their use and enjoyment.”<sup>33</sup> The draft language would have also established a right of the public to enforce the trust.<sup>34</sup>

Step three was a second plebiscite held on September 4, 2022.<sup>35</sup> For reasons unrelated to the public trust doctrine,<sup>36</sup> Chilean voters soundly rejected the proposed constitution by a margin of sixty-two to thirty-eight percent.<sup>37</sup> Thus, the military junta’s 1980 constitution will remain in place. Despite the result of the plebiscite, some polling indicates as many as seventy-four percent of Chilean voters support a new redrafting process,<sup>38</sup> and President Gabriel Boric has also voiced his

<sup>30</sup> *Id.* at 25.

<sup>31</sup> *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.”).

<sup>32</sup> PROPUESTA CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE, art. 127(1) (2022), translated in *Chile’s Draft Constitution of 2022*, <https://perma.cc/8UAG-7MFB>. The translated text of the proposed constitution dealing with environmental protection is attached as an appendix to this article. See *infra* App.

<sup>33</sup> PROPUESTA CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE, art. 127(4).

<sup>34</sup> *Id.* art. 127(6) (“Any person may demand the fulfillment of the constitutional duties of custody of the natural common goods.”). However, it is unclear exactly how this enforcement would have proceeded because the proposed constitution reserves the procedures for a later date. *Id.* (“The law shall determine the procedure and requirements of this action.”).

<sup>35</sup> *Chile Finalizes Proposed Constitution, Final Vote on Sept. 4*, REUTERS (July 4, 2022), <https://perma.cc/M3G4-LSAK>.

<sup>36</sup> Misinformation about the proposed constitution may have played a role, like the false claim that “expanded housing rights meant the government would confiscate private property.” Catherine Osborn, *How Chile’s Constitution Revolution Missed the Mark*, FOREIGN POL’Y (Sept. 9, 2022), <https://perma.cc/P8NQ-9VLG>. Additionally, the constitution may have been too progressively ambitious. *Id.* Particularly controversial were the provisions establishing Chile as a “plurinational” state and guaranteeing the rights of self-determination and autonomy to indigenous nations. PROPUESTA CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE, art. 1(1), 190 (2022); Jack Nicas, *Chile Says ‘No’ to Left-Leaning Constitution After 3 Years of Debate*, N.Y. TIMES (Sept. 6, 2022), <https://perma.cc/3JLR-832T>. Finally, Chilean voters may also have thought the convention was too partisan. *Id.* Leftists controlled more than two-thirds of the seats, and so did not need a single vote from conservatives to make additions to the proposed text. *Id.* This sense of unfairness was furthered by several scandals, including one convention member faking a cancer diagnosis to aid in his election to the convention. *Id.*

<sup>37</sup> Osborn, *supra* note 36.

<sup>38</sup> *Id.*

support.<sup>39</sup> Any subsequent draft a new constitution will likely result in a more politically centrist document.<sup>40</sup> However, there is reason to hope that the strong environmental protections established in the proposed constitution—including the public trust doctrine—can be carried into a future constitutional drafting process.<sup>41</sup>

### III. 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.<sup>42</sup> Before the pulp mill, there were more than 5,000 swans in the sanctuary; within a year, that number declined to just four.<sup>43</sup> Autopsies revealed that the swans died of high concentrations of iron and other metals in the water.<sup>44</sup> This tragedy produced widespread protests and substantially changed the Chilean public's awareness of environmental issues.<sup>45</sup>

#### 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.<sup>46</sup> Among the latter was the *Patagonia Sin Represas* (Patagonia Without Dams) campaign, which successfully halted construction of a major hydro-electric project.<sup>47</sup> Chilean courts more frequently ruled in favor of the environment after the swan die-off.<sup>48</sup> In 2009, for example, the Supreme Court of Chile invalidated a permit for a coal-fired power plant because the plant was located in an area restricted to recreational and green uses.<sup>49</sup>

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<sup>39</sup> John Polga-Hecimovich, *Scenarios in Chile After a Failed Constitution*, GEOPOLITICAL INTELLIGENCE SERVS. (Oct. 24, 2022), <https://perma.cc/YM7M-XBDD>; Lautaro Cella & Eli Rau, *Chile's New Voting Rules May Have Derailed the New Constitution*, WASH. POST (Sept. 16, 2022), <https://perma.cc/DSX7-7QPH>.

<sup>40</sup> Polga-Hecimovich, *supra* note 39; Osborn, *supra* note 36.

<sup>41</sup> See Osborn, *supra* note 36 (noting that politicians who campaigned for the rejection of this draft have stated support for a focus on climate change and shoring up social rights to remain in future drafts).

<sup>42</sup> CHILEAN WHITE PAPER, *supra* note 1, at 5.

<sup>43</sup> Steve Anderson, *Celco Trashes Chile River Yet Again, Shuts Down Plant*, PATAGONIA TIMES (June 19, 2007), <https://perma.cc/46QE-PG2M>.

<sup>44</sup> *Id.*

<sup>45</sup> CHILEAN WHITE PAPER, *supra* note 1, at 5.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* The HidroAysén project 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://perma.cc/LF3C-832R>.

<sup>48</sup> CHILEAN WHITE PAPER, *supra* note 1, at 5–6.

<sup>49</sup> Corte Suprema de Justicia [C.S.J] [Supreme Court], 22 Junio 2009, “Correa c. Comision Regional Del Medio Ambiente of Valparaiso,” Rol de la causa: No. 1219-09, Apelción Protección, <https://perma.cc/58KU-HGCX> (Chile); CHILEAN WHITE PAPER, *supra*



Institutional change included creating the Ministry of the Environment and the Superintendency of the Environment in 2010.<sup>50</sup> In 2012, the Chilean legislature created specialized environmental courts.<sup>51</sup>

Despite these institutional changes, public demand for the government to do more to protect the environment has persisted.<sup>52</sup> From 2004 through 2018, news articles identified at least 283 socio-environmental conflicts created by investment projects.<sup>53</sup> The *Instituto Nacional de Derechos Humanos* estimates there are over 120 ongoing environmental conflicts.<sup>54</sup> A 2019 survey named Chile among the 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.<sup>55</sup>

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.<sup>56</sup> These meetings brought together over 200,000 citizens to discuss constitutional issues, after which social scientists issued a report concluding that environmental protection was among the highest of public priorities.<sup>57</sup>

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note 1, at 5–6; Rodrigo Ropert, *The Campiche Case: Legal or Ideological Factors?*, 37 *ECOLOGY L. Q.* 789, 789–90 (2010) (arguing that although the Chilean Supreme Court “ruled the permit was illegal under” the zoning plan, the decision can be best explained as a reaction to the historical environmental problems in the area).

<sup>50</sup> CHILEAN WHITE PAPER, *supra* note 1, at 6.

<sup>51</sup> Law No. 20.600, “Crea los Tribunales Ambientales,” 18 Junio 2012, BIBLIOTECA DEL CONGRESO NACIONAL DE CHILE [B.C.N.]. For more information on Chile’s environmental courts, see text accompanying *infra* notes 240–246.

<sup>52</sup> See Suez, *supra* note 2.

<sup>53</sup> Daniela M. Carranza et al., *Socio-environmental conflicts: An underestimated threat to biodiversity conservation in Chile*, 110 *ENV’T SCI. & POL.* 46, 47–48 (2020) (defining socio-environmental conflicts as “[e]nvironmental conflicts that also include economic and/or social aspects . . . [such] as disputes between natural persons, organizations, private companies and/or the State which are publicly expressed . . . and show divergences of opinions, positions, interests and demands”).

<sup>54</sup> See *Map of Socio-Environmental Conflicts in Chile*, INSTITUTO NACIONAL DE DERECHOS HUMANOS, <https://perma.cc/8CFZ-4MVL> (last visited Sept. 9, 2022) (follow link, and then click on side panel to see overview of all environmental conflicts in the country).

<sup>55</sup> Suez, *supra* note 2.

<sup>56</sup> 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* (Mar. 13, 2018), <https://perma.cc/YA7K-2P6C>.

<sup>57</sup> *Id.* The report, issued to President Bachelet, quantified the number of mentions each issued received in the *cabildos* and *encuentros*. *Id.*; see also 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 Administration.”). Environmental protection emerged as a high priority even in the absence of an organized campaign. *Id.*

*B. The Inadequacy of Current Constitutional Language*

Protecting the environment remained a high priority in the most recent constitutional reform process, responding to the limits on environmental protection imposed by the current constitution.<sup>58</sup> Although the constitution does contain environmental language, including an express fundamental right to live in an unpolluted environment,<sup>59</sup> environmental protection is discretionary, often thwarted by the Chilean legislature, and the constitution fails to incorporate a public dimension of environmental protection.<sup>60</sup>

The principal environmental protection in the Chilean constitution is a declared right to live in an unpolluted environment.<sup>61</sup> Article 19, No. 8(1) guarantees all persons “[t]he right to live in an environment free of contamination, [imposing a] duty of the State to ensure that this right is not jeopardized and to promote the preservation of nature.”<sup>62</sup> The constitutional remedy for this individual right is found in Article 20, No. 2, often referred to as *recurso de protección*, 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.’”<sup>63</sup> 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.”<sup>64</sup> However, this clause merely empowers discretionary legislative action, which has essentially authorized the legislature to create exemptions from 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 utilities and health and the preservation of the environment<sup>65</sup>

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<sup>58</sup> During the social unrest in October 2019, sixty-five percent of the self-convened councils across the country listed the environment as a priority issue. CHILEAN WHITE PAPER, *supra* note 1, at 6.

<sup>59</sup> CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] art. 19, No. 8, *translated in Chile’s Constitution of 1980 with Amendments Through 2021*, (Apr. 27, 2022), <https://perma.cc/Z2W8-NT6R>; see *infra* notes 61–64 and accompanying text.

<sup>60</sup> See CHILEAN WHITE PAPER, *supra* note 1, at 7 (stating that many view the lack of a public dimension of environmental protection as a major weakness of the current Constitution).

<sup>61</sup> CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] art. 19, No. 8, para. 1.

<sup>62</sup> *Id.*

<sup>63</sup> CHILEAN WHITE PAPER, *supra* note 1, at 6 (quoting CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] art. 20, No. 2).

<sup>64</sup> CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] art. 19, No. 8.

<sup>65</sup> *Id.* art. 19, No. 24.

The Chilean government may impose this limitation—the so-called “social function of property”—for the conservation of the environment without compensation.<sup>66</sup> The few invocations of this provision have failed to “establish[] a national legal norm of environmental protection that constrains individual economic rights.”<sup>67</sup>

Two critical weaknesses in the constitution’s environmental protection provisions are that they are discretionary, and they fail to 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; Chilean courts have interpreted it quite narrowly, limiting its application only to the state, not to private actors, and only to the natural elements of the environment.<sup>68</sup> In practice, the state incorporates environmental protection only when statutes and regulations impose specific obligations or duties.<sup>69</sup> Moreover, the social function limitation on private property merely authorizes state action.<sup>70</sup> The relevant language states that “[o]nly the law *can* set the mode of acquiring property, of using, enjoying and disposing of it”; 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.<sup>71</sup>

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.<sup>72</sup> Under the current constitution, only individuals can make environmental rights claims, and they can do so only if they have a personal interest that has been directly affected.<sup>73</sup>

The constitution also prioritizes economic freedom and private property rights over environmental rights, establishing a short list of fundamental economic principles known as the “public economic order,” that have operated to restrict environmental protection.<sup>74</sup> The 1980

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<sup>66</sup> *Id.*; 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).

<sup>67</sup> CHILEAN WHITE PAPER, *supra* note 1, at 7.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> 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). 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. *Id.*

<sup>72</sup> CHILEAN WHITE PAPER, *supra* note 1, at 7.

<sup>73</sup> 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).

<sup>74</sup> See BAUER, *supra* note 21, at 17–18 (explaining that Article 19, No. 8 “is not usually considered an ‘economic’ right, and it has weaker judicial protection than [other] economic rights”). See *id.* at 12 (the public economic order “consists of broad private economic rights

constitution aimed to encourage a free-market economy by “expand[ing] private economic rights and liberties, [and] tightly restrict[ing] state economic activity and regulatory authority.”<sup>75</sup> Article 19, No. 23 ensures the freedom to acquire ownership over all types of property, a broad guarantee establishing free appropriation of property as a general constitutional principle.<sup>76</sup> Although 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 whole nation and the law so declares”—the exclusion extends only to *public* natural resources, which the legislature is free to define.<sup>77</sup>

Water, for example, is not a declared public natural resource by the constitution.<sup>78</sup> Water rights are instead regulated by the Water Code, which does announce that water is a “national good for public use.”<sup>79</sup> But that designation is undermined in practice because, while one cannot own the water itself, one can own the use of water.<sup>80</sup> The constitution, consequently, explicitly protects rights to use water once they have been privatized by the state.<sup>81</sup> Article 19, No. 24 states 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.”<sup>82</sup> Once the legislature has granted a water use right, that right is constitutionally protected property, requiring compensation if taken by the state.<sup>83</sup>

Chile does recognize a doctrine of public ownership for goods or resources that are held by the state and excluded from private property.<sup>84</sup> The doctrine requires the state to manage these resources under a distinct legal regime.<sup>85</sup> But the public ownership doctrine is not explicitly established in the Chilean constitution.<sup>86</sup> Under the 1980

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.

<sup>75</sup> *Id.* at 12.

<sup>76</sup> 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”).

<sup>77</sup> *Id.* Furthermore, “[a] law [passed by] qualified quorum . . . may establish limitations or requirements for acquiring ownership over some assets.” *Id.* (emphasis added).

<sup>78</sup> 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).

<sup>79</sup> See BAUER, *supra* note 21, at 34 (“Waters are defined as ‘national property for public use’ (bienes nacionales de uso público)”).

<sup>80</sup> *Id.* at 35.

<sup>81</sup> CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] art. 19, No. 24(11).

<sup>82</sup> *Id.* art. 19, No. 24(12).

<sup>83</sup> See *id.* art. 19, No. 24(3)–(5) (guaranteeing compensation if a person’s property is expropriated).

<sup>84</sup> CHILEAN WHITE PAPER, *supra* note 1, at 18; BAUER, *supra* note 21, at 34.

<sup>85</sup> CHILEAN WHITE PAPER, *supra* note 1, at 18.

<sup>86</sup> *Id.*

constitution, the legislature is free to determine which goods or resources may be excluded from private ownership.<sup>87</sup> The legislature can even decide to revoke a public designation after previously recognizing it.<sup>88</sup>

#### IV. HISTORY AND ELEMENTS OF THE PUBLIC TRUST DOCTRINE

Although the common law concept of a trust has no counterpart in Spanish law, the root of the public trust doctrine is the same in both the English common law and Spanish civil law traditions.<sup>89</sup> Incorporating the public trust doctrine into the Chilean constitution would be as consistent with the Spanish civil law tradition as recognizing the doctrine in U.S. law was with the English common law tradition.<sup>90</sup> Understanding the doctrine's history and basic elements will help explain how it can remedy the shortcomings of the current Chilean constitution.

##### A. Origins of the Public Trust Doctrine

The public trust doctrine dates at least to the Roman Empire and the *Institutes of Justinian*, published in 533.<sup>91</sup> 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.<sup>92</sup> The *Institutes* stipulated that “[n]o one, therefore is forbidden to approach the sea-shore, provided that he respects habitations, monuments, and the buildings, which are not, like the sea, subject only to the law of nations.”<sup>93</sup> These recognized public rights to access and make use of the sea, referred to as *res communis*, formed the basis of the modern public trust doctrine.<sup>94</sup>

*Las Siete Partidas*, a 13th century Spanish compilation of Roman civil law, imported the trust language from the *Institutes of Justinian* into Spanish law by incorporating much of the *res communis* concept restated by Justinian.<sup>95</sup> Compiled during the reign of King Alfonso X of Castile, the *Partidas* echoed Justinian, stating that the air, running

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<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 10.

<sup>90</sup> *See id.* (establishing the history of the respective legal concepts); *See id.* at 25 (stating the consistencies between implementing the doctrine in Chile and the United States).

<sup>91</sup> *See generally* J.B. Ruhl & Thomas A.J. McGinn, *The Roman Public Trust Doctrine: What Was It, and Does It Support an Atmospheric Trust?*, 47 *ECOLOGY L.Q.* 117 (2020) (tracing the roots of the public trust doctrine, and exploring whether atmospheric trust can be traced back in an “unbroken line” to Roman law).

<sup>92</sup> J. INST., *supra* note 12, at 2.1.1.

<sup>93</sup> *Id.*

<sup>94</sup> Lance Noel & Jeremy Firestone, *Public Trust Doctrine Implications of Electricity Production*, 5 *MICH. J. ENV'T & ADMIN. L.* 169, 176–77 (2015).

<sup>95</sup> LAS SIETE PARTIDAS, *supra* note 12, at 3.28.3; Barresi, *supra* note 12, at 20–21.

water, and the sea and its shores “belong in common to the creatures of this world,” and added rainwater to the list of property which belongs in common to all creatures.<sup>96</sup> 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.<sup>97</sup>

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.<sup>98</sup> 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.<sup>99</sup> According to Hale, the king had a duty to protect these public rights.<sup>100</sup>

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.”<sup>101</sup> A seminal American case was *Arnold v. Mundy*,<sup>102</sup> which involved a dispute over oyster harvesting on the Raritan River.<sup>103</sup> 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.”<sup>104</sup>

The court further concluded that the state, as sovereign, could not divest citizens of their common right.<sup>105</sup> This principle, first articulated by the New Jersey court, was soon adopted by the U.S. Supreme Court.<sup>106</sup>

<sup>96</sup> 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) (noting how Alfonso the Wise of Castile supervised the compilation and inclusion of the *Siete Partidas* between 1256 and 1265); LAS SIETE PARTIDAS, *supra* note 12, at 3.28.3.

<sup>97</sup> LAS SIETE PARTIDAS, *supra* note 12, 3.28.3.

<sup>98</sup> MATTHEW HALE, DE JURE MARIS (n.d.) *reprinted in* A HISTORY OF THE FORESHORE AND THE LAW RELATING THERETO 370, 374 (Stuart A Moore ed., 3d ed., London, Stevens & Haynes, 1888); Michael C. Blumm & Courtney Engle, *Proprietary and Sovereign Public Trust Obligations: From Justinian and Hale to Lamprey and Oswego Lake*, 43 VT. L. REV. 1, 6–8 (2018).

<sup>99</sup> See SLADE ET AL., *supra* note 13, at 5 (discussing the view of the English common law that shorelands were not useful for cultivation and thus their natural uses, such as fishing and commerce, were public in nature).

<sup>100</sup> See HALE, *supra* note 98, at 374 (noting that it was the “king’s jurisdiction . . . to reform and punish nuisances in all rivers, whether fresh or salt, that are a common passage”).

<sup>101</sup> See SLADE ET AL., *supra* note 13, at 5 (tracing the doctrine from England to the American colonies) (internal citation omitted); Dunning, *supra* note 13, at 516.

<sup>102</sup> 6 N.J.L. 1 (1821).

<sup>103</sup> *Id.* at 38. Arnold sued the Mundy group for trespass. *Id.* at 9.

<sup>104</sup> *Id.* at 76–77.

<sup>105</sup> *Id.* at 78.

<sup>106</sup> See *Martin v. Waddell’s Lessee (Waddell’s Lessee)*, 41 U.S. 367, 417–18 (1842) (overturning the lower court decision in favor of Waddell, who traced his title to 17th Century grants from the King of England); See also *Ill. Cent. R.R. Co. v. Illinois (Illinois*

*B. Elements of the Public Trust Doctrine*

A trust has three components: the *res*, the trustee, and the beneficiary.<sup>107</sup> The *res* is the property, asset, or resource subject to the trust.<sup>108</sup> In the public trust doctrine, the *res* is the natural resource subject to protection.<sup>109</sup> The trustee is the entity responsible for managing the *res* for the benefit of the beneficiary.<sup>110</sup> Under the public trust doctrine, the trustee is the government.<sup>111</sup> The beneficiary is the person or entity benefiting from the property.<sup>112</sup> The public trust doctrine establishes the public, including future generations, as the beneficiary.<sup>113</sup>

Traditionally, the doctrine applied to the beds of navigable waters.<sup>114</sup> However, as Professor Joseph Sax recognized decades ago, there is 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.”<sup>115</sup> Professor Mary Christina Wood has argued for an expanded scope of the doctrine because “the entire workings of Nature operate together as a system.”<sup>116</sup> Over the last fifty years, the public trust *res* has in fact expanded to include ecological protection.<sup>117</sup> For example, the constitution of Hawai‘i imposes a duty on the state to “conserve and protect Hawai‘i’s natural beauty and all natural resources, including land, water, air, minerals and energy sources.”<sup>118</sup> The Pennsylvania constitution imposes a similar duty on that state.<sup>119</sup> In 2012, the Pennsylvania Supreme Court concluded that

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*Central*), 146 U.S. 387, 456 (1892) (endorsing *Arnold v. Mundy* and *Martin v. Waddell’s Lessee*).

<sup>107</sup> AMY MORRIS HESS ET AL., *BOGERT’S THE LAW OF TRUSTS AND TRUSTEES* § 1, Westlaw (database updated June 2022).

<sup>108</sup> *Id.*

<sup>109</sup> Wood, *supra* note 14, at 78.

<sup>110</sup> HESS ET AL., *supra* note 107.

<sup>111</sup> Wood, *supra* note 14, at 68 (citing *Geer v. Connecticut*, 161 U.S. 519 (1896)).

<sup>112</sup> HESS ET AL., *supra* note 107.

<sup>113</sup> Wood, *supra* note 14.

<sup>114</sup> *See Illinois Central*, 146 U.S. 387, 459–61 (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 1,000 acres of the lakebed of the Chicago harbor).

<sup>115</sup> Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 556–57 (1970).

<sup>116</sup> Wood, *supra* note 14, at 83 (“Recognizing this, it is difficult to find any resource that can be summarily excised from public trust treatment.”).

<sup>117</sup> CHILEAN WHITE PAPER, *supra* note 1, at 10; *see* Wood, *supra* note 14, at 80 (recognizing how the doctrine now reaches to areas of public interest like wetlands and wildlife).

<sup>118</sup> HAW. CONST. art. XI, § 1. For further discussion of the Hawai‘ian constitution, *see infra* Part V, Section D; *see also In re Water Use Permit Applications (Waiāhole Ditch)*, 9 P.3d 409, 447 (Haw. 2000) (“[W]e 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.”).

<sup>119</sup> PA. CONST. art. I, § 27 (“The people have a right to clean air, pure water, and the preservation of the natural, scenic, historic and esthetic value of the environment.”).

the state constitution's trust language restricted the legislature's ability to promote natural gas fracking by preempting a local zoning ordinance, and in 2017, the court struck down a legislative funding scheme that diverted trust money from natural resources conservation to balance the state budget.<sup>120</sup>

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.<sup>121</sup> 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."<sup>122</sup> The subservient title, *jus privatum*, is the private right to use or possess trust land.<sup>123</sup> 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.<sup>124</sup> 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.<sup>125</sup>

As an attribute inherent in sovereignty, the public trust doctrine is, like the police power, inalienable and cannot be abdicated.<sup>126</sup> But while the police power authorizes state action to protect the 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.<sup>127</sup> Enforcement of this obligation requires independent judicial review to ensure the government is adequately protecting trust resources.<sup>128</sup> 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.<sup>129</sup>

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<sup>120</sup> See *Robinson Twp. v. Commonwealth (Robinson Township)*, 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 V, Section C; *Pa. Env't Def. Found. v. Commonwealth*, 161 A.3d 911, 939 (Pa. 2017). For further discussion of Pennsylvania's public trust doctrine, see *infra* Part V, Section C.

<sup>121</sup> SLADE ET AL., *supra* note 13, at 6.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> CHILEAN WHITE PAPER, *supra* note 1, at 10; *Illinois Central*, 146 U.S. 387, 453 (1892) ("The state can no more abdicate its trust over property in which the whole people are interested . . . than it can abdicate its police powers").

<sup>127</sup> CHILEAN WHITE PAPER, *supra* note 1, at 10.

<sup>128</sup> See *Sax*, *supra* note 115, 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.") (emphasis omitted).

<sup>129</sup> CHILEAN WHITE PAPER, *supra* note 1, at 10.



V. EXAMPLES OF THE PUBLIC TRUST DOCTRINE FROM U.S. LAW<sup>130</sup>

As a fundamental element of American property law, the public trust doctrine has had widespread effects.<sup>131</sup> 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;<sup>132</sup> (2) ensured that the doctrine cannot be supplanted by legislation;<sup>133</sup> (3) imposed trust duties on all levels of government, including local governments;<sup>134</sup> (4) required that trust resources be managed for the preservation of trust resources, not for the public interest generally;<sup>135</sup> and (5) subjected private uses of trust resources to heightened judicial scrutiny to ensure against “substantial impairment” of trust resources.<sup>136</sup> Comparing the breadth of results of the cases explored in this section may be useful to Chileans in terms of what a Chilean public trust doctrine might mean. This Part explains some practical results of the application of the public trust doctrine in the United States.

A. *The Non-Alienation Principle*

The preeminent public trust case in the United States is *Illinois Central Railroad v. Illinois*,<sup>137</sup> involving a 1869 conveyance by the Illinois state legislature of over 1,000 acres of the Lake Michigan lakebed along the central business district of Chicago to a railroad company.<sup>138</sup> Four years later, the state legislature repealed the 1869 grant.<sup>139</sup> The Supreme Court eventually concluded that an expansive grant of a public natural resource was necessarily revokable because the

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<sup>130</sup> For international examples of the application of the public trust doctrine, see generally 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).

<sup>131</sup> Dunning, *supra* note 13, at 516.

<sup>132</sup> See *Illinois Central*, 146 U.S. 387, 453 (1892) (preventing the abdication of duties the doctrine imposed on the state); see also discussion *infra* Part V.A.

<sup>133</sup> See generally Dunning, *supra* note 13 (explaining how the doctrine cannot be supplanted by legislation); see also *infra* text accompanying note 184.

<sup>134</sup> See CHILEAN WHITE PAPER, *supra* note 1, at 10 (stating that the public trust doctrine applies to all levels of government); see also *infra* text accompanying notes 162–168.

<sup>135</sup> See *infra* text accompanying notes 169–177.

<sup>136</sup> *Illinois Central*, 146 U.S. at 453; see *Nat'l Audubon Soc'y v. Superior Ct. (Mono Lake)*, 658 P.2d 709, 721 (Cal. 1983) (holding that resources protected under the trust should be maintained to ensure preservation of those rights and resources in way that does not cause harm); Sax, *supra* note 115, at 490 (discussing judicial approaches to private use of public trust resources); see also discussion *infra* Part V.D.

<sup>137</sup> *Illinois Central*, 146 U.S. at 387 (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 public trust doctrine in American law. Sax, *supra* note 115, at 489.

<sup>138</sup> Sax, *supra* note 115, at 489.

<sup>139</sup> *Id.*; *Illinois Central*, 146 U.S. at 449.

ownership of the lakebed was a subject of public concern.<sup>140</sup> Since the state held these lands in trust, they could not be alienated.<sup>141</sup>

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.”<sup>142</sup> 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.”<sup>143</sup> Moreover, the state may not allow “substantial impairment” of the public interest in trust resources, giving the trust doctrine an environmental dimension.<sup>144</sup>

### B. The Obligation 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)*.<sup>145</sup> Mono Lake is a terminal desert lake located on the eastern side of the Sierra Nevada Mountains.<sup>146</sup> The saline lake has no outlet, losing water only through evaporation.<sup>147</sup> As the water evaporates, natural salts are left behind.<sup>148</sup> The lake is fed by several streams, to which the City of Los Angeles began acquiring water rights in the early 1900s.<sup>149</sup> In 1940, the city applied to the state water board for the right to appropriate water from the tributaries.<sup>150</sup> 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

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<sup>140</sup> 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); *Illinois Central*, 146 U.S. at 455; see also JOSEPH D. KEARNEY & THOMAS W. MERRILL, LAKEFRONT: PUBLIC TRUST AND PRIVATE RIGHTS IN CHICAGO (2021), reviewed by Michael C. Blumm, *The Public Trust and the Chicago Lakefront*, 11 MICH. J. ENV’T & ADMIN. L. 315 (2022) (discussing the legal history of *Illinois Central* and its effects on the public trust doctrine).

<sup>141</sup> *Illinois Central*, 146 U.S. at 455. Although, the court made clear that small concessions might be acceptable, so long as the public interest is not harmed. *Id.* at 455–56.

<sup>142</sup> *Id.* at 453.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Mono Lake*, 658 P.2d 709, 721 (Cal. 1983) (reversing the lower court decision and holding that the public trust doctrine applied to tributaries of navigable water bodies).

<sup>146</sup> CHILEAN WHITE PAPER, *supra* note 1, at 11. For a thorough discussion of Mono Lake and the litigation it engendered, see generally Erin Ryan, *The Public Trust Doctrine, Private Water Allocation, and Mono Lake: The Historic Saga of National Audubon Society v. Superior Ct.*, 45 ENV’T L. 561 (2015).

<sup>147</sup> *Mono Lake*, 658 P.2d at 715.

<sup>148</sup> *Id.*

<sup>149</sup> CHILEAN WHITE PAPER, *supra* note 1, at 11.

<sup>150</sup> *Mono Lake*, 658 P.2d at 713.

prevent it.”<sup>151</sup> The city proceeded to increase its export of water in the 1970s by building a second aqueduct, consistent with its 1940 water right.<sup>152</sup> By October 1979, the lake had shrunk from an area of 85 square miles to 60.3 square miles, dropping forty-three feet in elevation from its pre-diversion level and portending ecological disaster.<sup>153</sup>

The State Water Board's claim that it lacked the authority to protect the lake when it permitted the diversions in 1940 was rejected by the California Supreme Court because the public trust doctrine had always existed in the state, and the scope of the doctrine extended beyond the navigable waters to include non-navigable tributaries.<sup>154</sup> The court concluded that the state had a trust duty to protect “the people's common heritage of streams, lakes, marshlands and tidelands,”<sup>155</sup> describing this affirmative state obligation as a continuous supervisory duty.<sup>156</sup> After the court enjoined the diversions, the state fulfilled this directive by promulgating a plan in 1994 to restore about half of the lake's water level, although a long-term, climate change-induced drought has limited the effects of the plan.<sup>157</sup>

### C. *The Distinction Between a Trustee and a Proprietor*

In 1971, the Pennsylvania public approved the public trust doctrine by constitutional amendment in a public referendum by a margin of nearly four to one.<sup>158</sup> 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.”<sup>159</sup> Further, “Pennsylvania's public natural resources are the common property of all the people, including generations yet to come.”<sup>160</sup> The constitution

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<sup>151</sup> *Id.* at 714 (emphasis omitted).

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 719–21. 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.*

<sup>155</sup> *Id.* at 724.

<sup>156</sup> *Id.* at 721 (“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 728 (“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.”).

<sup>157</sup> *See* CAL. STATE WATER RES. CONTROL BD. DECISION 1631, AMEND. OF THE CITY OF LOS ANGELES' WATER RIGHT LICENSES FOR DIVERSION OF WATER FROM STREAMS TRIBUTARY TO MONO LAKE, at 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 “approximately” twenty years). However, the current elevation of Mono Lake is only 6,379.0 feet, twelve feet below the restoration goal. *State of the Lake*, MONO LAKE COMM., <https://perma.cc/3FGZ-KUVK> (last visited Sept. 13, 2022).

<sup>158</sup> PA. CONST. art. 1, § 27; Pa. Env't Def. Found. v. Commonwealth, 161 A.3d 911, 916, 918 (Pa. 2017).

<sup>159</sup> PA. CONST. art. 1, § 27.

<sup>160</sup> *Id.*

established the state, as the trustee, is obligated to conserve and maintain trust resources for the benefit of the public.<sup>161</sup>

The Supreme Court of Pennsylvania recently interpreted this constitutional language in *Robinson Township v. Commonwealth*<sup>162</sup> and *Pennsylvania Environmental Defense Foundation v. Commonwealth*.<sup>163</sup> In *Robinson Township*, a plurality of the Supreme Court of Pennsylvania struck down a statute promoting natural gas extraction through hydraulic fracking by preempting local zoning laws as unconstitutional.<sup>164</sup> The court held that the local government was a trustee and that eliminating local control over trust resources violated the public trust doctrine.<sup>165</sup> 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.”<sup>166</sup> 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.”<sup>167</sup> Consequently, in Pennsylvania, all branches of government are trustees, even local governments.<sup>168</sup>

In 2017, in *Pennsylvania Environmental Defense Foundation*, the state supreme court affirmed *Robinson Township* and held that rental payments from leases used to extract oil and gas could fall within the corpus of the trust.<sup>169</sup> Under the Conservation and Natural Resources Act,<sup>170</sup> the money from these leases was meant to go to the Department of Conservation and Natural Resources.<sup>171</sup> However, three legislative amendments between 2008 and 2014 had redirected \$335 million from conservation to the state’s general fund.<sup>172</sup> 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,”<sup>173</sup> including the public trust rights reserved to the people in the 1971 constitutional amendments.<sup>174</sup> Therefore, the state could not redirect money reserved for trust resources to fund other state priorities.<sup>175</sup>

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<sup>161</sup> *Id.*

<sup>162</sup> 83 A.3d 901 (Pa. 2013).

<sup>163</sup> 161 A.3d 911 (Pa. 2017).

<sup>164</sup> *Robinson Township*, 83 A.3d at 1000.

<sup>165</sup> *Id.* at 913.

<sup>166</sup> *Id.* at 963.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 913.

<sup>169</sup> *Pa. Env’t Def. Found.*, 161 A.3d 911, 936 (Pa. 2017).

<sup>170</sup> 71 PA. STAT. AND CONS. STAT. § 8 (2022).

<sup>171</sup> *Pa. Env’t Def. Found.*, 161 A.3d at 920.

<sup>172</sup> *Id.* at 925 (citing John C. Dernbach, *The Potential Meanings of a Constitutional Public Trust*, 45 ENV’T L. 463, 488 (2015)).

<sup>173</sup> *Id.* at 930–31.

<sup>174</sup> *Id.* at 931 (citing PA. CONST. art. I, § 27).

<sup>175</sup> *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.’”) (citation omitted).

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."<sup>176</sup> The state therefore could not sell off trust assets for any purpose that might benefit the public; it was obliged to fulfill its fiduciary obligation to preserve trust resources, underscoring that fulfilling trust duties is narrower than simply acting in the public interest.<sup>177</sup> 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.<sup>178</sup>

#### *D. The Principle of Heightened Judicial Scrutiny*

Hawai'i has also codified the public trust doctrine in its constitution.<sup>179</sup> The Hawai'i Supreme Court interpreted the state's constitutional public trust in *In re Matter of the Water Use Permit Applications (Waiāhole Ditch)*,<sup>180</sup> involving a transbasin diversion of groundwater for large-scale agricultural uses harming native Hawai'iian users.<sup>181</sup> The court "reaffirm[ed] that . . . the public trust doctrine applies to all water resources without exception or distinction."<sup>182</sup> 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 Hawai'iian uses.<sup>183</sup> The court rejected the state's argument that the public trust doctrine had been supplanted by the state water code because the trust exists independent of any statute—both constitutionally and as an inherent attribute of sovereignty.<sup>184</sup> 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.<sup>185</sup> The court vacated in part the decision of the state Commission on Water Resource Management,

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<sup>176</sup> *Id.* at 935.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> The Hawai'i constitution 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.

HAW. CONST. art. XI, § 1.

<sup>180</sup> 9 P.3d 409, 439–55 (Haw. 2000).

<sup>181</sup> *Id.* at 422–24.

<sup>182</sup> *Id.* at 445.

<sup>183</sup> *Id.* at 448–49.

<sup>184</sup> *Id.* at 442–45.

<sup>185</sup> *Id.* at 448, 450, 454–56.

and remanded the case for reconsideration of instream flow standards that would provide a “reasonable ‘margin[] of safety.’”<sup>186</sup>

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 also to preserve trust resources for the benefit of current and future generations.<sup>187</sup> This duty cannot be abdicated by the state, nor can the trust be supplanted by legislation. The doctrine is inherently anti-monopolistic, limiting privatization and subjecting private commercial uses of trust resources to heightened judicial scrutiny.<sup>188</sup> The public trust requires the state trustee to protect trust resources against substantial impairment of the public’s interest in those resources.<sup>189</sup>

#### VI. THE POTENTIAL EFFECT OF A CONSTITUTIONAL PUBLIC TRUST DOCTRINE IN CHILE

The 1980 constitution has failed to adequately protect nature and the environment in Chile.<sup>190</sup> The recent constitutional drafting process offered an opportunity to better incorporate constitutional protection of the environment.<sup>191</sup> Constitutionalizing the public trust doctrine would have empowered the Chilean government to regulate natural resources without the threat of a compensatory taking.<sup>192</sup> Constitutionalizing the public trust doctrine would also impose an obligation on the state trustee to protect the environment.<sup>193</sup>

##### A. *The Rule of No Compensation*

Where private rights exist in public trust resources, the state’s *jus publicum* enables regulation without paying compensation.<sup>194</sup> Although the U.S. Constitution prohibits government takings of private property for public use without payment of just compensation, the U.S. Supreme Court in *Lucas v. South Carolina Coastal Council*<sup>195</sup> 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

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<sup>186</sup> *Id.* at 468.

<sup>187</sup> Wood, *supra* note 14, at 67.

<sup>188</sup> *Waiāhole Ditch*, 9 P.3d at 455–56.

<sup>189</sup> *Illinois Central*, 146 U.S. 387, 452–53 (1892).

<sup>190</sup> CHILEAN WHITE PAPER, *supra* note 1, at 17.

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* at 19.

<sup>193</sup> *Id.*

<sup>194</sup> CHILEAN WHITE PAPER, *supra* note 1, at 17; Michael C. Blumm & Rachel G. Wolfard, *Revisiting Background Principles in Takings Litigation*, 71 FLA. L. REV. 1165, 1183–85 (2019).

<sup>195</sup> 505 U.S. 1003 (1992).

ownership.”<sup>196</sup> The public trust doctrine is one such background principle that exempts state regulation of trust resources from takings claims.<sup>197</sup>

Chilean law has a constitutional provision that authorizes the government to expropriate property for public use, but like takings in U.S. law that do not involve background principles, expropriation requires compensation.<sup>198</sup> Moreover, absent an agreement, compensation must be made in cash, and in response to a complaint about the justifiability of the expropriation, a judge may suspend the expropriation.<sup>199</sup> 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,” and (2) limitations on private property based on the “social function” of the property.<sup>200</sup> There is also the non-constitutional doctrine of public ownership (*dominio público*), which is like the public trust doctrine in that both refer to resources held by the state for particular purposes.<sup>201</sup> Public ownership excludes these assets from compensable private property obligations and requires the state to manage the assets under a distinct legal regime.<sup>202</sup> The government cannot dispose of publicly owned resources, but instead must manage them so they continue to fulfill their public purpose.<sup>203</sup> However, *dominio público* is not recognized in the Chilean constitution.<sup>204</sup> Although the current constitution does reference goods that necessarily belong to the entire nation, this recognition is merely an exception to the rule that all goods

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<sup>196</sup> U.S. CONST. amend. V; *Lucas*, 505 U.S. 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.*

<sup>197</sup> See Blumm & Wolfard, *supra* note 194, at 1183–84, 1183 n.94 (explaining recent takings case law).

<sup>198</sup> CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] art. 19, No. 24(3), translated in *Chile's Constitution of 1980 with Amendments Through 2021*, (Apr. 27, 2022), <https://perma.cc/W5ZM-RHRE>. The complete text states:

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.*

<sup>199</sup> *Id.* art. 19, No. 24(4)–(5).

<sup>200</sup> CHILEAN WHITE PAPER, *supra* note 1, at 17.

<sup>201</sup> *Id.* at 18.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

are free for appropriation.<sup>205</sup> There is, moreover, no existing constitutional obligation imposed on the government to protect nature; the government is merely authorized to do so.<sup>206</sup> The Chilean government has not pursued this option aggressively under the current framework.

Nor does the constitution define which assets are in public ownership.<sup>207</sup> The legislature is free to determine which resources are in public ownership and can even rescind that designation.<sup>208</sup> Mineral resources are an exception; they are constitutionally assigned to public ownership—government mineral ownership is constitutionally “declared absolute, exclusive, inalienable, and imprescriptible.”<sup>209</sup> Despite this constitutional proclamation, Chilean mining law authorizes the government to grant concessions to private parties that, once granted, are constitutionally protected private property.<sup>210</sup>

The social function of private property, similar to the public trust doctrine, does provide the government with a defense against takings.<sup>211</sup> Two modifications to private property may be made under the existing Chilean constitution: expropriation and limitation.<sup>212</sup> As discussed above, expropriation allows the state to take property from an individual for public use with payment of compensation.<sup>213</sup> Property serving a social function, on the other hand, enables the government to impose limitations and obligations on that property without compensation.<sup>214</sup> However, restrictions based on social function are severely limited by the principle of “equal distribution of . . . public

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<sup>205</sup> CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] art. 19, No. 23(1), translated in *Chile's Constitution of 1980 with Amendments Through 2021*, (Apr. 27, 2022), <https://perma.cc/5E9P-QKXK> (“[E]xcept for those [resources] 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. CHILEAN WHITE PAPER, *supra* note 1, at 18; see also *supra* text accompanying notes 84–88.

<sup>206</sup> CHILEAN WHITE PAPER, *supra* note 1, at 18.

<sup>207</sup> CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] art. 19, No. 23(1).

<sup>208</sup> CHILEAN WHITE PAPER, *supra* note 1, at 18.

<sup>209</sup> CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] art. 19, No. 24(6). Chile is the top producer of copper in the world, with twenty-eight percent of global copper production, and the second largest producer of lithium, with twenty-two percent of global production. *Chile – Country Commercial Guide*, INT’L TRADE ADMIN. (Sept. 30, 2022), <https://perma.cc/9PFR-GSPG>. Chile is also the top producer of iodine, rhenium, sodium, and potassium nitrate. *Id.* The mining sector represented fifteen percent of Chile’s GDP in 2021, with \$317 billion, and contributed sixty-two percent of the total exports. *Id.*

<sup>210</sup> CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] art. 19, No. 24(7), (9); See also *supra* note 78 (explaining that art. 19, No. 24(7) allows the legislature to grant private use of mineral resources through “mining concessions”).

<sup>211</sup> CHILEAN WHITE PAPER, *supra* note 1, at 19.

<sup>212</sup> CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] art. 19, No. 24(2)–(3).

<sup>213</sup> See *supra* note 198 and accompanying text (explaining that art. 19, No. 24(3) allows the government to expropriate for public utility or national interest, subject to compensation); CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] art. 19, No. 24(3).

<sup>214</sup> CHILEAN WHITE PAPER, *supra* note 1, at 19; CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] art. 19, No. 24(2), (4).



burdens,” and may be declared unconstitutional if violative of that principle.<sup>215</sup> Significantly, the social function doctrine operates only defensively, imposing no affirmative obligation on the government to regulate.<sup>216</sup>

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. Since Chile is a country with a civil law tradition, constitutionalizing the trust could have two beneficial outcomes: (1) it would require the legislative and administrative bodies to adopt measures to protect the environment; and (2) it would give courts a standard by which to measure state efforts to implement the trust.<sup>217</sup>

## VII. ENFORCING THE PUBLIC TRUST DOCTRINE IN CHILE

Legislative action in Chile is slow and uncertain.<sup>218</sup> The Chilean water code, for example, enacted in 1981, has only recently seen significant reforms when the legislature passed a bill after a ten-year delay, despite widespread agreement of the need for reform.<sup>219</sup> Constitutional restrictions, such as the requirement for qualified quorums for the legislature to regulate the basic organization of the public administration and to define the powers of the courts, have contributed to delayed legislative action.<sup>220</sup>

Another cause of uncertainty is a constant threat of intervention by the Constitutional Court, which has restrictively interpreted the scope of the Constitution, especially on economic matters.<sup>221</sup> Although the U.S. Congress is also slow to act, federalism allows a relief valve at the state level, as state legislatures can engage in environmental protection and in land use planning.<sup>222</sup> The unitary nature of the Chilean government means that no similar relief valve exists to side-step the legislative inactivity of the national congress.<sup>223</sup> A clear constitutional standard would provide political incentives for national action.<sup>224</sup>

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<sup>215</sup> CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] art. 19, No. 20; CHILEAN WHITE PAPER, *supra* note 1, at 19. The principle of equal distribution of public burdens is like a regulatory taking in U.S. law. *Id.*

<sup>216</sup> CHILEAN WHITE PAPER, *supra* note 1, at 19.

<sup>217</sup> *Id.*

<sup>218</sup> *Id.* at 21.

<sup>219</sup> *Id.*; Dave Sherwood, *Chile's Dictatorship-era Water Code Is Getting a Makeover*, REUTERS (Aug. 4, 2021), <https://perma.cc/G3GG-49SQ>; John Bartlett, *'Consequences Will Be Dire': Chile's Water Crisis Is Reaching Breaking Point*, THE GUARDIAN (June 1, 2022), <https://perma.cc/MYV5-S39R>.

<sup>220</sup> CHILEAN WHITE PAPER, *supra* note 1, at 21 (citing CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] art. 38, art. 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).

<sup>221</sup> CHILEAN WHITE PAPER, *supra* note 1, at 21.

<sup>222</sup> See, e.g., S.B. 100, 57th Leg. Assemb., Reg. Sess. (Or. 1973) (mandating comprehensive land use plans for cities, counties, and the state).

<sup>223</sup> CHILEAN WHITE PAPER, *supra* note 1, at 21.

<sup>224</sup> *Id.*

Like the United States, Chile has a presidential system of government.<sup>225</sup> Although the Chilean president has greater influence over the legislative process than the American president, both systems struggle to enact legislation when different parties control the legislature and the presidency.<sup>226</sup> Chilean presidential power is in fact stronger than under the U.S. system, but independent regulatory power is rarely invoked and has been interpreted narrowly by the courts.<sup>227</sup> The Constitutional Court has narrowly interpreted the regulatory power of the Chilean president through a “reservation of law” doctrine, which reserves certain types of regulation to statutory law.<sup>228</sup> Moreover, the Comptroller General of the Republic must also approve administrative regulations before they can be promulgated,<sup>229</sup> imposing a kind of veto, and leaving little room for experimentation and innovation.<sup>230</sup> Thus, regulatory power in Chile is much weaker than its system of government might suggest.<sup>231</sup>

Chile has a unitary form of government, meaning no agencies are independent of the president, and most agencies are run by political appointees of the president.<sup>232</sup> Public service lacks stability, professionalism, and training, and there is little incentive to develop a career in administrative agencies.<sup>233</sup> Thus, there is a high degree of turnover.<sup>234</sup> All of these factors contribute to an administrative system that is comparatively weaker than its U.S. counterpart.<sup>235</sup> A clear constitutional directive incorporating the public trust doctrine could spur regulatory authority, especially if citizens are able to use the trust doctrine to require the government to take action to protect nature through its regulatory agencies.<sup>236</sup>

Chile has adopted a system of specialized courts—some have jurisdiction over labor, some over family disputes, some over

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<sup>225</sup> *Id.*

<sup>226</sup> *Id.*; see also CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] art. 32, translated in *Chile’s Constitution of 1980 with Amendments Through 2021*, (Apr. 27, 2022), <https://perma.cc/XFC9-JR5S> (outlining the special powers of the Chilean president).

<sup>227</sup> CHILEAN WHITE PAPER, *supra* note 1, at 21–22.

<sup>228</sup> *Id.* at 22.

<sup>229</sup> *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 acts [sic] of the Administration”).

<sup>230</sup> CHILEAN WHITE PAPER, *supra* note 1, at 22.

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*; see generally Cass R. Sunstein & Adrian Vermeule, *The Unitary Executive: Past, Present, Future*, 2020 SUP. CT. REV., no. 1, 2021, at 83 (providing arguments for a strong and weak unitary executive in the United States).

<sup>233</sup> CHILEAN WHITE PAPER, *supra* note 1, at 22.

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> *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.*

environmental issues.<sup>237</sup> These lower courts are subject to review by respective Courts of Appeal, which are in turn subject to review by the Supreme Court.<sup>238</sup> “There is also a separate Constitutional Court[,] with jurisdiction distinct from the Supreme Court.”<sup>239</sup>

Since 2012, Chile has had three specialized environmental courts, with jurisdiction split geographically over the north, center, and south of the country.<sup>240</sup> These courts can order the restoration of environmental damage and invalidate illegal administrative actions.<sup>241</sup> However, their jurisdiction is limited to four types of claims: (1) reparations of environmental damage against executive decrees in specified matters; (2) challenges to directives of the Superintendency of the Environment; (3) objections to authorizations within the environmental impact assessment system for investment projects; and (4) claims against other administrative actions related to the environment.<sup>242</sup> The 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.<sup>243</sup>

The Chilean public generally has a positive perception of these courts, especially in trials related to environmental damage.<sup>244</sup> Environmental courts could become the primary enforcers of the public trust doctrine.<sup>245</sup> 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 Chilean constitution clearly imposed a duty on the government to protect the environment.<sup>246</sup>

#### VIII. CONCLUSION

The language of the draft constitution would have encouraged and empowered the Chilean legislature and executive to recognize and implement the public trust doctrine. The doctrine would have enabled the public to resort to the courts to review and ensure implementation by the political branches of government.

The Chilean White Paper proposed the Pennsylvania constitutional language as a model.<sup>247</sup> The convention responded favorably to the

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<sup>237</sup> *Id.* at 23.

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

<sup>243</sup> *Id.* Jurisdiction only extends to these regulations if related to situations of environmental damage or to an administrative instrument of environmental management. *Id.*

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> *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

White Paper's suggestions and drafted language that would have established the key elements of the doctrine,<sup>248</sup> calling for the government to assume an active duty protecting the environment for the benefit of the public, including future generations.<sup>249</sup> The public would have been empowered to enforce the public trust doctrine, so that government implementation would not have been discretionary.<sup>250</sup>

The public trust doctrine should be included in any future draft of the Chilean constitution. The doctrine is fully consistent with Chilean legal doctrines like the social function of property and with the Spanish civil law tradition codified in *Las Siete Partidas*.<sup>251</sup> It 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 and end the assumption that existing constitutional protections of private property may eliminate or reduce public rights.<sup>252</sup> The public trust doctrine is capable of protecting the Chilean environment, while still accommodating private property, and providing the Chilean government with a powerful directive to confront current and future environmental challenges.<sup>253</sup>

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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.”).

<sup>248</sup> See *supra* notes 32–34 and accompanying text.

<sup>249</sup> PROPUESTA CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE, art. 134(1) (2022), translated in *Chile's Draft Constitution of 2022*, <https://perma.cc/27HY-G3EK>.

<sup>250</sup> *Id.* art. 134(6).

<sup>251</sup> The public trust doctrine would also be consistent with rights of nature recognized in other Latin American countries, see *supra* notes 15–19 and accompanying text.

<sup>252</sup> CHILEAN WHITE PAPER, *supra* note 1, at 19, 24; see *supra* Part III, Section B (“The constitution . . . prioritizes . . . private property rights over environmental rights”); see also PROPUESTA CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE, art. 134(4)–(5), 138 (empowering government oversight of private rights in trust resources and establishing the protection of the social function of property).

<sup>253</sup> Blumm, *supra* note 11, at 650 (“The doctrine actually functions to mediate between public and private rights”).

## APPENDIX

Chapter III. Nature and Environment<sup>254</sup>Article 127

Nature has rights. The State and society have a duty to protect and respect them.

The State should adopt an ecologically responsible administration and promote environmental and scientific education through lifelong learning and training processes.

Article 128

These are principles for the protection of nature and the environment, at least those of progressivity, precaution, prevention, environmental justice, intergenerational solidarity, responsibility and just climate action.

Whoever damages the environment has the duty to repair it, notwithstanding to the administrative, criminal, and civil penalties that correspond according to the Constitution and the laws.

Article 129

It is the duty of the State to adopt actions to prevent, adapt and mitigate the risks, vulnerabilities and effects caused by the climate and ecological crisis.

The State must promote dialogue, cooperation and international solidarity to adapt, mitigate and face the climate and ecological crisis and protect nature.

Article 130

The State protects biodiversity, and must preserve, conserve and restore the habitat of wild native species in the appropriate quantity and distribution to sustain the viability of their populations and ensure the conditions for their survival and non-extinction.

Article 131

Animals are subject to special protection. The State shall protect them, recognizing their sentience and the right to live a life free from abuse.

The State and its entities shall promote education based on empathy and respect for animals.

Article 132

The State, through a national system of protected areas, unique, comprehensive and of a technical nature, must guarantee the

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<sup>254</sup> This chapter of the proposed constitution would have provided extensive environmental protections. To see the rest of the proposed constitution, in English, see PROPUESTA CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE, (2022), *translated in Chile's Draft Constitution of 2022*, <https://perma.cc/BF92-EEGN>.

preservation, restoration and conservation of natural spaces. It must also monitor and maintain up-to-date information regarding the attributes of these areas and ensure the participation of local communities and territorial entities.

Article 133

It is the duty of the State to regulate and promote the management, reduction and recovery of waste.

**Natural Common Goods**

Article 134

Natural common goods are elements or components of nature over which the State has a special duty of custody in order to secure the rights of the nature and interest of present and future generations.

The territorial sea and its seabed are natural common goods; the beaches; waters, glaciers and wetlands; geothermal fields; the air and the atmosphere; the high mountains, protected areas and native forests; the subsoil, and others declared by the Constitution and the law.

Among these goods are non-appropriable water in all its states, the air, the territorial sea and beaches, those recognized by international law and those that the Constitution or laws declare as such.

In the case of natural common goods that are non-appropriable, the State must preserve, conserve and, where appropriate, restore them. It must also administer them in a democratic, solidary, participatory and equitable manner. With respect to those natural common goods that are in the private domain, the duty of custody of the State implies the power to regulate their use and enjoyment, with the purposes established in paragraph 1.

The State may grant administrative authorizations for the use of non-appropriable natural common property, in accordance with the law, temporarily, subject to grounds for expiration, extinction and revocation, with specific conservation obligations, justified in the public interest, the protection of nature and the collective benefit. These authorizations, whether individual or collective, do not generate property rights.

Any person may demand the fulfillment of the constitutional duties of custody of the natural common goods. The law shall determine the procedure and requirements of this action.

Article 135

The State must promote measures to conserve the atmosphere and the night sky, according to territorial needs.

It is the duty of the State to contribute and cooperate internationally in space research for peaceful and scientific purposes.

Article 136

The State, as custodian of wetlands, native forests and soils, will ensure the integrity of these ecosystems, their functions, processes and water connectivity.

Article 137

The State guarantees the protection of glaciers and the glacial environment, including frozen soils and their ecosystem functions.

Article 138

The State shall protect the ecological and social function of the land.

Article 139

Chile is an oceanic country that recognizes the existence of the *maritory* as a legal category that, like the territory, must have specific regulatory regulation, which incorporates its own characteristics in the social, cultural, environmental and economic fields.

It is the duty of the State to conserve, preserve and care for continental, island and Antarctic marine and coastal ecosystems, promoting the various vocations and uses associated with them and ensuring, in any case, their preservation, conservation and ecological restoration.

A statute will establish the administrative division of the *maritory*, its spatial planning, integrated management and the basic principles that must inform the legal bodies that materialize its institutionalization, through a differentiated, autonomous and decentralized treatment, as appropriate, on the basis of equity and justice.

### **Status of Water**

Article 140

Water is essential for life and the exercise of human and natural rights. The State must protect the waters, in all their states and phases, and their hydrological cycle.

The exercise of the human right to water, sanitation and ecosystem balance will always prevail. The other uses shall be determined by statute.

Article 141

The State shall promote and protect the community management of drinking water and sanitation, especially in rural and extreme areas and territories, in accordance with the law.

Article 142

The State shall ensure a reasonable use of the waters. Authorizations for the use of water shall be granted by the National

Water Agency, of an inedible nature, granted on the basis of the effective availability of water, and shall oblige the holder to the use that justifies their granting.

Article 143

The State shall ensure a participatory and decentralized water governance system through integrated watershed management. The river basin shall be the minimum unit of management.

The basin councils shall be responsible for the administration of water, notwithstanding to the supervision and other powers of the National Water Agency and the powers assigned to other institutions.

The law shall regulate the powers, functioning and composition of the councils. These must be integrated, at least, by the holders of water use authorizations, civil society and territorial entities with a presence in the respective basin, ensuring that no actor can reach control alone.

Councils may coordinate and associate where appropriate. In those cases where a council is not constituted, the administration will be determined by the National Water Agency.

Article 144

The National Water Agency is an autonomous body, with legal personality and its own patrimony, which operates in a decentralized manner and is responsible for ensuring the sustainable use of water for present and future generations, access to the human right to water and sanitation and the conservation and preservation of its associated ecosystems. To this end, it is responsible for collecting information, coordinating, directing and supervising the actions of state bodies with competence in water matters and individuals where appropriate.

The National Water Agency has the following powers:

Lead and coordinate the agencies with competence in water matters.

Ensure compliance with the National Water Policy established by the respective authority.

Grant, review, modify, expire or revoke water use authorizations.

Implement and monitor environmental management and protection instruments in water matters.

Coordinate and develop a unified public information system.

Promote the constitution of the basin councils. It will assist them in carrying out integrated management, participatory governance and planning of interventions in water bodies and ecosystems associated with the or the respective basins.

Monitor the responsible and sustainable use of water.

Impose the corresponding administrative sanctions, which may be claimed before the courts of justice.

Determine the quality of health services.

The others set forth by statute.



The law shall regulate the organization, designation, structure, functioning and other functions and powers of the National Water Agency.

### **Status of Minerals**

#### Article 145

The State has absolute, exclusive, inalienable and imprescriptible control of all mines and mineral, metallic, non-metallic substances and deposits of fossil substances and hydrocarbons existing in the territory. national, with the exception of surface clays, notwithstanding to ownership of the land on which they are situated.

The exploration and exploitation of these substances shall be subject to regulation that considers their finite, non-renewable nature, intergenerational public interest and environmental protection.

#### Article 146

Glaciers, protected areas, those established by statute and others declared by statute for reasons of hydrographic protection are excluded from all mining activity.

#### Article 147

The State must establish a policy for mining activity and its productive chain, which will consider, at least, environmental and social protection, innovation and the generation of added value.

The State must regulate the synergistic impacts and effects generated in the different stages of mining activity, including its productive chaining, closure or paralysis, in the manner established by statute. It is the obligation of whoever carries out the mining activity to allocate resources to repair the damages caused, the environmental liabilities and mitigate their harmful effects in the territories in which it is developed, in accordance with the law. The law shall specify how this obligation shall apply to small-scale mining and *pyrquinos*.

The State shall adopt the necessary measures to protect small-scale mining and *pyrquinos*, promote them and facilitate access to and use of the tools, technologies and resources for the traditional and sustainable exercise of the activity.

### **Nature Ombudsman's Office**

#### Article 148

An autonomous body, with legal personality and its own patrimony, called the Ombudsman's Office of Nature, will have as its function the promotion and protection of the rights of nature and of the environmental rights guaranteed in this Constitution, in the international environmental treaties ratified and in force in Chile, against the acts or omissions of the organs of the State Administration and private entities.

The Nature Ombudsman's Office will concentrate on regional ombudsmen's offices. The law shall determine the powers, organization, functioning and procedures of the Office of the Ombudsman for Nature.

Article 149

The Office of the Ombudsman for Nature shall have the following powers:

To supervise the organs of the State and private entities in the fulfillment of their obligations in terms of environmental rights and rights of nature.

Formulate recommendations in the matters of its competence.

Process and follow up on complaints about violations of environmental rights and refer where appropriate.

File constitutional and legal remedies when environmental and nature rights are violated.

Promote training and education in environmental and nature rights.

The others entrusted to it by the Constitution and the law.

Article 150

The direction of the Ombudsman of Nature will be in charge of a defender of nature, who will be appointed in a joint session of the Congress of Deputies and the Chamber of the Regions, by the majority of its members in office, based on a shortlist prepared by environmental organizations of civil society, in the manner determined by statute.