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The Public Trust Doctrine:
Roman Law Roots and Future Litigation
Phoebe J. Liccardo
Western Michigan University
Kalamazoo, MI

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Acronyms and Abbreviations

Administrative Procedures Act (APA)

Affordable Clean Energy Rule (“Rule”)

Clean Power Plan (CPP)

Environmental Protection Agency (EPA)

Public Trust Doctrine (PTD)

Res Communes Omnium (RCO)

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The Public Trust Doctrine:
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Introduction

United States law communicates that the value of the environment is economic. The Constitution provides no enumerated rights for environmental protection and many keystone environmental acts invoke the Commerce Clause.¹ In the United States, nature is a commodity. An object given to humans to exploit and deplete for our sole benefit. The laws which purport to protect nature do so only to ensure their perpetual exploitation. Exploitation itself is not a destructive force. Water resources were always exploited for drinking, travel, and fishing. Air resources for breathing and hunting, and land resources for food production and shelter. Nature is our common home. Its resources are exactly that, resources. They are intended for use. However, humans are abusing these resources to the detriment of other species and themselves. Water resources are overexploited such that fish populations are threatened and areas of oxygen depleted water almost 7,000 mi² large persist.² Air resources are exploited to the point that it's unbreathable for some groups, and the entire global climate continues to warm.

The warming of the global climate, commonly known as climate change, is an especially harrowing effect of human resource exploitation. Climate change is throwing every ecosystem off balance and inducing irreparable harm to human and non-human communities around the world. The effects of climate change are not hypothetical future events. With high confidence, the Intergovernmental Panel on Climate Change (IPCC), a United Nations body, reports impacts

¹ *Clean Air Act*, U.S. Code 42 (1970) § 7401 et seq.; *Clean Water Act*, U.S. Code 33 (1972) § 1251 et seq.; *Toxic Substances Control Act*, U.S. Code 15 (1976) § 2601 et seq.; *Safe Drinking Water Act*, U.S. Code 42 § 300f et seq.

² "Happening Now: Dead Zone in the Gulf 2021," *Ocean Today* (National Oceanic and Atmospheric Administration, 2022), <https://oceantoday.noaa.gov/deadzonegulf-2021/welcome.html>.

of climate change include “widespread and rapid changes in the atmosphere, ocean, cryosphere and biosphere... weather and climate extremes in every region across the globe... widespread adverse impacts and related losses and damages to nature and people.”³ The IPCC predicts with near certainty that “adverse impacts from human-caused climate change will continue to intensify.”⁴ Ultimately, what the IPCC calls “business-as-usual” exploitation will lead to an unrecognizable world.

Most worrisome in this assessment is the United States’ role in climate change. Climate change is directly linked with emissions of greenhouse gases, most prominently, carbon dioxide (CO₂).⁵ Historically, the United States accounts for 24.6% of all CO₂ emissions.⁶ Not only is this the largest portion of any country, but the United States makes up only 4.25% of the global population.⁷ Additionally, while China surpassed the United States as the current largest emitter, the United States is a close second, emitting 15% of the world’s CO₂.⁸ All of this to say, the United States is culpable, if not most culpable, for the global impacts of climate change.

The United States’ complicity in global climate change has led to an array of political attempts to mitigate adverse environmental impacts. As Alexis de Tocqueville famously remarked, “scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question.”⁹ Climate change is no different. Attempts to mitigate climate

³ Intergovernmental Panel on Climate Change, *Climate Change 2022: Impacts, Adaptation, and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report* (Cambridge, U.K. and New York, USA: Cambridge University Press, 2022) A.2, doi:10.1017/9781009325844.001

⁴ *Ibid*, SPM.1

⁵ *Ibid*, B.1.1

⁶ Nadja Popovich and Brad Plumer, “Who Has The Most Historical Responsibility for Climate Change?,” *The New York Times*, November 12, 2021, <https://www.nytimes.com/interactive/2021/11/12/climate/cop26-emissions-compensation.html>.

⁷ “U.S. and World Population Clock,” United States Census Bureau, April 16, 2023, <https://www.census.gov/popclock/>.

⁸ “Global Greenhouse Gas Emissions Data,” EPA (United States Environmental Protection Agency, February 15, 2023), <https://www.epa.gov/ghgemissions/global-greenhouse-gas-emissions-data>.

⁹ Alexis de Toqueville, *Demoncracy in America* (London: Saunders and Otley, 1835).

change have entered the judicial branch. The subject of this research investigates an ancient legal doctrine, the public trust, and its relationship to climate change degradation. Unlike an agency rule or congressional act, the public trust does not source its legal authority from a statute or the Constitution. Rather, the public trust doctrine (PTD) is embedded in common law, persisting through time from the Roman Empire into modern day.

As this paper aims to prove, PTD differs from statutory environmental law because it does not rely on Commerce Clause authority for the protection of natural resources. PTD gives natural resources intrinsic value, recognizing that their benefit to the public is inherent, and does not derive from fiscal or economic considerations. The two elements that comprise PTD are 1) certain natural resources are held in the trust of the sovereign state for the public as beneficiary, and 2) these resources cannot be alienated from the public, neither by state nor private activities. The author establishes these two elements as the original intent of the Roman law. Elements that persist through English law, and into American law. However, as global economies and populations grew, these natural resources were inextricably linked to commerce. Ultimately, reducing the efficacy of PTD.

As litigation around climate change continues to rise in the United States, this research explores the heritage of PTD, and the implications that heritage has on environmental law in the United States. Using the author's literacy in Latin, methodologies for research include translation of primary Roman and English law and subsequent interpretation and commentary. Admittedly controversial, this research examines the merits of multiple, opposing scholarly arguments surrounding climate change litigation as it relates to PTD. Primarily through the scholarship of J.B. Ruhl and Thomas A.J. McGinn, who offer an in-depth analysis of historic and current

scholarly arguments on Roman roots of PTD.¹⁰ Ultimately culminating in a legal analysis of historic and current case law in the United States on PTD and related environmental law.

Throughout this research and subsequent argument, the author uses the legal strategy of interpreting the original intent of a law. She analyzes the Roman law in a way that reveals the intention of Roman authors to compose PTD. After establishing the Roman intent, the author identifies English and early American jurists who enacted laws maintaining this Roman intent. Simultaneously, the author traces the accompaniment of commerce to natural resource law, resulting in an estrangement from Roman intent in the United States. Using this research, the author poses an argument for what future adoption of PTD in the United States should encompass if the original, Roman intent is upheld. Finally, the author offers an analysis of the current and future potential of PTD in climate change litigation, given the composition of the United States Supreme Court.

Roman Roots Narrative

The application of ancient law to the modern PTD is widely debated among jurists and historians in the field of environmental law. The PTD is represented well in case law, but for almost a century there was very little activity concerning its use. The legal conversation around the PTD was reignited in 1970 with the publication of Joseph Sax's "The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention." This article sparked conversation because it presented the PTD as a legal avenue for natural resource management and protection.¹¹ Historically, application of the PTD is confined to navigable waterways. Joseph Sax

¹⁰ J. B. Ruhl and Thomas McGinn, "The Roman Public Trust Doctrine: What Was It, and Does It Support an Atmospheric Trust?," *Ecology Law Quarterly* 47, no. 1 (November 21, 2020): pp. 117-178, <https://doi.org/10.2139/ssrn.3440244>.

¹¹ Joseph L. Sax, "The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention," *Michigan Law Review* 68, no. 3 (1970): p. 471, <https://doi.org/10.2307/1287556>.

emphasized an expanded PTD, one that is comprehensive in its protection of all waters, air, wildlife, and the resources essential for life. More so, he made very broad claims about the Roman law foundations of the American PTD, known as the Roman roots narrative.¹²

Proponents of the Roman roots narrative believe that PTD supports broad protections of air, freshwater, sea and seashore with sweeping legal implications for the federal government. These proponents utilize Roman law and its documented progression into English law, and subsequently into American law as evidence. They believe the elements establishing a “public trust” in Roman law are the same elements present in American law. Opponents of these claims, and the Roman roots narrative, also cite the progression of Roman law into American law but argue there is a lack of coherent progression. Furthermore, opponents also claim Roman law never established a “public trust” as it is presented in the American PTD in the first place.¹³

While Sax’s claims about the inception of PTD dating back to Roman law are correct, many of his arguments were unsubstantiated by legal, contextual, or historical evidence. Following his landmark article, other scholars of both Roman and environmental law took up strong views on this nuanced approach to ecological stewardship. Sax made his Roman roots claim about PTD with the same evidence that most other legal authors use to stake their claim, the *Res Communes Omnium* (RCO) passage of Justinian’s Institutes.

***Res Communes Omnium* Passage**

The RCO passage states:

Justinian’s Institutes, 2.1.1.1: Et quidem naturali iure communia sunt omnium haec: aer et aqua profluens et mare et per hoc litora maris. nemo igitur ad litus maris accedere prohibetur, dum tamen villis et monumentis et aedificiis absteineat.

¹² Ruhl et al., *supra* note 10

¹³ James L. Huffman, “Speaking of Inconvenient Truths—A History of the Public Trust Doctrine”, *Duke Environmental Law and Policy Forum*, 18 (Fall 2007): pp. 1-103.

Indeed, by natural law there are these common things for all: air, flowing water, the sea, and through it the shore of the sea. Therefore, no one is prohibited from approaching the shore of the sea, so long as they keep away from houses, monuments, and buildings.

This passage is raised as the progenitor of the PTD and cited by both proponents and opponents of an expanded interpretation of PTD. The primary grievance aimed at scholars of the Roman roots narrative is that neither party conducts detailed interpretations of Roman law beyond the mention of RCO in Justinian's Institutes.¹⁴ Undoubtedly, this passage renders the greatest source of authority for proponents of the Roman roots narrative. However, because those who support a Roman roots narrative typically *only* cite the RCO, it provides little support for their argument.

Roman law historians place the greatest importance on “chronology, context, nuance, and interpretation” when analyzing legal texts and manuscripts.¹⁵ Contemporary jurists of Roman law analyze the work of both proponents and opponents of the Roman roots narrative and find that these attributes are critically absent from proponents and misconstrued by opponents.¹⁶ The lapse in understanding between the two parties is due mainly to a lack of attention placed on these contextual aspects of Roman law. Therefore, further development of these analytical elements would render the most appropriate examination of the Roman roots narrative and its implications for the authority of the American PTD.

More so than proponents, opponents of the narrative branch out from the Institutes and RCO passage and gather Roman law from more expansive sources such as Justinian's Digest, also known as the Pandects. Examining the Digest is important to extract the most textually relevant material from Roman law. The Digest is a more comprehensive corpus than the *Institutiones*, an elementary composition in comparison. Yet even those examining the Digest

¹⁴ Ruhl et al., *supra* note 10

¹⁵ *Ibid.*

¹⁶ *Ibid.*

still fail to incorporate crucial aspects of interpretation by presenting arguments in complete isolation of relevant context.

The foundation of the RCO, whether sourced from the Institutes or the Digest of Justinian, comes from its designation as *ius naturale*, Natural Law. The Classical orator and statesman Marcus Tullius Cicero eloquently explains the philosophy of *ius naturale* in his *De Re Publica*, written between 54-51 B.C. Presented as a response by Roman politician Laelius:

Cicero, *De Re Publica*, 3.22: Est quidem vera lex recta ratio naturae congruens, diffusa in omnes, constans, sempiterna...nec vero aut per senatum aut per populum solvi hac lege possumus...cui qui non parebit, ipse se fugiet ac naturam hominis aspernatus hoc ipso luet maximas poenas, etiamsi cetera supplicia, quae putantur, effugerit.

Indeed, there is the true law, a proper doctrine, corresponding with nature, spread into all things, lasting, eternal... in truth we are not able to be released from this law neither through the senate nor through the people...he who does not yield to it will flee himself, and by rejecting the very nature of humanity he will pay the greatest penalties, even if he does flee other punishments.

Cicero emphasizes the everlastingness of the Law of Nature by placing *constans* and *sempiterna* in consecutive word order. By placing these synonyms next to each other, Cicero employs redundancy, emphasizing the infinitude of the Law of Nature. Additionally, the oral delivery of these two words, as Cicero would have presented it, are connected by the *s* at the end of *constans* and the beginning of *sempiterna*, creating the aural sensation of a drawn out, everlasting word. In addition to its perpetual nature, Cicero also emphasizes the inescapability of the Law of Nature. Cicero warns that dissolution from Natural Law is not possible, not by a Senatorial declaration and certainly not through individual resistance. Cicero's final warning is reminiscent of the environmental struggles faced today. By ignoring and decimating the natural order of his own ecosystems, man has grown wealthy with a full stomach. But the "punishments" that past generations have fled are now the "penalties" that future generations face.

The RCO passage is explicitly referenced as *ius naturale* in both the Institutes and the Digest. The claim presented in the RCO passage is an incredibly straightforward and digestible statement of environmental protection. Thus, it is easy to comprehend why proponents of the Roman roots narrative repeatedly cite the RCO as evidence that protection of these natural resources should be expanded. However, more context is required to defend an argument with such broad implications.

Furthermore, to complicate matters for proponents, the Roman law lacks legal authority in American law. Proponents of the Roman roots narrative and those who cite the RCO passage are aware it lacks legal force. Roman law once held a status of legal authority in American law as many briefs and opinions utilized its law to argue their case. However, as American law has sufficiently established its own precedents in every facet of jurisprudence, laws that come from ancient sources are much less authoritative. Today, Roman laws are not considered primary sources of law. The development of PTD also follows this pattern. At this point in its history, the United States has a sufficient foundation of PTD through its own court cases and precedents. As that foundation continues to grow, the authority of Roman law in American courts continues to wane. However, as the forebearer of both English and American law, there is consensus that Roman law is the origin of PTD.

Authorship of RCO Passage

Examiners of the Roman roots narrative focus heavily on the author of the RCO passage to provide historical context. The author of the RCO passage is also important for determining the ancient intent of PTD. Original intent, primarily applied to Constitutional interpretation, requires an understanding of what the authors of a law intended that law to achieve. This involves research into the thoughts, ideas, and opinions of the author. Certainly, to explore the

original intent of a law, its author must be established. However, there is disagreement over who the true author of the RCO is.

The presence of works on PTD expansion that credit or cite Justinian himself with the creation of the Institutes, Digest, or Codex exemplifies this absence of contextual analysis. Emperor Justinian was known as Justinian the Great, but he did not achieve that greatness on his own. Multiple times, Justinian ordered the compilation of all Roman laws enacted throughout history by its various rulers. Contracting jurists to compile a single, comprehensive law was common practice for most systems of Roman law, such as the composition of the Twelve Tables.¹⁷ Justinian did this to unify the Roman Empire under one shared law. He succeeded in this feat not by his own hand, but by the hands of the many compilers of his *Corpus Iuris Civilis*, formally composed between 529 and 534 A.D.¹⁸ Thus, is it historically inaccurate to give sole credit to Justinian himself without any mention of the generations of jurists who truly composed Justinian's *Corpus Iuris Civilis*.

The compilers of both the Digest and the Institutes of Justinian designate the author of the RCO passage as Aelius Marcianus, or Marcian. Marcian was a Roman jurist writing during the reign of Emperors Elagabalus and Severus Alexander, between roughly 218-235 A.D.¹⁹ Marcian's RCO passage found in Justinian's Digest is similar to that in the Institutes. However, for the purpose of comparing potential authors, it's important to identify how the RCO passage is produced in the Digest:

Dig. 1.8.2.1: Et quidem naturali iure omnium communia sunt illa: aer, aqua profluens, et mare, et per hoc litora maris.

¹⁷ Hans Julius Wolff, *Roman Law: An Historical Introduction* (Norman: University of Oklahoma Press, 2005).

¹⁸ *Ibid.*

¹⁹ Ruhl et al., *supra* note 10

Indeed, by natural law there are those common things for all: air, flowing water, the sea, and through it the shore of the sea.

Almost identical to the first sentence of the Institutes passage, the Digest provides the basic components for the category of *res communes omnium*. Opponents of the Roman roots narrative often use Marcian's authorship of the RCO passage found in the *Corpus Iuris Civilis* as fodder for their argument against legal expansion of PTD. The basis of this argument is that Marcian, as a jurist, used literature and philosophy as evidence for his legal arguments as opposed to sources of law itself. Therein, opponents argue that the RCO is included in the Institutes as a philosophy of law introduced by Marcian rather than an authoritative legal ruling.²⁰ This argument is supported by instances in the Institutes and Digest where Marcian explicitly cites extralegal sources such as Roman philosophers and literary authors as opposed to rulers or statesmen. For example, just four sections after the RCO passage in the Digest, Marcian states:

Digest, 1.8.6.5: Cenotaphium quoque magis placet locum esse religiosum, sicut testis in ea re est Vergilius.

Also, it is agreed upon more that an empty tomb is a religious place, just as Vergil testifies in his writing.

Ultimately, opponents of the Roman roots narrative are correct that as the author of the RCO, Marcian lacks credibility insofar as a bulk of his legal writings are sourced from philosophy or literature. While this on its own does not render Marcian an unreliable or incompetent jurist, it does strain the authority of the RCO passage in American law even more than time already has.

Aside from Marcian, Roman law historians establish Gnaeus Domitius Ulpianus, or Ulpian, as a potential original author of the RCO.²¹ Note that Ulpian is not credited with generating the RCO passage itself, but there is a great body of evidence to support that the actual

²⁰ Patrick Deveney, "Title, Jus Publicum, and the Public Trust An Historical Analysis", 1 *Sea Grant Law Journal*, 13 (1976).

²¹ Ruhl et al., *supra* note 10

category of *res communes omnium* was the creation of Ulpian, and adopted by Marcian for his RCO passage. The most compelling evidence for such an argument is from a section of the Digest attributed to Ulpian:

Dig. 47.10.13.7: Si quis me prohibeat in mari piscari vel everriculum (quod graece *sagyny* dicitur) ducere, an iniuriarum iudicio possim eum convenire? sunt qui putent iniuriarum me posse agere: et ita Pomponius et plerique esse huic similem eum, qui in publicum lavare vel in cavea publica sedere vel in quo alio loco agere sedere conversari non patitur, aut si quis re mea uti me non permittat: nam et hic iniuriarum conveniri potest... si quem tamen ante aedes meas vel ante praetorium meum piscari prohibeam, quid dicendum est? me iniuriarum iudicio teneri an non? et quidem mare commune omnium est et litora, sicuti aer, et est saepissime rescriptum non posse quem piscari prohiberi: sed nec aucupari, nisi quod ingredi quis agrum alienum prohiberi potest. usurpatum tamen et hoc est, tametsi nullo iure, ut quis prohiberi possit ante aedes meas vel praetorium meum piscari: quare si quis prohibeatur, adhuc iniuriarum agi potest. in lacu tamen, qui mei dominii est, utique piscari aliquem prohibere possum.

If someone should prevent me to fish in the sea or to lead a drag-net, which is said in Greek *sagyny*, then would I be able to bring him for injuries in court? There are those who think I am able to sue for injuries: such as Pomponius, and the majority think that he is similar to he who is not allowed to bathe in public or to sit in a public theater or in which it is not permitted to go, sit, or converse in some other place, or if anyone does not permit me to use my things: for even this man can be sued for injuries... Nevertheless, if I should prohibit anyone to fish in front of my house or in front of my headquarters, what must be declared? That I should be held by the court for injuries or not? *Indeed, the sea is common for all men and the shores, just as the air*, and there is most often a rescript for which it is not possible to be prohibited to fish: nor also to fowl, except someone is able to be prohibited to enter that which is another's land. But nevertheless, this is customary, although by no law, that anyone is able to be prohibited to fish in front of my house or my headquarters: for this reason, if anyone should be prohibited, it can still be brought for injuries. However, in a lake, which is in my ownership, I am able to prohibit anyone to fish and to use it.

Along with the blatantly similar language found in both passages, chronological context is also crucial to the analysis of who generated the RCO. As previously mentioned, Marcian is hypothesized to have produced the majority of his work during the reign of Elagabalus and subsequently, Severus Alexander. Ulpian lived through the reign of Elagabalus and was assassinated during the reign of Severus Alexander. However, it is generally accepted that the

majority of Ulpian's work was completed under the reign of Caracalla, who was succeeded by Elagabalus.²² Specifically, Ulpian's *Libri ad editum*, the work from which this excerpt of the Digest is sourced from, is attributed to the period of Emperor Caracalla. Caracalla reigned from 211-217 A.D., almost a decade or two before the bulk of Marcian's work is supposedly written.²³

Although it seems that a single decade or two does not present a major distinction in the millennia of Roman history, the distinction between Marcian and Ulpian is significant. Not only does chronology lend itself to Ulpian as the author of the category of RCO, but a comparison of the two RCO texts does as well. The most notable difference between Marcian's Digest 1.8.2.1 and Ulpian's 47.10.13.7 is the addition of *aqua profluens*. While it's easy to miss the absent *aqua profluens* in the expanse of Ulpian's rhetorical questions, it's clearly present in the brief RCO passage by Marcian. This addition is easily attributed to Marcian because the list of RCO resources that Ulpian provides is exhaustive.

Ulpian adequately expresses the legal role of *res communes omnium* using only the sea as an example per his fishing analogy. However, he purposely inserts "*et litora, sicuti aer.*" This insertion provides no additional support for his fishing analogy. Thus, the most reasonable assumption is that he provided these two *res* to complete the category of RCO and establish an exhaustive list without supplementing each resource with its own analogy.²⁴ Marcian's addition of "*aqua profluens*" supports Ulpian's generation of the category by adding a fourth *res* that was not originally in Ulpian's exhaustive list.

Along with authorship, interpolations in Justinian's *Corpus Iuris Civilis* are a recurring point of controversy in the Roman roots narrative of the PTD. Interpolations are insertions or

²² Ruhl et al., *supra* note 10, see Bruce W. Frier, Law on the Installment Plan, 82 Michigan Law Review 856, 863 (1984), citing numerous predecessors.

²³ Ruhl et al., *supra* note 10, at 163.

²⁴ Ruhl et al., *supra* note 10, at 166.

deletions in the language of a passage that don't seem attributable to the credited author. Some opponents of the Roman roots narrative "lay the RCO at the feet of Justinian and his compilers," insinuating that the entire RCO is interpolated, and therefore a Justinian era law rather than dating back centuries to Marcian or Ulpian.²⁵ These theories of interpolation are founded in the sense that the likelihood of interpolations is fairly high from texts thousands of years old which were transcribed from laws spanning the history of ancient Rome. However, it is highly unlikely that the entire RCO was contrived by Justinian and his compilers and simply attributed to Marcian and Ulpian. Mainly because mention of RCO is found in both the Institutes and the Digest, in a variety of books, on a variety of topics, and by more than one jurist. Additionally, because Justinian ordered the compilation of all prior Roman laws, the origin of these laws by Roman jurists are cited from their proper place in history. As is the case for both Marcian's RCO passage and Ulpian's initial mention of the RCO category.

Those who attribute the entire creation of the RCO, category and passage, to Marcian believe that Ulpian's Digest 47.10.13.7 is an interpolation on the part of Justinian and his compilers. Specifically, they believe that "et litora" is an interpolation because *litora*, a plural noun, is the subject of the singular verb *est* and therefore is not properly situated in Ulpian's sentence.²⁶ However, Latin grammar rules state that in the case of two subjects which "are considered as a single whole," such as the sea and shore, "the verb is usually singular."²⁷ Thus, it is appropriate to assume that the sentence "*et quidem mare commune omnium est et litora, sicuti aer*" is entirely attributable to Ulpian and not an interpolation on the part of Justinian's compilers.

²⁵ Ruhl et al., *supra* note 10, at 162.

²⁶ Ruhl et al., *supra* note 10, at 153, *see* analysis of Emilio Costa, *Le Acque Nel Diritto Romano* 91, 115 n. 3 (1919) (1916).

²⁷ J. H. Allen and J. B. Greenough, *New Latin Grammar*, §314.b, (Mineola, NY: Dover Publications Inc., 2006).

Attributing the creation of RCO to Ulpian magnifies the legal credibility of the passage. While both Marcian and Ulpian were respected jurists, the prestige achieved by Ulpian extends more credibility to the RCO. As mentioned before, it is well known that Marcian relied heavily on ancient philosophy and literature to source his legal writing. This inherently dissipates the authority of his legal texts because they lack a primary legal origin. Ulpian, on the other hand, exudes legal credibility as one of the most respected jurists of his time.²⁸ The eminence of Ulpian, especially when compared to Marcian, enhances the legal authority of the RCO. Ulpian as the original author also provides evidence that the RCO as Romans understood it has similar attributes to the principles underlying the American PTD.

Roman Management of RCO

Roman law prescribes different methods of management for different types of state property. Opponents of the Roman roots narrative assert the overlap of public state property, *res publicae*, and *res communes omnium* as evidence that RCO is a legal philosophy, not an explicit Roman law. They claim that the incorporation of the sea and shore in texts on *res publicae* nullify the distinction of RCO as its own legal category.²⁹ Furthermore, they argue that state ownership over *res publicae* implies state ownership over RCO as well.³⁰ The lapse inherent to all of these “contradiction” arguments is rationalized by some to be evidence for the complete Justinian interpolation of RCO. However, these arguments are explained away by the conclusion that no true contradiction need be drawn between *res publicae* and *res communes omnium*.

In 1925, Italian jurist, Biondo Biondi, postulated that the distinction between these two legal categories is complementary, and they are essentially different sides of the same coin.

²⁸ Ruhl et al., *supra* note 10, at 147.

²⁹ *Ibid.*

³⁰ *Ibid.*

Specifically, he claims, “[t]hey are *res communes* in terms of their universal accessibility of use, and *res publicae* in terms of the management of this accessibility by the State.”³¹ In other words, RCO describes the property itself, while *res publicae* is a description for its management by the state. In this way, Biondi provides a reasonable explanation for the continued use of both terms to describe the same resources without any apparent contradiction.

In addition to legal authority, Ulpian as the creator of the RCO category provides context pertaining to *res publicae* that Marcian’s passage does not. In Dig. 47.10.13.7, Ulpian asserts, “he is similar to he who is not allowed to bathe in public or to sit in a public theater or in which it is not permitted to go, sit, or converse in some other place.” By comparing the prohibition of fishing in the sea, a *res* universally agreed upon as part of RCO, to other public assets (i.e. baths, theaters, other public places) understood to be *res publicae*, Ulpian seems to implicate the alleged contradiction. However, Biondi’s explanation for this contradiction is supported by Ulpian’s passage. In addition to introducing *res publicae*, Ulpian goes further by acknowledging prior classic jurists’ distinction between two types of *res publicae*. These are *in patrimonio fisci* (in the ownership of the treasury), which the state considered assets much like private property, and *in publico usu* (in public use), which brought in revenue but whose access could not be alienated by the state.

Ulpian introduces only property recognized as *res publicae in publico usu* through his mention of baths, theaters, and other public places, with the noticeable omission of any *res publicae in patrimonio fisci*. This comparison between property that is clearly identifiable as *res publicae* and those that are *res communes omnium*, does not impose a contradiction but rather

³¹ Ruhl et al., *supra* note 10, at 154, *see* Biondo Biondi, “Condizione giuridica del mare e del litus maris,” in *Biondo Biondi, Scritti Giuridici*, vol. 3, 107, 108 (1965) (1925).

implies that both are managed as property *in publico usu*. If *res publicae* and RCO are two sides of the same coin, Ulpian understands the coin to be *in publico usu* property management.

Limited Alienability Principle

A difference exists between *res publicae* and RCO, if nothing more than that RCO is a peculiar subset of *res publicae*. The quality that joins the two categories is the limited alienability principle of *in publico usu* property management. In its simplest form, the limited alienability principle grants access to all citizens to utilize public places and resources without interference from the state or other persons. Thus, because *in publico usu* strictly prohibits alienability, this obligates the state to maintain access for the public, both from external inhibitions and threats from the state itself. Furthermore, limited alienability implies that any concurrent management of private or public property which conflicts with such adequate access is null and void. This limited alienability principle is ultimately the most significant aspect that separates *in publico usu* from *in patrimonio fisci* property management. To ignore or stray from this alienability principle would be to nullify the entire characterization of a public place or resource as *in publico usu* property.

Limited alienability as a trait of *res communes omnium* property is exemplified by Ulpian's reference to a praetorian interdict:

Dig, 43.8.2 (pr): Praetor ait: "ne quid in loco publico facias in eum locum immittas, qua ex re quid illi damni detur, praeterquam quod lege senatus consulto edicto decretove principum tibi concessum est."

The praetor declares: "Lest you should make anything in a public place or you should insert anything into that place which would cause injury, except that which has been yielded to you by law of the senate with an edict or decree of a leader having been consulted."

The intent of this interdict is to prohibit injuries to the public and to the resources themselves.

Ulpian interprets the interdict this way as well:

Dig, 43.8.2.2: Et tam publicis utilitatibus quam privatorum per hoc prospicitur. loca enim publica utique privatorum usibus deserviunt... et tantum iuris habemus ad optinendum, quantum quilibet ex populo ad prohibendum habet. propter quod si quod forte opus in publico fiet, quod ad privati damnum redundet, prohibitorio interdicto potest conveniri.

Through this, it is protected for public use as much as for private. Indeed, public places certainly provide for the needs of private citizens... and we possess so much of the law for retaining as anyone from the people possesses for preventing. For this reason, if anything perhaps becomes a burden in public, which pours over injury to a private citizen, it is able to be brought by [this] interdict.

Ulpian identifies the intent of this interdict to protect public welfare, and he explicitly equates the state's right to possess public places with the public's right to access them. This intention for public accessibility is further developed by contrasting state management of *res publicae* and *res in patrimonio fisci*:

Dig, 43.8.2.4: Hoc interdictum ad ea loca, quae sunt in fisci patrimonio, non puto pertinere: in his enim neque facere quicquam neque prohibere privatus potest: res enim fiscales quasi propriae et privatae principis sunt. igitur si quis in his aliquid faciat, nequaquam hoc interdictum locum habebit: sed si forte de his sit controversia, praefecti eorum iudices sunt.

I do not think that this interdict extends to those places which are *in fisci patrimonio* (inheritance of the treasury): for in these places it is possible neither to make anything nor to prohibit a private citizen: for treasury things are for the individual and for the private emperor. Therefore, if anyone in these places should make anything, by no means will the place hold this interdict: but if perhaps there should be a dispute in these places, their prefects are judges.

The contrast between state authority over public places and places owned by the state is significant for the limited alienability principle. Ulpian makes public accessibility the cornerstone of this interdict. In this passage, Ulpian takes a step back from *res publicae* and instead contrasts *in publico usu* management with *in fisci patrimonio*. Ulpian is very explicit that this interdict does not apply to property owned by the state, and therefore, that the state did not own property *in publico usu*. In this way, he clarifies that Romans did understand property intended for public welfare, and not solely for the benefit of state interests. In fact, from the

previous passage (43.8.2.2) it's clear that Romans understood public welfare itself to be beneficial to the state.

Moving on from *res publicae*, Ulpian addresses the applicability of this interdict to the sea, a universally recognized *res communes omnium*:

Dig, 43.8.2.8: Adversus eum, qui molem in mare proiecit, interdictum utile competit ei, cui forte haec res nocitura sit: si autem nemo damnum sentit, tuendus est is, qui in litore aedificat vel molem in mare iacit.

Against him, who puts forth a structure in the sea, this interdict is sufficient in use for him, who perhaps has been injured by these things: if however, no one feels an injury, he must be protected, who builds on the shore or tosses a structure in the sea.

This application to the sea wholly demonstrates the limited alienability principle as it applies to RCO. Essentially, if something was done in or around the sea that limited the usufruct of the public it was prohibited. If something was done in or around the sea that did not limit the usufruct of the general public, then it must be allowed. This is the essence of the limited alienability principle, to protect both the value of these resources and the public's right to use them.

In addition to physical obstructions or inhibitions, Ulpian also specified the procedure if one citizen were to prevent another citizen from using RCO:

Dig, 43.8.2.9: Si quis in mari piscari aut navigare prohibeatur, non habebit interdictum, quemadmodum nec is, qui in campo publico ludere vel in publico balineo lavare aut in theatro spectare arceatur: sed in omnibus his casibus iniuriarum actione utendum est.

If anyone should be prevented from fishing or navigating in the sea, this interdict will not hold, just as he who is hindered from playing in a public park or bathing in a public bath or watching in a theatre: but in all these cases an action for injury must be brought.

Here, Ulpian explains this interdict does not apply when a citizen is prevented by another from enjoying property *in publico usu*. However, he counters that while the interdict does not apply,

this is still an injury. This indicates that limited alienability also includes outright hindering access, even if there is nothing physically causing the injury. Essentially, just as villas can't hinder access to the sea, people and their activities can't hinder access either. While these required two different routes of Roman adjudication, they are both encompassed by the limited alienability principle.

Perhaps most importantly, Ulpian provides what Roman jurists would constitute as an injury:

Dig, 43.8.2.11: *Damnum autem pati videtur, qui commodum amittit, quod ex publico consequatur, qualequale sit.*

He seems to suffer an injury, who loses benefit, which was obtained from a public thing, whatever it is.

Dig, 43.8.2.12: *Proinde si cui prospectus, si cui aditus sit deterior aut angustior, interdicto opus est.*

Hence if the view for someone or if the approach for someone is degraded or restricted, this interdict applies.

These explanations of injuries demonstrate in multiple ways how Romans applied law to natural resources. First, Roman jurists understood the intrinsic value of nature to humans and general welfare. Public access to natural resources was essential for public health and sustenance.

Romans relied on these resources for food, water, and other essential nutrients for life. Second, that the loss of this sustenance was an injury. Romans understood that denying the benefits of natural resources negatively impacts the public. Finally, that this benefit cannot be alienated from the public regardless of circumstance. These resources were not owned by the state, but by the people. As such, this benefit must simultaneously be granted to every person and protected from misuse.

In conclusion, Roman jurists saw natural resources for what they are, an inalienable right. They did not treat nature solely as a commodity. However, they also did not recognize a need to

protect the resource itself. Rather, Roman jurists identified the danger of loss for the people. In ancient Rome, these abundant resources flawlessly provided ecosystem services. The threat was not to the health or longevity of nature, but to the access of individual citizens. In this way, Roman jurists protected usufruct of RCO by protecting access. Today, limited alienability is not being violated by any single structure or individual, but by federal institutions which over time have lost the legal recognition of the intrinsic value of nature. This loss developed slowly, correlating with the rise of industrialization and global economies. This is evident in English laws which continue the intent of the RCO passage.

Public Trust in English Law

The limited alienability principle of property *in publico usu*, established by the RCO passage, grants unimpaired access to natural resources for the public. This principle was much easier to manage when access to these resources was abundant. Individual access to *res communes omnium* was only truly inhibited by physical implementations, such as erecting buildings or placing obstructions in public waterways. These types of inhibitions were the impetus for the praetorian interdict Ulpian incorporates. As time progressed, Rome fell but many of its laws persisted, their original intentions still intact.

Following the fall of Rome, Justinian's laws were not recovered until the 11th century A.D. The recovery of Justinian's *Corpus Iuris Civilis* coincided with heated political debates over jurisdiction and ownership of public places and natural resources. This medieval period is also responsible for the aforementioned discussion among jurists about the contradiction (or lack thereof) between *res publicae* and *res communes omnium*. These scholarly debates also coincided with the Magna Carta, a historical legal document commonly cited when discussing the roots and progression of the RCO passage.

Navigability as an Element of Public Waters

The Magna Carta presents strong evidence that the intention of the RCO passage is to ensure access to natural resources. This document is historically seen as a monumental grant of rights to private citizens by a tyrannical monarchy. By this time, access to public waterways was noticeably impaired. Magna Carta presents English law with correlations to the Roman RCO passage:

Magna Carta, 1215, Cl. 33: *Omnis kidelli de cetero deponantur penitus de Tamisia, et de Medewaye, et per totam Angliam, nisi per costeram maris.*

All nets henceforth are banished inside the Thames, and the Medway, and throughout the whole Anglia, but not throughout the coast of the sea.

Interestingly, this clause was formulated as a result of citizen exploitation, rather than intrusion by the monarchy.³² The *kidelli* referenced were large fishing nets with poles stabilized into the bed of a river, or into the seafloor of shallow water. These *kidelli* were causing piscary and navigability issues in English rivers.³³ The River Thames, which flows under the London Bridge, was filled with *kidelli* at the publication of Magna Carta. These *kidelli* were incredibly efficient at catching fish. While this kept London's appetite for fish satiated, these bulky nets made it difficult for private citizens to access fishable areas of the Thames. However, this piscary aspect of *kidelli* was less concerning to the Monarch and to the citizenry than the navigability aspect of Clause 33.

The navigability impairment caused by *kidelli* in English rivers generated the navigability requirement commonly associated with the PTD that is present today. *Kidelli* limited access to the River Thames by hindering transport vessels in and out of London. Navigability, the ability

³² H. Summerson, 'The 1215 Magna Carta: Clause 33, Academic commentary', *The Magna Carta Project*, http://magnacartaeseach.org/read/magna_carta_1215/Clause_33?com=aca.

³³ *Ibid.*

to navigate and progress through public waterways without inhibition, was crucial to the economic success of London and therefore, England.³⁴ Subsequently, Clause 33 of the Magna Carta was enacted to correct this alienability of the River Thames, Medway and Anglia for transport vessels.

Navigability was not a factor of limited alienability when Ulpian and Marcian first authored the RCO passage. Navigability of rivers and other public waterways was not obstructed by any third century piscary devices. However, as populations and economies grew, the natural services provided by flowing waters, a *res communes omnium*, were in higher demand. This evolution of society and the increasing need for services provided by *res communes omnium* is demonstrated in Clause 33. Its main purpose was to alleviate the strain on navigability caused by a lack of regulation on the River Thames, Medway, and Anglia.³⁵ This navigability aspect of RCO, enshrined by the Magna Carta, is the basis upon which many American PTD cases have been decided. Even beyond the PTD, American law has incorporated navigability into the very definition of what waters can and cannot be regulated under federal authority.³⁶

Colonial Era Interpretation

Precursors to this navigability test presently used today are found in the opinions of English jurists writing in the early seventeenth century. Navigability, while a reason behind Clause 33, was not formally identified as an attribute of public trust waters until Sir John Davies' *River Banne* decision of 1611:

[T]here are two kinds of rivers, navigable and not navigable; that every navigable river, so high as the sea ebbs and flows in it, is a royal river, and belongs to the King, by virtue of his prerogative; but in every other river, and in the fishery of such other river, the ter-tenants on each side have an interest of common right; the

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ 33 U.S.C. 1362(7), defines waters subject to federal regulation.

reason for which is, that so high as the sea ebbs and flows, it participates of the nature of the sea, and is said to be a branch of the sea so far as it flows.³⁷

This test of navigability was based on the ebb of flow of the sea. While the definition of a navigable river was altered by the *Daniel Ball* decision (1870), a connection can be drawn between the two decisions, bridging English law and American law. Royal rivers described by Sir John Davies have a direct legal relationship with *regiae viae*, King's ways. Sir Edward Coke sourced his 1628 understanding of *regiae viae* from Henry de Bracton:

There be three kinde of wayes, whereof you shall reade in our ancient bookes. First a foote way, which is called *Iter, quod est jus eundi vel ambulandi hominis* [path, that is the right of a human being to go or walk], and this was the first way.

The second is a foote way and horse way, which is called *actus, ab agendo* [a drive, from "driving"]; and this vulgarly is called packe and prime way, because it is both a foot way, which was the first or prime way, and a packe or drift way also.

The third is *via* or *aditus* which conteyne the other two, and also a cart way, for this is *jus eundi, vehendi, & vehiculum & iumentum ducendi* [right of way for carrying, vehicles, and leading animals]; and this is twofold. *Regia via*, the Kings high way for all men, & *communis strata* belonging to a Citie or Towne, or between neighbours and neighbours.³⁸

This third kind of way, *regia via*, can be compared to Sir John Davies interpretation of a royal river. The status of a royal river, subject to the "virtue of [the King's] prerogative"³⁹ is not indicative of a river in the ownership of the kingdom, as it may seem. Rather, a royal river is like that of a *regia via*, "for all men."⁴⁰ This is further demonstrated by Henry Schultes in his 1839 interpretation of *regia via* as it applies to navigable waters:

Every navigable river, as high as the sea flows and reflows, is called a royal stream, and the king has an interest in it; because such river participates of the nature of the sea, and is considered as a branch of the sea as high as the tide flows.

³⁷ *The Royal Fisheries in the river Banne*, 80 Eng. Rep. 540 (K.B. 1611).

³⁸ Edward Coke, *Institutes of the Laws of England* (1628), 56.

³⁹ *The River Banne*, *supra* note 37.

⁴⁰ Edward Coke, *supra* note 38.

And it is usually called a royal stream, not in reference to the property of the river, but to the public use of it; for these kinds of rivers are regarded as public highways by water, and all things of public safety and convenience being in a special manner under the king's care and protection, and every public river or stream is *alta regia via*, the king's highway.⁴¹

This explanation of an *alta regia via*, or a navigable public waterway, embodies the limited alienability principle of resources *in publico usu* present in Roman law. Schultes' interpretation of the King's interest is comparable to Ulpian's distinction between property *in publico usu* and property *in patrimonio fisci*. Specifically, Schultes states, "it is usually called a royal stream, not in reference to the property of the river, but to the public use of it... under the king's care and protection."⁴² This interpretation of English law's definition of a navigable waterway places the *res* in the care and protection of the state (or King), while negating any property rights to or outright ownership of it. Thus, English law, like Roman law, imparted an obligatory role onto the state to protect access to public resources for the use and enjoyment of the public.

While the "ebb and flow" definition of navigable waters was replaced by the navigable-in-fact standard, the American definition is comparable to Coke's *regia via*, and Schultes' *alta regia via*. In 1870, the *Daniel Ball* decision created the standard of public waters navigable-in-fact:

Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.⁴³

⁴¹ Henry Schultes, *Aquatic Rights* (1839), 50.

⁴² *Ibid.*

⁴³ *Daniel Ball*, 77 U.S. (10 Wall.) 557 (1870)

These “highways for commerce”⁴⁴ are similar to *regia via*, as defined by Coke, due to the types of transportation present on these highways. Of the three types of ways described by Coke, the *regia via* is inarguably the only path for a merchant to transport his product in a timely manner. Thus, navigability of these *regia via* was critical to trade and commerce. *Alta regia via*, as explained by Schultes, are “regarded as public highways by water, and all things of *public safety* and *convenience* being in a special manner...”⁴⁵ This characterization makes clear that waters subject to the king’s jurisdiction (*alta regia via*) were responsible for travel, trade, and commerce. Ultimately, as society evolved with increasingly complex economies and global trades, limited alienability became synonymous with navigability. The ability for individuals to navigate through a public waterway and successfully engage in trade was the main priority for an industrializing society concerned equally with economic growth and omnipotent monopolies.⁴⁶

The Magna Carta’s exception of *kidelli* permitted in the sea demonstrates this phase of the limited alienability principle in environmental and commercial history. Magna Carta establishes that the English faced widespread accessibility inhibitions to public rivers that the Romans did not face.⁴⁷ Thus, English common law appropriately applied the limited alienability principle of the RCO passage by prohibiting these obstructions in rivers. However, the navigability of the sea was not limited by the *kidelli*. Magna Carta, again, appropriately applied the limited alienability of the RCO passage by expressly permitting *kidelli* access at the seashore. This directly applies Ulpian’s praetorian interdict, which prohibits obstructions *only* that cause injury, otherwise these additions must be allowed.

⁴⁴ *Ibid.*

⁴⁵ Schultes, *supra* note 41.

⁴⁶ Summerson, *supra* note 32.

⁴⁷ *Ibid.*

Magna Carta and discussions of *regia via* do not represent a comprehensive collection of the common law heritage of PTD in English law. However, this collection of common law, first from Ulpian's interdict, to Sir John Davies' and Sir Edward Coke's decisions, onto Schultes' claims, and ultimately the *Daniel Hall* decision, demonstrate the traceable roots from Roman law, to English law, and finally to American law. These examples are indicative of the navigability aspect of waters of the United States, historically, often the subject of PTD disputes.⁴⁸ Yet, limiting PTD protections to navigable waters is not consistent with Roman law standards for the category of *res communes omnium*.

Public Trust in Early America

The RCO passage clearly defines *res communes omnium* beyond navigable waters, and the Supreme Court has also recognized public trust resources outside of navigable waters. American law, while much of its foundation comes from English law, has its own origin following the American Revolution. It's widely believed that the start of PTD precedent in U.S. history begins with *Arnold v. Mundy* (1821), as a controversy over public trust property "ha[d] never before come up before the courts of justice in this shape."⁴⁹ Though a case decided in New Jersey state court, *Arnold* establishes the legal distinction of property *in publico usu* in United States law by defining the trust in which natural resources are held.

Protection of trust resources was always central to disputes over public property. Fear mounted over those who would claim private ownership pitting themselves against those who would assert a common right. Furthermore, that "in their conflict for superiority... [they] not only [might] disturb the peace of society, but also destroy the very subject matter of

⁴⁸ *Clean Water Act*, *supra* note 36.

⁴⁹ *Arnold v. Mundy*, 6 N.J.L. 1 (1821).

controversy.”⁵⁰ The presence of this fear demonstrates the importance of public trust resources to general welfare. Without a ruling on this dispute over trust resources, both peace and the existence of natural resources were threatened.

The line of precedent from Roman law continues as *Arnold* utilizes Justinian’s Institutes, Sir John Davies *River Banne* decision, and Bracton to support navigable rivers, and seas held in a public trust. *Arnold* asserts navigable waters are property of a sovereign state, but they are retained for the use and enjoyment of the public:

Therefore, the wisdom of that law has placed it in the hands of the sovereign power, to be held, protected, and regulated for the common use and benefit. But still, though this title, strictly speaking, is in the sovereign, yet the use is common to all the people.⁵¹

This is the first instance which *in publico usu* property management is admitted into American law as it applies to PTD. *Arnold*’s reference to English and Roman law that also cite the RCO passage are further support of this admission. What Justinian’s Digest designated as state management for *in publico usu* property, the United States has designated as state management of a public trust. “[T]hat this power of disposition and regulation *must be exercised* by them in their sovereign capacity”⁵² [emphasis added], is further evidence that United States jurists adopted Roman precedent and intent. Roman states were obligated to protect access to *res communes omnium*, just as American States are obligated to protect trust resources.

In addition to the insertion of the *in publico usu* (trust) management, *Arnold* also invokes the limited alienability principle. The primary characteristic of the limited alienability principle is the promise of public access in absence of an injury.⁵³ Just as Romans were granted access

⁵⁰ *Ibid*

⁵¹ *Ibid*

⁵² *Ibid*

⁵³ Just. Dig. 43.8.2 (pr)

without the presence of injury, “the common people of England have regularly a liberty of fishing in the sea, and the creeks and the arms thereof, as a public common piscary, *and may not, without injury to their right, be restrained thereof*” [emphasis added].⁵⁴ Both the Roman law and *Arnold* declare that 1) public waters are held in the trust of the sovereign, who are obligated to regulate them for the usufruct of the public, and 2) in the absence of an injury, the public cannot be prevented from accessing these resources. Thus, *Arnold* interprets the law with the original intent of the Roman RCO passages.

Martin v. Waddell (1842), a U.S. Supreme Court case, established the same precedent for the entire U.S. that *Arnold* set for New Jersey. The facts surrounding *Martin* are almost identical to the facts of *Arnold*, involving an oyster bed on the banks of a navigable waterway in New Jersey. The Supreme Court essentially upheld the decision of *Arnold* in *Martin*. For posterity, *Martin* made the distinction that the U.S. Supreme Court, regardless of New Jersey precedent, also finds that claims of private rights to navigable waters are unfounded.⁵⁵ These claims were unfounded because title to navigable waters remains indefinitely with the sovereign, as decided in *Arnold* and reaffirmed by *Martin*.

The characteristics of the original intent of the Roman law outlined above (i.e., obligated to protect trust resources, and inability to limit access) are all present in what Dr. Michael Blumm has called “the lodestar case” of PTD law, *Illinois Central Railroad Co. v. Illinois* (1892), also a U.S. Supreme Court case.⁵⁶ In 1869, the Illinois legislature granted Illinois Central Railroad Co. title to some of the submerged lakefront of Chicago.⁵⁷ The legislature did this not

⁵⁴ *Arnold*, *supra* note 49.

⁵⁵ *Martin v. Waddell*, 41 U.S. 367 (1842).

⁵⁶ Michael Blumm & Lynn Schafer, *The Federal Public Trust Doctrine: Misinterpreting Justice Kennedy and Illinois Central Railroad*, 45 Environmental Law 399 (2015), https://lawcommons.lclark.edu/faculty_articles/56.

⁵⁷ *Ibid.*

for the benefit of Chicagoans, but because they were personal recipients of the funds provided from the railroad company in exchange for the title.⁵⁸ Following the induction of a new Illinois legislature, the State sued the railroad company to regain title to the submerged land.⁵⁹ *Illinois Central* appropriately applied the PTD and protected the Chicago lakefront from an unethical legislature and a profit-minded private company.

Foremost, *Illinois Central* bridges the gap between English and American definitions of waterways subject to PTD. *Illinois Central* adopts the doctrine to mean “the ownership of and dominion and sovereignty over lands covered by tidewaters, within the limits of the several states, belong to the respective states within which they are found, with the consequent right to use or dispose of any portion thereof when that can be done without substantial impairment of the interest of the public in the waters.”⁶⁰ The doctrine is further adopted into American law by specifying that “‘tidewater’ and ‘navigable water’ are synonymous terms, and ‘tidewater,’ with a few small and unimportant exceptions, meant nothing more than public rivers”.⁶¹ This effectively removed the English test of ebb and flow from the doctrine and applied the American definition of waters navigable-in- fact.

From here, commerce becomes an integral aspect of the public trust doctrine. The admission of the Great Lakes into the public trust was done under the consideration that “on their waters... a large commerce is carried on, exceeding in many instances the entire commerce of states on the borders of the sea.”⁶² The acceptance of the Great Lakes into the public trust was not based solely on the navigable-in-fact standard, but primarily because it was a hotbed of

⁵⁸ *Ibid.*

⁵⁹ *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387 (1892).

⁶⁰ *Ibid.*

⁶¹ *Illinois Central*, quoting from *The Genesee Chief*, 12 How. 443, 53 U. S. 455.

⁶² *Illinois Central*, *supra* note 59.

commercial activity. The Supreme Court effectively declared that the reason these waters are in public trust is because of the *financial* benefit it brought to the people. Even the navigable-in-fact standard is essentially based on whether commerce can be conducted on waters. This financial benefit became the paramount factor for the regulation of natural resources.

Political acts of exploitation of natural resources for personal gain seen in *Illinois Central* are not specific to the Illinois legislature. This occurred in England as “this great principle of the common law was... gradually encroached upon and broken down; that the powerful barons, in some instances, appropriated to themselves these common rights; that the kings themselves, also... granted them out to their courtiers and favourites.”⁶³ The PTD is peculiarly situated to combat exploitation of this sort. In *Illinois Central*, the doctrine was appropriately applied and effectively reversed the illegal taking of submerged lands from Illinoisans. Unfortunately, just four years later, the U.S. Supreme Court distanced the doctrine from its Roman intent in *Geer v. Connecticut* (1896).

Estrangement from Original Intent

On its face, *Geer* expanded the scope of the PTD doctrine by incorporating wildlife as a trust resource. The RCO passage clearly encompasses air, flowing water, the sea, and seashore.⁶⁴ Additionally, Ulpian’s RCO category, and the Carta Foresta makes clear that animals and birds were also intended to be protected as *res communes omnium in publico usu* for the purpose of hunting:

Dig, 47.10.13.7: est saepissime rescriptum non posse quem piscari prohiberi: sed nec aucupari

There is most often a rescript for which it is not possible to be prohibited to fish:
nor also to bird hunt.

⁶³ *Arnold, supra* note 49.

⁶⁴ Just. Instit. 2.1.1.1

Carta Foresta, Clause 13: Unusquisque liber homo habeat in boscis suis aereas, ancipitrum et spervariorum et falconum, aquilarum, et de heyrinis et habeat similiter mel quod inventum fuerit in boscis suis

Every free man shall have in his woods flocks of prey-birds and sparrow-hawks and falcons, eagles and herons and shall similarly have honey which was discovered in his woods.

The presence of wildlife in the RCO category speaks to the extent that Roman jurists intended this legal doctrine to span. This ancient intention of protecting access to wildlife is introduced into American jurisprudence through *Geer v. Connecticut* (1896).

In 1889, Geer was arrested for violating a Connecticut law that prohibited the transportation of wild game outside of the state. The dispute centered on whether this prohibition was unconstitutional under the Commerce Clause. In accordance with the original intent of the doctrine, the Court determined that “[n]o restriction... was placed by the Roman law upon the power of the individual to reduce game, of which *he was the owner in common with other citizens*, to possession.”⁶⁵ Following an analysis of both Roman and English law, the Court determined “the power or control lodged in the state, resulting from this common ownership [in game], is to be exercised, like all other powers of government as a trust for the benefit of the people.”⁶⁶ This decision invokes the basic principle of public trust that the state must manage the taking of *res communes*. The decision continues “and not as a prerogative for the advantage of the government as distinct from the people, or for the benefit of private individuals as distinguished from the public good.”⁶⁷ This establishes the presence of the limited alienability principle. A state may be in the ownership of wildlife, but it cannot regulate game such that it causes injury to the public good.

⁶⁵ *Geer v. Connecticut*, 161 U.S. 519 (1896).

⁶⁶ *Ibid*

⁶⁷ *Ibid*

Geer undoubtedly continues the pattern of commerce accompanying the PTD. *Geer*'s caveat to state ownership *supra*⁶⁸ demonstrates that the antithesis between protection of natural resources and commercial greed was evident over 125 years ago. While *Geer* ardently tried to protect both the rights of States and the public good, it failed to do the latter. Classified as a Commerce Clause case, *Geer* set precedent for both interstate commerce and management of trust resources. The composition of the Supreme Court at the publication of *Geer* was heavily in favor of States' rights over federal authority.⁶⁹ Thus, from a Commerce Clause perspective, Connecticut's right to manage wildlife was protected over the federal government's authority to regulate interstate commerce.⁷⁰ Not only did this leave wildlife in the jurisdiction of State law, but it reasserted that the PTD was also a subject of state power. The rejection of wildlife as a subject of interstate commerce did not repudiate wild game as *de facto* commerce. In fact, wildlife was designated as a subject of internal commerce.⁷¹

While *Geer* seemingly expanded the trust to include wildlife, it also established the precedent that states are in the "ownership" of wildlife. Specifically, the Court held that "the power of the state... to control [game] *ownership* for the common benefit, clearly demonstrates the validity of the statute of the State of Connecticut." [emphasis added].⁷² Ownership over a trust resource that is singular in nature, such as a dead animal, is slightly more comprehensible. However, the ownership language is removed from the intention that trust resources are common, and therefore unable to be owned. The aftermath of *Geer* resulted in the manipulation of trust resources for the "advantage of the government as distinct from the people" that Justice

⁶⁸ See quoted portion of note 67.

⁶⁹ David M. O'Brien, *Storm Center: The Supreme Court in American Politics*, 12th ed. (New York, NY: W. W. Norton & Company, 2020), p. 149.

⁷⁰ *Geer*, *supra* note 65.

⁷¹ *Ibid.*

⁷² *Ibid.*

White warned of.⁷³ Ownership of resources intended for “common benefit”, in combination with their designation as internal commerce led to distance between the original intention of the RCO passage and public trust interpretation in the U.S.

As owners of public trust resources, states began to engage in economic protectionism under the guise of protecting resources for the usufruct of their citizens. For almost a century, PTD was misconstrued by states for their own benefit. Prior to the codification of the Endangered Species Act in 1973, any regulation of wild animals was subject to state police powers per *Geer* (1896). It often happened that states attempted to use this “ownership” status to benefit their own economies. States attempted to “conserve” resources for themselves, including wildlife⁷⁴, land⁷⁵, and even fossil fuels⁷⁶, at the exclusion of other states. While none of these cases were argued successfully by these respective States, the ownership language and status of internal commerce continued to induce states to exclude their resources from other states for economic benefit. This commercial warfare was compared to that seen under the Articles of Confederation, an impetus for the adoption of the Constitution.⁷⁷ More than anything, this behavior communicated the necessity of federal authority over trust resources.

Following almost a century of these attempts at commercial exclusion, *Geer* was overruled by the U.S. Supreme Court in *Hughes v. Oklahoma* (1979). As another Commerce Clause case, *Hughes* reassigned wildlife as a subject of interstate commerce and therefore, federal authority.⁷⁸ Beyond granting federal jurisdiction over wildlife, *Hughes* clarified that “[t]he 'ownership' language... must be understood as no more than a 19th-century legal fiction

⁷³ *Ibid*

⁷⁴ See *Missouri v. Holland*, 252 U.S. 416 (1920); see *Foster-Fountain Packing Co v. Haydel*, 278 U.S. 1 (1928).

⁷⁵ See *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978).

⁷⁶ See *West v. Kansas Natural Gas Co.*, 221 U.S. 229 (1911).

⁷⁷ *Hughes v Oklahoma*, 441 U.S. 322 (1979).

⁷⁸ *Ibid*

expressing 'the importance to its people that a State have power to preserve and regulate the exploitation of an important resource.'"⁷⁹ This clarification reinstated the original intention of the public trust to provide benefit to the public, not to the state. However, while *Hughes* removed wildlife from the whims of state regulation, it also removed wildlife as a resource held in public trust. *Res communes* such as air, water, and wildlife were now interstate commerce and subject to federal authority through the Clean Air Act, Safe Drinking Water Act, and Endangered Species Act, respectively.⁸⁰ *Hughes* unequivocally expanded the *de facto* protection of natural resources, but it did so under the Commerce Clause; thereby, communicating that nature's value is economic. The protection of natural resources authorized by PTD still remains in state jurisdiction. Therefore, *Hughes* effectively reverted and limited the authority of PTD to navigable waters within a state, chipping away at its effectiveness in U.S. law.

Obsolescence in State Jurisdiction

The consensus that the PTD is subject to state, rather than federal, jurisdiction stems from the acquisition of title to waters and submerged lands granted to States at their adoption.⁸¹ This logic is sustained throughout PTD jurisprudence. However, even prior to *Hughes*, the inability of states to adequately protect natural resources was apparent. In the late 1910s, a treaty and subsequent statute were enacted by the federal government to protect migratory birds.⁸² In *Missouri v. Holland* (1920), another U.S. Supreme Court case, Missouri refused to follow these laws, relying on *Geer* to assert their police power over regulation of migratory birds.⁸³ In defense of the treaty and federal statute, it was noted by the Court that “[b]ut for the treaty and the

⁷⁹ *Hughes*, citing *Toomer*.

⁸⁰ Federal statutes, *supra* note 1.

⁸¹ *Shively v. Bowlby*, 152 U.S. 1 (1894).

⁸² *Migratory Bird Treaty Act*, U.S. Code 16 (1918) § 703-712.

⁸³ *Missouri v. Holland*, 252 U.S. 416 (1920)

statute, there soon might be no birds for any powers to deal with.”⁸⁴ Furthermore, and relevant to state obsolescence of resource management, the Court concluded, “[i]t is not sufficient to rely upon the States. The reliance is vain.”⁸⁵

The nature of migratory birds as a transient resource was central to federal jurisdiction in this case. Migratory birds were threatened by human activities, and they were ubiquitous throughout the country and continent.⁸⁶ Independent states were useless to protect these birds traversing borders, and their protection required national and international cooperation. Protecting migratory birds was considered a national interest because “[w]e see nothing in the Constitution that compels the Government to sit by while a food supply is cut off and the protectors of our forests and our crops are destroyed.”⁸⁷ The effects of the climate emergency have proven that it too is transient in nature. These include, but certainly are not limited to, the decimation of fisheries, a food supply; destruction of wetlands, the protectors of our shores; and decade-long droughts, stunting crop yield.⁸⁸ The bases for federal intervention, over state power, present in *Holland* are also present in the climate emergency.

The issue of federal jurisdiction over PTD, rather than national interest, was addressed following an oil spill in Virginia, resulting in the destruction of 30,000 migratory birds.⁸⁹ Following the overruling of the ownership language in *Hughes*, “the State of Virginia and the United States do not seek recovery for the value of the waterfowl based upon a claimed ownership interest... [the public trust] doctrine [is] viable and support[s] the State and the Federal claims for the waterfowl.”⁹⁰ Although *Hughes* overruled state ownership of wildlife, it did not

⁸⁴ *Ibid*

⁸⁵ *Ibid*

⁸⁶ *Ibid*

⁸⁷ *Ibid*

⁸⁸ IPCC, *supra* note 3.

⁸⁹ *Matter of Steuart Transp. Co.*, 495 F. Supp. 38 (E.D. Va. 1980).

⁹⁰ *Ibid*

nullifying sovereign obligation to protect wildlife. In fact, “[u]nder the public trust doctrine, the State of Virginia *and the United States* have the right and the duty to protect and preserve the public's interest in natural wildlife resources” [emphasis added].⁹¹ Thus, trust obligations have been applied to the federal government and are not limited to state jurisdiction. A reliance on the states to protect *res communes* that span multiple states, countries, and even continents is illogical. Therefore, the PTD, a doctrine uniquely situated to combat the national and global crisis of climate change, should be subject to federal jurisdiction.

Even when PTD is deployed to protect navigable waters clearly within state jurisdiction, it cannot compete with federal authority. Michigan Attorney General, Dana Nessel, brought a lawsuit against the international energy company Enbridge in *Nessel v. Enbridge Energy LP* (2019). The case was an attempt to enjoin Enbridge’s use of Line 5, an oil pipeline under the Straits of Mackinaw. Line 5 was commissioned in 1953, for fifty years of use.⁹² That 50-year lifespan expired twenty years ago, putting Line 5 at 140% of its capacity. Michigan Governor, Gretchen Whitmer, also tried to halt its use after it was struck by an anchor in 2021, compromising the safety of the surrounding waters.⁹³ Nessel brought the case to Michigan state court under the PTD, but to her detriment, the case was removed to federal court.⁹⁴ Furthermore, the judge accepted Enbridge’s request that the case be evaluated under federal jurisdiction provided by the Commerce and Supremacy Clauses. This only further demonstrates how under the law, nature’s paramount value is economic.

⁹¹ *Ibid*

⁹² *Nessel v. Enbridge Energy LP*, Clause 15, 19 Mich 474 (2019).

⁹³ “Governor Whitmer Takes Action to Shut down the Line 5 Dual Pipelines through the Straits of Mackinac after a Reasonable Transition Period to Protect the State's Energy Needs,” (State of Michigan, November 13, 2020), <https://www.michigan.gov/whitmer/news/press-releases/2020/11/13/governor-whitmer-takes-action-to-shut-down-the-line-5-dual-pipelines-through-the-straits-of-mackina>.

⁹⁴ *Nessel v. Enbridge Energy LP et al.*, (W.D. Mich., 2021)

The destruction and subsequent oil spill of Line 5 is inevitable. In addition to being in use beyond its intended lifespan, Enbridge is attempting to continue its use by building a tunnel around the pipeline to protect surrounding waters.⁹⁵ Enbridge's attempt to expedite this Great Lakes Tunnel is essentially an admission that the State is correct, and the pipeline is a danger to the health of the Great Lakes and the usufruct of Michiganders. This is just one example of a state appropriately applying the PTD in state law, but the doctrine being displaced in favor of federal law.

Michigan's PTD claim against Enbridge is based in ensuring citizens navigable, fishable, and drinkable access to both Lake Michigan and Lake Huron, which join at the location of Line 5, culminating in the largest area of freshwater in the world. Yet, this strong PTD claim could not compete with the Commerce Clause and its domain over nature, classified as interstate commerce. This extraordinary example of Michigan fighting to protect a treasure of the world for public use, and failing, proves the obsolescence of the PTD if it is retained solely in state jurisdiction. If the PTD is restricted to state law the likelihood of retaining its original intent is minute if not eradicated entirely. Even if the state appropriately applies the PTD, the court itself has demonstrated it cannot compete with the federal government.⁹⁶ The consequences of the PTD becoming obsolete are dire as access to resources in public trust are already strained, if not substantially limited, in every state of the Union, regardless of PTD assurances. On the contrary, the benefits of expanding the jurisdiction of the PTD are plentiful. Including, but not limited to, returning both the original intention, and the intrinsic value of nature to common law.

⁹⁵ "The Great Lakes Tunnel Project," Enbridge Inc., <https://www.enbridge.com/projects-and-infrastructure/public-awareness/line-5-michigan/great-lakes-tunnel-project>

⁹⁶ *Nessel v. Enbridge Energy LP et al.*, *supra* note 94

Public Trust in the Generation of Climate Catastrophe

The Intergovernmental Panel on Climate Change and countless other scientific analyses and publications assert that humans are responsible for the negative impacts on the global climate.⁹⁷ More so, the United States is the second largest polluter of greenhouse gases globally.⁹⁸ The strain put on natural resources and ecosystem services is beyond what Roman or even English jurists could predict. The United States, specifically, demands more of these *res communes* than ever before; more than Romans, more than Englishmen.

The U.S. was aware of these impacts for almost six decades.⁹⁹ The initial recognition of these damages reflects the wave of environmental legislation enacted in the 1960s and 70s.¹⁰⁰ Judicial decisions during this time also expanded environmental protections. As it relates to the public trust, it was declared that “in this latter half of the twentieth century, the public rights in tidal lands are not limited to the ancient prerogatives of navigation and fishing.”¹⁰¹ Furthermore, “[t]he public trust doctrine... should not be considered fixed or static, but should be molded and extended to meet changing conditions and needs of the public it was created to benefit.”¹⁰² Now, in the first half of the twenty-first century, this research from Roman, English, and U.S. law demonstrates that to adequately combat the national degradation which accompanies the climate crisis, the PTD must be interpreted such that all pertinent natural resources reasonably considered public in use are under its protection.

⁹⁷ IPCC, *supra* note 3

⁹⁸ EPA, *supra* note 8

⁹⁹ President’s Science Advisory Committee, Report of the Environmental Pollution Panel, *Restoring the Quality of Our Environment*, Washington D.C., 1965.

¹⁰⁰ *Supra* note 1, federal statutes; *National Environmental Policy Act*, U.S. Code 42 (1970) § 4321 et seq.; *Endangered Species Act*, U.S. Code 16 (1973) § 1531 et seq.

¹⁰¹ *Borough of Neptune City v. Borough of Avon-by-the-sea*, 294 A.2d 47 N.J. (1972)

¹⁰² *Ibid*

Litigating Climate Change

Legal cases addressing climate change under PTD are on the rise. In one case, it was legally recognized that access and enjoyment of navigable waters, air, and wildlife is injured.¹⁰³ This legal recognition effectively declares that climate change is harming Americans and the federal government is culpable for that harm. However, in this case, repugnant to the PTD, the U.S. 9th Circuit Court of Appeals rejected the claim that it has an obligatory role to redress the insufficient and harmful actions of its co-equal branches.¹⁰⁴

Three elements, injury, causation, and redressability make up the basis for legal standing in a lawsuit. U.S. citizens proved that climate change is injuring them, they traced the cause of that injury to the federal government, but the 9th Circuit Court claims there is nothing they, or any other court, can do to redress (or mitigate) those injuries.¹⁰⁵ Therefore, *Juliana v. U.S.*, a climate change case proposing a PTD claim, failed to pass the requirements of standing. Before claiming that PTD provides legal grounds for climate change mitigation, the ability to bring climate change injuries, or prove standing, in court must be established. The court in this case provided several reasons why an Article III Court does not have the authority to decide the case. They opined that climate injury arguments constitute a question that must be addressed by the political branches, also that mitigating climate change was too great of an injury for even the U.S. to redress, and that even if a favorable ruling was issued, they were unable to oversee the sufficiency of subsequent regulations.¹⁰⁶ While there are merits to the court's opinion on standing, there are also sound arguments against it.

¹⁰³ *Juliana et al. v. United States et al.*, 947 F.3d 1159 (9th Cir. 2020)

¹⁰⁴ *Ibid*

¹⁰⁵ *Ibid*

¹⁰⁶ *Ibid*

Climate Change as a Political Question

Plaintiffs in *Juliana* were denied standing in part because the 9th Circuit Court considered climate change injuries under the umbrella of a political question.¹⁰⁷ Yet, adjudicating political questions has happened before in *ad hoc* cases very similar to the dire circumstances imposed by the climate crisis. Politically divisive issues such as segregation¹⁰⁸, abortion¹⁰⁹, same-sex marriage¹¹⁰, Obamacare¹¹¹, and even presidential elections¹¹² that have political undertones, if not blatant overtones, have been decided by the courts. These “political” decisions have enforced both conservative and liberal ideology, further supporting that it is within the authority of the Court to decide partisan issues regardless of the politics involved. In fact, *Baker v. Carr* (1962), the source of these political question limitations, addressed the partisan issue of gerrymandering. Once considered a non-justiciable political question, *Baker* reset the legal precedent that gerrymandering is justiciable, and it continues to be an issue adjudicated today.

As another example, in *Bush v. Gore* (2000), the Supreme Court, for all intents and purposes, raised George W. Bush to the presidency. Arguably, electing the President is the most political decision made in the United States. The Court opinion stated, “[n]one are more conscious of the vital limits on judicial authority than are the Members of this Court. However, it becomes our *unsought* responsibility to resolve the federal and constitutional issues the judicial system has been *forced* to confront” [emphasis added].¹¹³ For clarity, the Court is never forced to adjudicate anything. Their broad discretion allows them to deny any writ of certiorari and

¹⁰⁷ *Ibid*

¹⁰⁸ *Plessy v. Ferguson*, 163 U.S. 537 (1896); *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954)

¹⁰⁹ *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992); *Dobbs v. Jackson Women’s Health Organization, et al.*, 597 U.S. (2022)

¹¹⁰ *Obergefell v. Hodges*, 576 U.S. 644 (2015)

¹¹¹ *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012)

¹¹² *Bush v. Gore*, 531 U.S. 98 (2000)

¹¹³ *Ibid*

therefore, any decision made is explicitly sought by the Court.¹¹⁴ This decision further exemplifies the Court's ability to hear a case with partisan support because the case was decided in alignment with the Justices' ideological divides. In other words, the composition of the Court at the time of *Bush*'s publication was 5-4, with a slim majority of conservative ideologies. *Bush* was decided with a 5-4 vote in line with this ideological divide.¹¹⁵ In addition to their broad discretion on deciding what cases to hear, the Court's lack of accountability to voters, or any superiors allows them to decide cases almost exclusively based on their ideology.¹¹⁶ Therefore, if the Court wanted to, it very well could decide a case questioning the federal government's public trust obligation to mitigate climate change.

Imposition on Political Branches

Generally, the court attempts to refrain from exercising judicial review over its co-equal branches. Exercising judicial restraint allows the court to avoid political conflict and maintain its legitimacy.¹¹⁷ In *Juliana*, the 9th Circuit Court rejected plaintiffs' request for relief because "it is beyond the power of an Article III court to order, design, supervise, or implement the plaintiffs' requested remedial plan."¹¹⁸ However, plaintiffs only requested declaratory and injunctive relief on the federal actions exacerbating climate change.¹¹⁹ Therefore, all designing, supervising, and implementation of a remedial plan would be left to the Executive and Congress. After conceding that the Court could order the Executive and Congress to develop their own plan, they countered that such a plan "would subsequently require the judiciary to pass judgment on the sufficiency of the government's response to the order, which necessarily would entail a broad range of

¹¹⁴ O'Brien, *supra* note 69, pg. 146

¹¹⁵ *Bush*, *supra* note 112

¹¹⁶ O'Brien, *supra* note 69, pg. 268

¹¹⁷ *Ibid*, pg. 358

¹¹⁸ *Juliana*, *supra* note 103

¹¹⁹ *Juliana v. United States*, 217 F. Supp. 3d 1224 (D. Or. 2016)

policymaking.”¹²⁰ While policymaking is not an authority granted to the judiciary, as the 9th Circuit Court dissent countered, an order would not require the courts to “manage all of the delicate foreign relations and regulatory minutiae implicated by climate change,” but could still “offer real relief.”¹²¹ This policymaking argument is also negated by the Supreme Court’s history of ordering remedial plans not dissimilar from plaintiffs’ request in *Juliana*.

Brown v. Board (1954) required the entire Southern U.S. to revise their system of education, just days before the start of the 1954 school year.¹²² *Brown II* (1955) explicitly did “pass judgement on the sufficiency of the government’s response”¹²³ by ordering that desegregation of schools proceed with “all deliberate speed.”¹²⁴ Additionally, the Court ordered lower courts nationwide to oversee the adoption of *Brown* by school boards.¹²⁵ While “all deliberate speed” was interpreted variously nationwide, it demonstrates that it is within the authority of the court to order plans that remediate injuries. Additionally, the *Bush* decision didn’t directly promote George W. Bush to the presidency. Rather, it ordered new voting guidelines and an entire revote and recount in the State of Florida in just 6 days.¹²⁶ This task was so monumental on the part of Florida that candidate Gore conceded the presidential race, accepting the impossibility of this court order.¹²⁷

Contrary to the *Juliana* majority opinion, the Supreme Court has ruled that redress of climate change is possible, because even minimal redress is redress.¹²⁸ This is especially true because it is universally accepted that no single action, regardless of its origin, would be enough

¹²⁰ *Juliana*, *supra* note 103

¹²¹ *Juliana et al. v. United States et al.*, 947 F.3d 1159 (9th Cir. 2020) (Staton J. dissenting opinion)

¹²² *Brown v. Board*, *supra* note 108

¹²³ *Juliana*, *supra* note 103

¹²⁴ *Brown v. Board of Education II*, 349 U.S. 294 (1955)

¹²⁵ O’Brien, *supra* note 69, pg. 335

¹²⁶ *Bush*, *supra* note 112

¹²⁷ O’Brien, *supra* note 69

¹²⁸ *Massachusetts v EPA*, 549 U.S. 497 (2007)

to provide complete redress of climate change.¹²⁹ As with most changes in environmental regulations, these transformations can happen over a matter of years, or even decades. The removal of degradative practices on the part of the federal government can be phased out, rather than abruptly enjoined. Action that would result in “even a partial and temporary reprieve would constitute meaningful redress.”¹³⁰ In fact, relief to this effect would be no different from “the desegregation orders... the Supreme Court has sanctioned.”¹³¹ Ultimately, these decisions are not in the hands of justices or judges but officials of the Executive and Congress. The majority in *Juliana* spends a great deal of their argument explaining why the court must defer policy decisions to the elected branches. Yet, the dissent in this case and the history of the Court demonstrates that a judicial order is not *ipso facto* policymaking. Furthermore, it is within the authority of the court to issue an order that directs or requires action on the part of other branches.

In addition to the reluctance to impose orders on political branches, the immensity of remediation for climate change injuries impedes the courts from ruling on the matter. The federal government’s complicity in the climate emergency is stipulated in *Juliana*. The majority relies on “the record show[ing] that many of the emissions causing climate change happened decades ago or come from foreign and non-governmental sources” to argue that the federal government could not redress climate change alone.¹³² Even the dissent in *Juliana* agrees that “[n]o case can singlehandedly prevent the catastrophic effects of climate change.”¹³³ However, “the mere fact that this suit cannot alone halt climate change does not mean that it presents no claim suitable for

¹²⁹ *Juliana*, *supra* note 103; *Juliana* (Staton J. dissenting), *supra* note 121

¹³⁰ *Juliana* (Staton J. dissenting), *supra* note 121

¹³¹ *Ibid*

¹³² *Juliana*, *supra* note 103

¹³³ *Juliana* (Staton J. dissenting), *supra* note 121

judicial resolution.”¹³⁴ Experts, politicians, and jurists agree that effective climate change mitigation requires international cooperation. Yet, purporting that a single country cannot address the issue communicates that other individual countries should not try at all. This ignorance leads to global inaction, not cooperation. As the second largest global emitter, the immense transition required to ameliorate climate change only grows as the courts continue to “throw up their hands”¹³⁵ on the issue.

One of the primary faults with the majority opinion is that they underestimate the ability of their co-equal branches to ameliorate the effects of climate change. Relying on plaintiffs’ experts, the 9th Circuit Court argues that “no less than a fundamental transformation of this country’s energy system, if not that of the industrialized world” would be required to remediate climate change.¹³⁶ Yet, the Executive and Congress have both been effective at mitigating the effects of environmental degradation. The promulgation of the Endangered Species Act has restored threatened or endangered species’ populations.¹³⁷ The Executive branch has signed international environmental treaties such as the Montreal Protocol, which phased out the use of harmful aerosols and subsequently reduced the hole in the ozone layer.¹³⁸ These actions demonstrate the ability of the United States to effectively remediate ecosystem imbalances. The stark contrast between environmental policy as a nonpartisan issue in the 1970s to a divisive partisan issue today has rendered the political branches ineffective stewards of the environment.

¹³⁴ *Ibid*

¹³⁵ *Ibid*

¹³⁶ *Juliana, supra* note 103

¹³⁷ “Delisting Species under the Endangered Species Act,” NOAA Fisheries (National Oceanic and Atmospheric Administration, March 27, 2023), <https://www.fisheries.noaa.gov/national/endangered-species-conservation/delisting-species-under-endangered-species-act>.

¹³⁸ “Has the Montreal Protocol Been Successful in Reducing Ozone-Depleting Gases in the Atmosphere?” NOAA, 2006.

The uselessness of the harshly divided political branches to ameliorate climate change injuries is exemplified by the life and death of the Clean Power Plan (CPP). In 2015, the Environmental Protection Agency (EPA), an executive agency, attempted to implement the CPP.¹³⁹ This agency action would have aided in President Obama’s commitment to reducing coal generated electricity and other attempts to mitigate climate change. Following the inauguration of Donald Trump, the CPP was nullified and replaced with the Affordable Clean Energy Rule (“Rule”), a law that repealed the rules contained in the CPP. In 2019, the Senate conducted a vote to repeal the nullification of the CPP and the implementation of the Rule.¹⁴⁰ This vote failed in a 41-53 roll call, with all 41 “yes” votes coming from Democrats, and 53 “no” votes coming from Republicans. This divide demonstrates that so long as environmental policy remains a partisan issue, the “fundamental transformation of this country’s energy system”¹⁴¹ necessary to combat the inevitable destruction that accompanies climate change is not going to occur in the political branches. While the threats of climate change may presently require a sweeping transformation of the United States’ relationships with nature, there is absolutely no remedy, transformation, or even complete overhaul that will protect the Union after climate warming reaches its tipping point. The courts must rule on the federal government’s unlawful complicity in climate change injuries before its effects alter the Nation beyond recognition.

The absence of executive or congressional action does not allow the courts to step into their place, but it does reaffirm that this issue has room for redress. The 9th Circuit Court refused to rule on climate change injuries because it claims that environmental policy is the realm of the political branches. However, where a law or doctrine obligates the sovereign act, such as PTD,

¹³⁹ *Clean Power Plan*, U.S. Code 42 (2015) § 7411

¹⁴⁰ S.J.Res.53, 116th Congress, October 17, 2019.

¹⁴¹ *Juliana*, *supra* note 103

an absence of action is repugnant to said law. Complicity in climate change is not currently recognized as a violation of trust duties. Yet each injury stipulated in *Juliana* was a limitation on resources identified as *res communes omnium* (air quality, sea rise, etc.), violating the PTD.¹⁴² These duties are currently only the responsibility of the States, though it's been argued based on this research that they are also subject to federal jurisdiction. Therefore, because the injuries caused by climate change violate the interpretation of the PTD that obligates sovereigns to protect usufruct of these resources, the courts can redress this injury by imparting PTD duties on the federal government as it relates to climate change.

Juliana directly connects the PTD with climate change because plaintiffs' claimed climate change injuries are violations of the PTD. Roman, English, and U.S. law have all interpreted the PTD such that there are natural resources which are the common property of the public. This common property is held in the trust of the sovereign, with the public as the beneficiary. This Trust imparts an obligation and duty onto the sovereign to protect these resources for the public benefit. Climate change is damaging and degrading access to resources held in public trust. The federal government is a cause of climate change, thereby violating their public trust obligations. This violation implicates the federal courts to repudiate the affirmative actions of the federal government in climate change through declaratory and injunctive relief.

Ideology of Today's Court

Climate change is a divisive issue not because the science is unclear, but because the science conflicts with traditional methods of economic growth. Humans have capitalized off other species because these natural resources are viewed as free. The capture of a wild bird, fish, tree, or fossil fuel itself costs nothing. The costs associated only incorporate the materials needed

¹⁴² *Juliana*, *supra* note 119

to extract those resources. The public trust doctrine and other environmental policies that seek to insert intrinsic value and costs onto these resources disrupt this traditional view of environmental exploitation for economic growth. As a result, the attacks on climate change mitigation occur at the places which seek to impose and enforce these intrinsic costs. Namely, the EPA and other executive agencies implementing environmental policy. While the Supreme Court is not considered a political branch of the federal government, the conservative or liberal ideologies of justices are evident by their decisions. With climate change as an especially partisan issue, the Supreme Court is not immune from exercising ideological opinions in its decisions.

The CPP demonstrates the partisan nature of today's Supreme Court just as much as it does the political branches. The 41-53 Senatorial vote was not the end of the CPP. The U.S. Court of Appeals for the D.C. Circuit eliminated the Rule, subsequently reinstating the CPP.¹⁴³ In 2022, this decision was reviewed and reversed by the Supreme Court in *West Virginia v. EPA*.¹⁴⁴ In a 6-3 decision (with a 6-3 conservative majority), the Court determined "it is not plausible that Congress gave EPA the authority to adopt on its own [CPP]."¹⁴⁵ In addition to climate change generating partisan divides, this decision is also reflective of the conservative ideology to dismantle the administrative state.

Conservative ideology on the administrative state has roots in the New Deal era, originating from opposition to the administrative state rolled out during the 1930s.¹⁴⁶ The basis of this thinking stems from the nondelegation doctrine, and the proposed inability of Congress to delegate its legislative responsibilities to executive agencies.¹⁴⁷ This legal argument was

¹⁴³ *West Virginia v. EPA*, 985 F. 3d 914 (2019)

¹⁴⁴ *West Virginia v. EPA*, 142 S. Ct. 2587 (2022)

¹⁴⁵ *Ibid*

¹⁴⁶ Gillian E. Metzger, "1930s Redux: The Administrative State Under Siege," *Harvard Law Review* 131, no. 1 (November 2017)

¹⁴⁷ *Ibid*

presented by the Court as they denied that Congress gave the EPA the authority to completely overhaul the coal and energy industry.¹⁴⁸ These claims differ from the majority opinion in *Juliana* because that decision implied that the legislative branch *and* executive branch have the ability to make climate change policies. In fact, in *Juliana*, the federal government, as the defendant, attempted to restrict the plaintiffs' claims to the Administrative Procedures Act (APA).¹⁴⁹ In theory, this would have given the court the opportunity to dismiss plaintiffs' claims by citing the nondelegation doctrine, thereby removing administrative ability to address climate change and restricting all authority to Congress. However, the 9th Circuit Court expressly rejected this attempt to restrict claims to the APA, citing the applicability of both Due Process and PTD violations to plaintiffs' injuries.¹⁵⁰ Nevertheless, this attempt by the federal government demonstrates the conservative objective to limit the authority of administrative agencies in favor of Congressional legislation.

In conclusion, climate change litigation resides at a particularly prickly precipice in judicial activity. Not only is climate change a politically divisive issue, but it's also a legally divisive issue. The political branches play legislative tag with environmental policy depending on what party holds the presidency, and congressional majorities. While the courts use environmental regulations to wage its own war against the authority of executive agencies. Ultimately, the biggest loser is the environment. Public trust assertions pose a threat to the political objectives of each of these federal entities, limiting its acceptance. Although this research demonstrates that the original intent of the Roman law calls for an expanded interpretation of public trust resources with regards to the climate emergency, the political

¹⁴⁸ *West Virginia v. EPA*, *supra* note 144

¹⁴⁹ *Juliana*, *supra* note 103

¹⁵⁰ *Ibid*

disposition of climate change, in combination with the current conservative majority on the Supreme Court will limit, if not eliminate, the presence of justiciable public trust claims in federal climate change litigation.

Conclusion

The Roman roots narrative lacks a general consensus on the application of Roman law to the United States public trust. Since Joseph Sax reignited the conversation on the breadth of PTD in 1970, scholars have taken up opposing views. For those who support an expansive PTD, the *res communes omnium* passage has become a source of Roman law relied upon heavily. Though proponents of this expansion often cite Justinian's Institutes without further development, lack of context can be justified because Roman law no longer holds legal authority in the United States. However, developing this context and interpretation of the Roman law provides nuanced evidence on the ancient intent of PTD.

Establishing the author of the *res communes omnium* passage is paramount to investigating the original intent for what ultimately became the public trust. Ulpian, as the author of RCO, grants the passage more legal authority because of his prestige as a jurist and the corresponding laws he admitted into Justinian's *Corpus Iuris Civilis*. Ulpian's entries into Justinian's Digest demonstrate the role of the state in management of *res communes omnium* and other public property. From these entries, two elements establish the Roman intent of protecting RCO property. First, that this property was held by the sovereign and must be managed for the benefit of the public. Second, that access to this property could not be limited by private or state activities. These two elements are identified as *in publico usu* property management, and the limited alienability principle, respectively.

Property *in publico usu* and the limited alienability principle are found in English law as it relates to access to the sea. In this stage of common law, management of natural resources underwent changes to accommodate for national commercial growth. Along with the original two elements, commerce as an element of public welfare persisted into U.S. law. Unfortunately, the public trust remained subject to state law at the exclusion of federal law. Federal attempts to protect the environment continued, but often occurred under the Commerce Clause. This greatly limited the efficacy of the public trust as States became useless to protect their own resources.

The obsolescence of the public trust in state jurisdiction is exemplified by the adverse impacts of climate change. The impacts on U.S. citizens as a result of climate change are recognized as legal injuries. These injuries invoke public trust resources and access to them as they include sea level rise, and unbreathable air quality conditions, among others. The courts have also recognized that no single case, action, or even country can stop the adverse effects of climate change alone. Therefore, how can States possibly be expected to mitigate the effects of climate change that violate public trust duties. They cannot, which is why public trust duties must also be placed upon the federal government, a sovereign more capable of honoring trust obligations that require mitigation of climate change.

Climate change is also a highly politicized issue, decreasingly the likelihood of any political action occurring that may ameliorate its adverse impacts. The life and death of the Clean Power Plan, from 2015 to 2022, demonstrates this political stalemate. Democrats will continue to pursue climate change mitigation, while Republicans will continue to oppose it. The courts are not immune from this division. However, when it comes to environmental regulation, divides in legal ideology often focus more on the powers of the administrative state. Specifically, the conservative majority on the Supreme Court attempts to limit the authority of executive agencies

over environmental regulation by imposing the nondelegation doctrine. The EPA, an administrative agency, is most often responsible for enforcing climate change mitigation. Therefore, it is likely that the Supreme Court will limit, if not eliminate, federal authority to mitigate climate change under the public trust doctrine.

Works Cited

- Allen, J. H., and J. B. Greenough. *New Latin Grammar*. Mineola, NY: Dover Publications Inc., 2006.
- Blumm, Michael & Schafer, Lynn. *The Federal Public Trust Doctrine: Misinterpreting Justice Kennedy and Illinois Central Railroad*, 45 *Environmental Law* 399 (2015), https://lawcommons.lclark.edu/faculty_articles/56.
- de Toqueville, Alexis. *Demoncracy in America*. London: Saunders and Otley, 1835.
- “Delisting Species under the Endangered Species Act.” NOAA Fisheries. National Oceanic and Atmospheric Administration, March 27, 2023. <https://www.fisheries.noaa.gov/national/endangered-species-conservation/delisting-species-under-endangered-species-act>.
- Deveney, Patrick. “Title, Jus Publicum, and the Public Trust An Historical Analysis”, 1 *Sea Grant Law Journal*, 13 (1976).
- “Global Greenhouse Gas Emissions Data.” EPA. United States Environmental Protection Agency, February 15, 2023. <https://www.epa.gov/ghgemissions/global-greenhouse-gas-emissions-data>.
- “Governor Whitmer Takes Action to Shut down the Line 5 Dual Pipelines through the Straits of Mackinac after a Reasonable Transition Period to Protect the State's Energy Needs.” Governor Gretchen Whitmer. State of Michigan, November 13, 2020. <https://www.michigan.gov/whitmer/news/press-releases/2020/11/13/governor-whitmer-takes-action-to-shut-down-the-line-5-dual-pipelines-through-the-straits-of-mackina>.
- “The Great Lakes Tunnel Project.” Enbridge Inc. Accessed April 16, 2023. <https://www.enbridge.com/projects-and-infrastructure/public-awareness/line-5-michigan/great-lakes-tunnel-project>.
- “Happening Now: Dead Zone in the Gulf 2021.” Ocean Today. National Oceanic and Atmospheric Administration, 2022. <https://oceantoday.noaa.gov/deadzonegulf-2021/welcome.html>.
- “Has the Montreal Protocol Been Successful in Reducing Ozone-Depleting Gases in the Atmosphere?” National Ocean and Atmospheric Administration, 2006.
- Huffman, James L. “Speaking of Inconvenient Truths—A History of the Public Trust Doctrine”, *Duke Environmental Law and Policy Forum*, 18 (Fall 2007): pp. 1-103.
- Intergovernmental Panel on Climate Change, *Climate Change 2022: Impacts, Adaptation, and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report*

(Cambridge, U.K. and New York, USA: Cambridge University Press, 2022) A.2,
doi:10.1017/9781009325844.001

Metzger, Gillian E. “1930s Redux: The Administrative State Under Siege.” *Harvard Law Review* 131, no. 1 (November 2017).

O'Brien, David M. *Storm Center: The Supreme Court in American Politics*. 12th ed. New York, NY: W. W. Norton & Company, 2020.

Popovich, Nadja, and Brad Plumer. “Who Has The Most Historical Responsibility for Climate Change?” *The New York Times*. November 12, 2021.
<https://www.nytimes.com/interactive/2021/11/12/climate/cop26-emissions-compensation.html>.

Ruhl, J. B., and Thomas McGinn. “The Roman Public Trust Doctrine: What Was It, and Does It Support an Atmospheric Trust?” *Ecology Law Quarterly* 47, no. 1 (November 21, 2020): 117–78. <https://doi.org/10.2139/ssrn.3440244>.

Sax, Joseph L. “The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention.” *Michigan Law Review* 68, no. 3 (1970): 471.
<https://doi.org/10.2307/1287556>.

H. Summerson, 'The 1215 Magna Carta: Clause 33, Academic commentary', *The Magna Carta Project*, http://magnacartaresearch.org/read/magna_carta_1215/Clause_33?com=aca.

“U.S. and World Population Clock.” United States Census Bureau, April 16, 2023.
<https://www.census.gov/popclock/>.

Wolff, Hans Julius. *Roman Law: An Historical Introduction*. Norman: University of Oklahoma Press, 2005.