# ARTICLES

## The Local Public Trust Doctrine

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ABSTRACT

*The public trust doctrine is a potent common law doctrine that places obligations on government to maintain and preserve certain natural resources. For decades, academics and advocates alike have mined the doctrine for answers to pressing environmental problems. But missing from the public trust doctrine's robust literature is any attention to the role of local governments. This Article seeks to fill that gap by situating the public trust doctrine as dependent, at least in part, on local governments for its practical effect. Indeed, the way many citizens experience the public trust doctrine is influenced by local governments. I call this phenomenon the local public trust doctrine.*

*This Article makes two contributions. First, it examines and catalogs three interrelated roles through which local governments impact the doctrine: (1) local government as landowner; (2) local government as regulator; and (3) local government as enforcer. Each role demonstrates the largely unexplored extent of local government's impact on the everyday realities of the public trust doctrine.*

*Second, this Article offers explanations for why the public trust doctrine is so susceptible to local governments' influence. It concludes that the very nature of the public trust doctrine—its changing legal foundations, its inherent flexibility, and its situs between public and private rights—renders the doctrine uniquely prone to local government influence. The Article concludes by offering a series of recommendations for governments, advocates, and scholars to better understand and employ the local public trust doctrine.*

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## INTRODUCTION

On a Saturday in mid-September 1977, six members of a sportfishing group combed a Westerly, Rhode Island beach for trash.[1] It was their "organization's eighteenth annual observance of 'National Beach Cleanup week.'"[2] As they collected debris and refuse, the members walked along the beach close to the Atlantic Ocean's shoreline.[3] They were joined in this effort by Park Police from the state environmental agency, the Department of Environmental Management.[4]

Imagine their collective surprise, then, when a shoreline property owner, apparently not keen on having what he believed to be his property cleaned, stopped them and insisted that they were trespassing.[5] Answering the property owner's call, a Westerly police department patrolman arrived at the contentious scene.[6] The property owner explained his belief that his property extended to the mean high tide line—conveniently marked with a stake, but at that time, well underwater.[7] The sportfishing members demurred, explaining that they had a state

1. *See* State v. Ibbison, Appellee's Br. at 1 (Feb. 24, 1982) (on file with author).
2. *Id.*
3. *Id.*
4. *Id.*; *see also Law Enforcement*, DEM RHODE ISLAND, http://www.dem.ri.gov/programs/law/ (last visited Jan. 13, 2022).
5. *See* State v. Ibbison, 448 A.2d 728, 729 (R.I. 1982); State v. Ibbison, Appellee's Br. at 1 (Feb. 24, 1982) (on file with author).
6. *See Ibbison*, 448 A.2d at 729; State v. Ibbison, Appellant's Br. at 2 (Oct. 14, 1981) (on file with author).
7. *Ibbison*, 448 A.2d at 729–30; State v. Ibbison, Appellee's Br. at 1 (Feb. 24, 1982) (on file with author).

constitutional right to walk on the shore up to the high-water mark.[8] It is unclear whether the state environmental agency officials took action or a position.[9]

The patrolman agreed with the property owner and instructed the sportfishing members that the land above the mean high tide line was off limits.[10]

The sportfishing members persisted in their belief that they had a right to walk on the shore up to the high-water mark; accordingly, they defied the patrolman's instructions and continued their clean-up, proceeding below the high-water mark but necessarily above the submerged mean high tide line.[11]

All six sportfishing members were arrested and charged with violating the Town of Westerly's trespassing ordinance.[12] After a dizzying back and forth—convicted in District Court, vindicated in Superior Court, and then rebuffed on the public trust issue at the Supreme Court—the seven sportfishing members ultimately had their convictions dismissed on due process grounds.[13]

This case—*State v. Ibbison*—is a watershed moment in the development of Rhode Island's public trust doctrine.[14] As a general matter, the public trust doctrine holds that certain resources are held in trust by the state for the benefit of the public.[15] It entrusts the state with the responsibility to prevent the impairment of those public trust resources.[16] Although some courts still treat the public trust doctrine as a singular doctrine,[17] most judges and academics alike acknowledge that there is no *one* public trust doctrine, but instead, many state-specific public trust doctrines.[18]

In stark relief, the *Ibbison* case presents a less acknowledged truth: the potent impact of local governments[19] on the public trust doctrine. Indeed, for the

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8. *See Ibbison*, 448 A.2d at 729; State v. Ibbison, Appellee's Br. at 1 (Feb. 24, 1982) (on file with author).

9. *See* State v. Ibbison, Appellee's Br. at 1 (Feb. 24, 1982) (on file with author).

10. *See* State v. Ibbison, Appellant's Br. at 2 (Oct. 14, 1981) (on file with author).

11. *See id.*

12. *Ibbison*, 448 A.2d at 729, 730–31.

13. *Id.* at 729, 733.

14. 448 A.2d 728 (R.I. 1982); *See, e.g.*, Hall v. Nascimento, 594 A.2d 874, 877 (R.I. 1991) (citing *Ibbison*, 448 A.2d at 730, 732–33) (defining Rhode Island's public trust doctrine).

15. *See, e.g.*, Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 458 (1892); *see also* Charles F. Wilkinson, *The Headwaters of the Public Trust: Some of the Traditional Doctrine*, 19 ENV'T L. 425, 426 (1989).

16. *See* Wilkinson, *supra* note 15, at 452 (noting that the Supreme Court in *Ill. Cent.* "left no doubt that the traditional public trust doctrine imposes obligations on the states").

17. *See, e.g.*, Matthews v. Bay Head Imp. Ass'n, 471 A.2d 355, 316–22 (N.J. 1984) (examining the public trust doctrine as a matter of common law).

18. *See* Wilkinson, *supra* note 15, at 425 (noting the fifty-one different public trust doctrines); *see also* Robin Kundis Craig, *A Comparative Guide to the Eastern Public Trust Doctrines: Classification of States, Property Rights, and State Summaries*, 16 PENN. STATE ENV'T L. REV. 1, 2–3 (2007) (noting the tendency to either "generalize all public trust law into a single doctrine" or "view each state's public trust doctrine as unique") [hereinafter Craig (Eastern)]; Robin Kundis Craig, *A Comparative Guide to the Western States' Public Trust Doctrines: Public Values, Private Rights, and the Evolution Toward an Ecological Public Trust*, 37 ECOLOGY L. Q. 53 (2010).

19. This Article uses the terms "local government" and "municipality" interchangeably. The terms are intended to encompass sub-state governing entities that have authority to enforce and regulate

sportfishing members, the local government was the keeper of the public trust doctrine. Through the patrolman, the local government made a determination as to where the public trust doctrine extended.[20] When the sportfishing members disagreed, the local government arrested the purported trespassers.[21] The sportfishing members were then charged with violation of a local government ordinance.[22] Throughout the incident, the local government controlled the scope and application of the public trust doctrine. What better illustration of the local government's influence in this realm than the image of State environmental agents standing to the side as a local government representative took control of the scene?

However, missing from the public trust doctrine's robust literature is any attention to the role of local governments.[23] This Article situates the public trust doctrine as dependent, at least in part, on local governments for both its substance and scope. Although any common law doctrine may be fairly described as local in character, the public trust doctrine is uniquely influenced by local governments. Indeed, the way many citizens experience the public trust doctrine is influenced by local governments. I call this phenomenon the local public trust doctrine.

This Article makes two contributions. First, it examines and catalogs three interrelated roles through which local governments impact the doctrine: (1) local government as landowner; (2) local government as regulator; and (3) local government as enforcer. Each role demonstrates the largely unexplored extent of local government's impact on the everyday realities of the public trust doctrine.

Second, this Article offers explanations for *why* the public trust doctrine is so susceptible to local governments' influence. It concludes that the very nature of the public trust doctrine—its changing legal foundations, its inherent flexibility, and its situs between public and private rights—renders the doctrine uniquely prone to local government influence.

These contributions challenge existing assumptions about the way the public trust doctrine operates. And they inform our understanding of the public trust doctrine's operation in everyday life.

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through ordinances, by-laws, and other measures. The terms include, but are not limited to, county governments, cities, towns, and townships.

20. State v. Ibbison, 448 A.2d 728, 729 (R.I. 1982).

21. *Id.*

22. *Id.*

23. This is not to suggest that local governments are entirely absent from the public trust doctrine's literature. *See, e.g.*, Alexandra B. Klass, *Renewable Energy and the Public Trust Doctrine*, 45 U.C. DAVIS. L. REV. 1021, 1046–50 (2012) (discussing a California Court of Appeals decision holding that a public trust claim should have been brought against the county government); *see also* Michael C. Blumm & Ryan J. Roberts, *Oregon's Amphibious Public Trust Doctrine: The* Oswego Lake *Decision*, 50 ENV'T L. 1227, 1247 (2020) (discussing the Oregon Supreme Court's "complete endorsement of the applicability of public trust law to municipalities."). However, it *is* to say that the literature has not yet grappled with the precise role of local governments in the public trust doctrine.

Such a contextualization of the way the public trust doctrine is being carried out is timely. Federal environmental legislative efforts have all but dried up.[24] Federal environmental regulatory efforts whipsaw from administration to administration.[25] As climate change worsens, many coastal municipalities are reconsidering public and private rights in the shadow of a rising tide.[26] And with sea level rise comes more opportunities for disputes between private property owners and members of the public.[27]

Finally, the public trust doctrine continues to play a significant role in environmental litigation.[28] From the high-profile *Juliana* case challenging the federal government's contribution to climate change[29] to Rhode Island's state lawsuit against fossil fuel companies,[30] the public trust doctrine remains a vital component of the current environmental law landscape. A reassessment of the public trust doctrine and the proper role of local governments in shaping it can revitalize the doctrine and reconfigure the doctrine's role as a tool for increased public access to and environmental protection of trust resources.

This Article proceeds as follows: Part I briefly sketches the parameters of the public trust doctrine, recognizing its common law underpinnings despite its state-specific nature. Part II traces the sources of local government authority in this

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24. *See, e.g.*, Todd S. Aagaard, *Environmental Law Outside the Canon*, 89 IND. L.J. 1239, 1240–41 (2014) (noting that "Congress has not passed a major environmental statute since the Clean Air Act Amendments of 1990."); *see also* Linda A. Malone, *Looking Beyond Environmental Law's Mid-Life Crisis*, 23 PACE ENV'T L. REV. 679, 680 (2006).

25. *See, e.g.*, Jody Freeman, *The Limits of Executive Power: The Obama-Trump Transition*, 96 NEB. L. REV. 545, 551 (2018) ("President Trump has already indicated that he will withdraw and rescind a variety of environmental rules, especially those related to climate change, but also various regulations affecting the oil-and-gas industry and energy policy."); *see also generally* Keith B. Belton, John D. Graham, *Trump's Deregulation Record: Is It Working?*, 71 ADMIN. L. REV. 803 (2019).

26. *See generally* Megan M. Herzog & Sean B. Hecht, *Combatting Sea Level Rise in Southern California: How Local Governments Can Seize Adaptation Opportunities While Minimizing Legal Risk*, 19 HASTINGS W.-N.W. J. ENV'T L. & POL'Y 463 (2013); *see also generally* Jane Cynthia Graham, *As the Tide Rolls In: Florida Cities and Counties Adapt to Sea Level Rise with Land-Use Plans*, 33-SPG NAT. RESOURCES & ENV'T 3 (2019); Shana Jones, Thomas Ruppert, Erin L. Deady, Heather Payne, J.Scott Pippin, Ling-Yee Huang, & Jason M. Evans, *Roads to Nowhere in Four States: State and Local Governments in the Atlantic Southeast Facing Sea-Level Rise*, 44(1) COLUMBIA J. OF ENV'T L. 67 (2019).

27. *See, e.g.*, J. Peter Byrne, *The Cathedral Engulfed: Sea-Level Rise, Property Rights, and Time*, 73 LA. L. REV. 69, 69 (2012) (noting that "[t]he now inevitable rise in sea levels" will "strain traditional understandings of property rights in land").

28. *See, e.g.*, Chernaik v. Brown, 475 P.3d 68, 78 (Or. 2020) (rejecting claims from young Oregonians that the state violated the public trust doctrine by failing to sufficiently combat climate change); *see also* Protect Our Parks, Inc. v. Chicago Park Dist., 971 F.3d 722, 731 (7th Cir. 2020) (dismissing for lack of standing claims from Chicago residents that planned presidential memorial center violated the public trust doctrine).

29. Juliana v. United States, 217 F. Supp. 3d 1224, 1246 (D. Or. 2016), *overruled on other grounds by* 947 F.3d 1159 (9th Cir. 2020). The *Juliana* case is predicated in part on a public trust doctrine cause of action. *See id.* at 1252–53.

30. Rhode Island v. Shell Oil Products Co., L.L.C., 979 F.3d 50 (1st Cir. 2020). Rhode Island's climate change case includes a public trust doctrine cause of action.

area. Part III explores the local government's role in the public trust doctrine through the three lenses described above, concluding that local governments play a substantial role in the public's everyday experience of the public trust doctrine. Part IV explains why the public trust doctrine is uniquely susceptible to local government influence. Finally, Part V provides recommendations consistent with local governments' acknowledged impact on the public trust doctrine.

## I. THE PUBLIC TRUST DOCTRINE, GENERALLY SPEAKING

Since it was revitalized in 1970 by legal scholar Joseph Sax's invigorating call, the public trust doctrine has been the subject of frequent academic attention.[31] Thousands of articles have been written on the topic.[32] Nearly all of them begin with a recitation of the public trust doctrine: what it means, what it looks like, and where it comes from.[33] This Article could do little to improve those descriptive and well-researched efforts.[34]

It is nevertheless important to trace the accepted common law and state-specific understandings of the doctrine. These recognized bases for the doctrine are central to how courts, advocates, and academics view it.

### A. COMMON TO COMMON LAW

As courts love to point out, the public trust doctrine is *old*.[35] Some courts trace it as far back as Roman law,[36] whereas others focus on the doctrine's English

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31. *See* Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 474 (1970).

32. To name a few, *see, e.g.*, Erin Ryan, *From Mono Lake to the Atmospheric Trust: Navigating the Public and Private Interests in Public Trust Resource Commons*, 10 GEO. WASH. J. ENERGY & ENV'T 39 (2019); Alexandra B. Klass, *Modern Public Trust Principles: Recognizing Rights and Integrating Standards*, 82 NOTRE DAME L. REV. 699 (2006); James L. Huffman, *The Public Trust Doctrine: A Brief (and True) History*, 10 GEO. WASH. J. ENERGY & ENV'T L. 15 (2019). A Westlaw search of "public trust doctrine" returns 3,737 law review articles.

33. *See, e.g.*, Klass, *supra* note 32 at 702–27.

34. But this Article can point to the thoughtful scholarship that precedes it. In addition to the articles cited *supra* note 32, for excellent scholarship on the historical origins of the public trust doctrine, see generally Wilkinson, *supra* note 15, Michael C. Blumm & Courtney Engel, *Proprietary and Sovereign Public Trust Obligations: From Justinian and Hale to* Lamprey *and Oswego Lake*, 43 VT. L. REV. 1 (2018), Hope M. Babcock, *The Public Trust Doctrine: What a Tall Tale They Tell*, 61 S.C. L. REV. 393 (2006), Robin Kundis Craig, *Adapting to Climate Change: The Potential Role of State Common Law Public Trust Doctrines*, 34 VERMONT L. REV. 781 (2010), Mary Christina Wood, *Advancing the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations (Part I): Ecological Realism and the Need for a Paradigm Shift*, 39 ENV'T L. 43 (2009), and Peter Manus, *To a Candidate in Search of an Environmental Theme: Promote the Public Trust*, 19 STAN. ENV'T L.J. 315 (2000).

35. *See, e.g.*, City of Montpelier v. Barnett, 49 A.3d 120, 127 (Vt. 2012) ("State trusteeship over navigable waters has a lengthy and somewhat mythic pedigree dating back to Roman and English law."); *see also* Champlin's Realty Assocs., L.P. v. Tilson, 823 A.2d 1162, 1166 (R.I. 2003) (citing DAVID C. SLADE, PUTTING THE PUBLIC TRUST DOCTRINE TO WORK 4 (1990) ("Since ancient times, the law has recognized the unique status of tidal lands through the public trust doctrine. The Greek

common law roots.[37] And though its true historical antecedents may be fairly scrutinized, the public trust doctrine is assuredly older than the United States.[38]

With this recognition of the doctrine's pedigree comes a certain attendant reverence. The very language courts use to describe the doctrine—"mythic[,]"[39] "ancient [,]"[40] and "reach[ing] back to the very early years of Western civilization"[41]—evince a judicial consciousness of the doctrine's significance. The doctrine's long history is thus often a shorthand for its importance.[42]

Public trust doctrine scholars, though often similarly reverential for the doctrine's longevity, take a more discerning look at the doctrine's history.[43] Some scholars, such as James Huffman, posit that the doctrine as we understand it today is really a twentieth century invention cloaked in historical garb.[44] And other scholars, such as Charles Wilkinson, eloquently caution that a dive into the

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philosophers set the foundation for the public trust doctrine, which first was codified in the second century Institutes and Journal of Gaius.")

36. *See, e.g.*, Glass v. Goeckel, 703 N.W.2d 58, 63–64 (Mich. 2005) ("Throughout the history of American law as descended from English common law, our courts have recognized that the sovereign must preserve and protect navigable waters for its people. This obligation traces back to the Roman Emperor Justinian"); *see also* Lawrence v. Clark Cnty., 254 P.3d 606, 608 (Nev. 2011) ("The public trust doctrine is an ancient principle thought to be traceable to Roman law and the works of Emperor Justinian."). For a thoughtful historical analysis on the "Roman roots" of the public trust doctrine, see J.B. Ruhl & Thomas A.J. McGinn, *The Roman Public Trust Doctrine: What Was It, and Does It Support an Atmospheric Trust?*, 47 ECOLOGY L. Q. 117 (2020).

37. *See, e.g.*, Shoreline Shellfish, LLC v. Town of Branford, 246 A.3d 470, 476 (Conn. 2020) ("The public trust doctrine evolved from English common law."). Some courts recognize both. *See In re* Water Use Permit Applications, 9 P.3d 409, 439 n.25 (Haw. 2000) ("The doctrine traces its origins to the English common law and ancient Roman law.").

38. *See, e.g.*, Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 458 (1892); s*ee also* James L. Huffman, *Speaking of Inconvenient Truths—A History of the Public Trust Doctrine*, 18 DUKE ENV'T L. & POL'Y F. 1, 12–27 (2007); Ruhl & McGinn, *supra* note 36. Additionally, there is debate over the origins of the phrase "the public trust doctrine" itself, which does not appear in *Ill. Cent. R.R. Co.*

39. *City of Montpelier*, 49 A.3d at 127.

40. *Lawrence*, 254 P.3d at 609.

41. Greater Providence Chamber of Commerce v. State, 657 A.2d 1038, 1041 (R.I. 1995).

42. *See, e.g.*, Chelan Basin Conservancy v. GBI Holding Co., 413 P.3d 549, 554 (Wash. 2018) ("While there is some debate whether this attribution to Roman law holds water, it is generally accepted even among the most skeptical of critics that the public trust doctrine has a long history and was firmly ingrained in English and American common law by the 19th century.").

43. *See* Huffman, *supra* note 38, at 12–27. *But see* Ruhl & McGinn, *supra* note 36, at 126 (arguing that "[t]here was a Roman public trust doctrine" and that "[t]here is a solid basis for asserting Roman roots" to the public trust doctrine).

44. *See* Huffman, *supra* note 32, at 15 ("There are thus two histories of the public trust doctrine. One founded in Anglo-American custom and case law. Another founded in the imaginations of now two generations of advocates in search of a fail-safe guardian of the environment."). For his arguments in this area, Professor Huffman has been called, by Professor Michael Blumm, the "Darth Vader of the public trust doctrine." *See id.* Professor Huffman has responded, "I would prefer to be thought of as the Luke Skywalker of the rule of law[.]" *Id.* Professor Huffman can at least take solace that the comparison is to a character from the original *Star Wars* trilogy, not the prequels or the more recent trilogy.

doctrine's true history is swimming in "the basin that holds the societies of the world."[45]

Despite these differences of opinion, both scholars and courts agree that the public trust doctrine is—at its core—a common law doctrine.[46] To some, that is the very point; as a common law doctrine, the public trust doctrine can evolve to address new challenges and changing circumstances.[47] To others, that is a drawback; as a common law doctrine, the public trust doctrine can be shoehorned to fit its square holdings into round jurisprudential holes.[48]

In any event, the public trust doctrine's common law roots are no mere historical footnote. Modern advocacy efforts to expand the public trust doctrine to wildlife,[49] dry sand areas of beaches for public recreation purposes,[50] and the

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45. *See* Wilkinson, *supra* note 15, at 431. Wilkinson writes:

> The real headwaters of the public trust doctrine, then, arise in rivulets from all reaches of the basin that holds the societies of the world. These things were articulated in different ways in different times by different peoples. In some cases the waters ran deep, in other places the waters ran shallow. But the idea of a high public value in water seems to have existed in most places in some fashion.

*Id.*

46. *See* Wilkinson, *supra* note 15, at 431 ("The English [] common law is the most direct source of our public trust doctrine"); *see also* Huffman, *supra* note 38, at 27; Babcock, *supra* note 34, at 396 ("The public trust doctrine is a potent common law property doctrine"). Though the doctrine's common law basis is clear, there are nonetheless suggestions that the doctrine is quasi-constitutional in that state legislatures cannot simply disclaim it. We see this most notably in *Illinois Central* where the United State Supreme Court held that "[t]he control of a state for the purposes of the [public] trust can never be lost." *Ill. Cent.*, 146 U.S. at 453.

47. *See, e.g.*, Babcock, *supra* note 34, at 394 ("[T]he public trust doctrine is a good legal fiction because it enables new uses of the doctrine to perform a gap-filling function in the absence of positive law and, therefore, that it deserves to continue unchallenged."); *see also* Craig (Eastern), *supra* note 18, at 4–6.

48. *See* Huffman, *supra* note 38, at 1, 16 (bemoaning the "mythological history of the [public trust] doctrine"); *see also* Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 633 (1986) [hereinafter Lazarus, *Changing Conceptions*] (arguing that the public trust doctrine obscures analysis and renders more difficult the important process of reworking natural resources law), *cited in* Byrne, *supra* note 27, at 71 n.7; Richard J. Lazarus, *Judicial Missteps, Legislative Dysfunction, and the Public Trust Doctrine: Can Two Wrongs Make it Right?*, 45 ENV'T L. 1139, 1152 (2015) ("I continue to worry that it is a serious mistake to take the public trust doctrine far beyond its historic moorings."); *but see* Michael C. Blumm, *Two Wrongs? Correcting Professor Lazarus's Misunderstandings of the Public Trust Doctrine*, 46 ENV'T L. 481 (2016).

49. *See* Pullen v. Ulmer, 923 P.2d 54, 61 (Alaska 1996) (holding that migrating salmon are "public assets of the state" that fall within the public trust doctrine). Critically, the Alaska Supreme Court based its holding on the acknowledgment that "'common law principles [are] incorporated'" into its state constitution. *See id.* at 60 (quoting Owsichek v. State, Guide Licensing, 763 P.2d 488, 495 (Alaska 1988)); *see also* Center for Biological Diversity, Inc. v. FPL Group, Inc., 83 Cal. Rptr. 3d 588, 695–600 (Cal. Ct. App. 2008) (holding that the public trust doctrine applies to wildlife).

50. *See* Matthews v. Bay Head Imp. Ass'n, 471 A.2d 355, 363 (N.J. 1984) (concluding that municipally-owned dry sand beach areas are included in the public trust doctrine). The New Jersey Supreme Court based this conclusion on common law understandings of the public trust doctrine.

atmosphere[51] all rely on the doctrine's common law background. Scholars Mary Christina Wood and Dan Gilpern go so far as to insist that this common law background controls "apart from statutory mandates."[52]

### B. A STATE-SPECIFIC MATTER?

No matter how common law the public trust doctrine's antecedents are, the modern public trust doctrine is undoubtedly state-specific.[53] There is thus no singular doctrine, but fifty-one public trust doctrines, each with their own idiosyncratic features.[54] Some states have codified the public trust doctrine into statutes, others into constitutional provisions.[55] A few have retained the doctrine in its common law formulation.[56]

But the codification of a state's public trust doctrine is no guarantee that a state court will follow the codification's state-specific contours. For one thing, despite the diversity of state-specific public trust doctrines, state courts routinely borrow from other jurisdictions in determining the reach of their own public trust doctrine. For example, in 2005, the Michigan Supreme Court expressly adopted the Wisconsin Supreme Court's definition of "ordinary high water mark" to denote the extent of the public trust doctrine's reach.[57] And the Alaska Supreme Court

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51. The so-called "Atmospheric Public Trust" idea is of relatively recent vintage. Through a series of envelope-pushing litigation—most notably Juliana v. United States, 217 F. Supp. 3d 1224 (D. Or. 2016), *overruled on other grounds by* 947 F.3d 1159 (9th Cir. 2020)—advocates of the Atmospheric Public Trust urge the application of public trust principles to the atmosphere to address climate change. The essential charge is that "state and national governments have abdicated their responsibilities under the public trust doctrine." *Juliana*, 217 F. Supp. 3d at 1254. Legal commentary has followed, both in support—Mary Christina Wood & Dan Gilpern, *Atmospheric Recovery Litigation: Making the Fossil Fuel Industry Pay to Restore a Viable Climate System*, 45 ENV'T L. 259 (2015)—and against— Caroline Cress, Comment, *It's Time to Let Go: Why the Atmospheric Trust Won't Help the World Breathe Easier*, 92 N.C. L. REV. 236 (2013). Crucially, virtually all agree that the public trust doctrine is "of common law[.]" Wood & Gilpern at 273.

52. Wood & Gilpern, *supra* note 51, at 282.

53. *See, e.g.*, Shively v. Bowlby, 152 U.S. 1, 26 (1894) ("[T]here is no universal and uniform law upon the subject, but that each state has dealt with the lands under the tide waters within its borders according to its own views of justice and policy . . . ."); *see also* PPL Montana, LLC v. Montana, 565 U.S. 576, 603–04 (2012) (citing Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 285 (1997); and then citing Appleby v. City of New York, 271 U.S. 364, 395 (1926)) ("[T]he public trust doctrine remains a matter of state law . . . .").

54. *See* Wilkinson, *supra* note 15, at 425 ("The public trust doctrine is complicated—there are fifty-one public trust doctrines in this country alone.").

55. *See* Craig (Eastern), *supra* note 18, at 2–3 (comparing and contrasting various states' public trust doctrines); *see also* Michael C. Blumm et al., *The Public Trust Doctrine in Forty-Five States*, LEWIS & CLARK LAW SCHOOL LEGAL STUDIES RESEARCH PAPER (2014), https://ssrn.com/abstract=2235329.

56. *See, e.g.*, Blumm, *supra* note 55, at 60, 161, 455 (noting this for Arkansas, Florida, and Missouri).

57. Glass v. Goeckel, 703 N.W.2d 58, 72 (Mich. 2005) (hedging that "we do not import our sister state's public trust doctrine where this Court has already spoken"). Michigan is not the only state to benefit from Wisconsin's expertise; the Illinois Supreme Court has taken a similar tack: "In passing we think it appropriate to refer to the approach developed by the courts of our sister State, Wisconsin, in dealing with diversion problems [of public trust lands]." Paepcke v. Public Bldg. Comm'n of Chicago, 263 N.E.2d 11, 19 (Ill. 1970).

has looked to sister states' jurisprudence in addressing the public trust doctrine's applicability to tideland conveyances.[58]

For another, states routinely revert to common law understandings of the public trust doctrine to resolve cases.[59] Rhode Island's approach aptly illustrates the point. In the mid-1990s, in recognition that the state's public trust doctrine is codified in the state constitution, the Rhode Island Supreme Court proclaimed that "[t]he laws of our sister states are not always helpful to a determination of the law of the State of Rhode Island regarding the public-trust doctrine."[60] But just eight years later, the Rhode Island Supreme Court resorted to articulating "the doctrine as a matter of American jurisprudence" and Roman and English common law antecedents.[61]

States with statutorily codified public trust doctrines—often in the form of environmental rights acts—similarly maintain common law forms of the doctrine. Minnesota, for example, has the Minnesota Environmental Rights Act ("MERA"), which broadly codifies public trust principles.[62] And the state's public trust doctrine has largely developed through application of the MERA.[63] But Minnesota still has a common law public trust doctrine.[64] And the state's common law public trust doctrine operates almost entirely independently of the MERA.[65]

Finally, the state-specific nature of the doctrine is obscured by the United States Supreme Court's looming presence, particularly as set forth in *Illinois Central Railroad Company v. Illinois*,[66] *Martin v. Waddell's Lessee*,[67] and

58. CWC Fisheries, Inc. v. Bunker, 755 P.2d 1115, 1118 (Alaska 1988) (looking to caselaw from California, Idaho, Washington, and Massachusetts).

59. *See* Chernaik v. Brown, 475 P.3d 68, 78 (Or. 2020) ("As a common-law doctrine, the public trust doctrine is not necessarily fixed at its current scope. It is within the purview of this court to examine the appropriate scope of the doctrine and to expand or to mold it to meet society's current needs, as we have done in the past.").

60. Greater Providence Chamber of Commerce v. State, 657 A.2d 1038, 1042 (R.I. 1995). Rhode Island's public trust doctrine is codified at R.I. Const. art I, § 17.

61. Champlin's Realty Assocs. v. Tilson, 823 A.2d 1162, 1166 (R.I. 2003).

62. MINN. STAT. § 116B.01–13 (1971) (amended 1986); *see also* Alexandra B. Klass, *The Public Trust Doctrine in the Shadow of State Environmental Rights Laws: A Case Study*, 45 ENV'T L. 431, 433 (2015) (describing how the Minnesota statute is modeled on a Michigan statute spearheaded by Professor Joseph L. Sax).

63. *See* Klass, *supra* note 62, at 434.

64. *See* White Bear Lake Restoration Assoc. *ex rel.* State v. Minn. Dept. of Nat. Res., 946 N.W.2d 373, 385–87 (Minn. 2020).

65. *See id.*; *see also* Klass, *supra* note 62, at 436 ("[T]he goal in this Article is to explore how the case law has developed in Minnesota and to *encourage* litigants in future cases to use the common law in efforts to protect the environment so a more robust common law jurisprudence can develop alongside judicial decisions interpreting MERA.") (emphasis in original).

66. *Ill. Cent.*, 146 U.S. 387.

67. Martin v. Waddell's Lessee, 41 U.S. 367 (1842).

*Shively v. Bowlby*.[68] These cases all recognize and employ the public trust doctrine. Some have viewed these cases as federalizing the public trust doctrine.[69] But more recent Supreme Court decisions—*PPL Montana, LLC v. Montana* in particular—appear to call into question any federal dimension of the public trust doctrine.[70] In any event, the extent of federal law's role in the public trust doctrine is appreciable, albeit evolving.[71]

These observations are not criticisms. And perhaps, given the wealth of common law underpinning the public trust doctrine, it is inevitable that what is technically a state-specific doctrine gives way to a general common law one.

But, nonetheless, the result is clear: whatever its particular current status—statutory, constitutional, or otherwise—the public trust doctrine maintains a common law dimension that is crucial to understanding both how it has functioned and how courts believe it to have functioned. As explained in Part IV, *infra*, this tendency for the doctrine to revert to its common law roots serves to amplify the impact local governments have on the doctrine's substance and scope.

## II. LOCAL AUTHORITY OVER THE PUBLIC TRUST

Understanding the role of local governments in the public trust context requires an understanding of local government authority. Of course, in most states that means recognizing that local governments lack inherent powers.[72] Indeed, the axiomatic caveat attending any discussion of local government authority is that local governments are strictly circumscribed by the state's

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

69. *See* Crystal S. Chase, *The* Illinois Central *Public Trust Doctrine and Federal Common Law: An Unconventional View*, 16 HASTINGS W.-N.W. J. ENV'T L. & POL'Y 113, 116 (2010) (arguing "that the Illinois Central public trust doctrine is grounded in federal common law"); *see also* Hope M. Babcock, *Using the Federal Public Trust Doctrine to Fill Gaps in the Legal Systems Protecting Migrating Wildlife From the Effects of Climate Change*, 95 NEB. L. REV. 649, 652 (2017) (asserting theoretical bases for a federal version of the public trust doctrine).

70. 565 U.S. 576, 603 (2012) (noting in dicta that "[t]he public trust doctrine remains a matter of state law[.]"). For contextualization of this passing statement—and an argument that the public trust doctrine remains part of federal law—*see* Michael C. Blumm & Mary Christina Wood, *"No Ordinary Lawsuit": Climate Change, Due Process, and the Public Trust Doctrine*, 67 AM. U. L. REV. 1, 49–51 (2017). Nonetheless, lower courts routinely cite this statement to argue against a federal public trust doctrine. *See, e.g.*, United States v. 32.42 Acres of Land, More or Less, Located in San Diego Cty., Cal., 683 F.3d 1030, 1038 (9th Cir. 2012) (quoting *PPL Montana* to hold that the public trust doctrine is governed by the states); *see also* Alec L. *ex rel.* Loorz v. McCarthy, 561 F. App'x 7, 8 (D.C. Cir. 2014) (Mem.) ("The Supreme Court in *PPL Montana,* however, repeatedly referred to 'the' public trust doctrine and directly and categorically rejected any federal constitutional foundation for that doctrine, without qualification or reservation.").

71. *See generally* Cathy J. Lewis, *The Timid Approach of the Federal Courts to the Public Trust Doctrine: Justified Reluctance or Dereliction of Duty?*, 19 PUB. LAND & RESOURCES L. REV. 51 (1998); Hope M. Babcock, *Grotius, Ocean Fish Ranching, and the Public Trust Doctrine: Ride 'Em Charlie Tuna*, 26 STAN. ENV'T L.J. 3 (2007).

72. *See, e.g.*, John R. Nolon, *In Praise of Parochialism: The Advent of Local Environmental Law*, 26 HARV. ENV'T L. REV. 365, 377 (2002); *see also* Hunter v. City of Pittsburgh, 207 U.S. 161, 178–79 (1907).

delegation of power.[73] This so-called "Dillon's Rule" provides "a standard of delegation, a canon of construction and a rule of limited power."[74] It establishes local governments as mere instrumentalities of the state, able to act *only* where the state has expressly delegated authority.[75] Under this regime, then, the state retains its sovereignty and authority. And although Dillon's Rule has been formally abandoned in a number of jurisdictions, the working assumption of local government authority is that it is limited.[76]

Despite these well-established formal limits on their authority, local governments nonetheless exercise a great deal of discretion within their delegated powers.[77] Particularly in states with home rule statutes or home rule constitutional provisions, local governments are granted considerable autonomy to act.[78] Whether through zoning, comprehensive land planning, or other land use controls, local governments have long enjoyed authority over the ill-defined category of issues termed "local issues."[79]

Within these delegated spheres, local governments have taken an increased role in environmental protection.[80] As Professor John R. Nolon describes it, local environmental efforts "include local comprehensive plans expressing environmental values, zoning districts created to protect watershed areas, environmental standards contained in subdivision and site plan regulations, and stand-alone environmental laws adopted to protect particular natural resources such as ridgelines, wetlands, floodplains, stream banks, existing vegetative cover, and forests."[81] For some localities, federal gridlock on pressing environmental issues has prompted local governments to step up their efforts to achieve environmental

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73. *See* Nolon, *supra* note 72, at 377–78; *see also Hunter*, 207 U.S. at 178–79; JOHN F. DILLON, TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS (1872).

74. Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 8 (1990).

75. *Id.*; *see also* Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059, 1062 (1980) ("Under current law, cities have no 'natural' or 'inherent' power to do anything simply because they decide to do it. Cities have only those powers delegated to them by state government, and traditionally those delegated powers have been rigorously limited by judicial interpretation.").

76. *See* Briffault, *supra* note 74 (noting that "Professor Frug and others contend that the Dillon's Rule tradition still leads state courts to construe local government powers narrowly.").

77. *See* Katrina M. Wyman & Danielle Spiegel-Feld, *The Urban Environmental Renaissance*, 108 CAL. L. REV. 305, 349 (2020) ("States' magnanimity towards municipalities has ebbed and flowed over the years as they have granted more or less generous home rule authority[.]").

78. *See* Rick Su, *Have Cities Abandoned Home Rule?,* 44 FORDHAM URB. L. J. 181, 181 (2017); *see also* R.I. CONST. art. XIII; *see generally* DALE KRANE, PLATON RIGOS, & MELVIN B. HILL, JR., HOME RULE IN AMERICA: A FIFTY-STATE HANDBOOK (2001).

79. *See* Nolon, *supra* note 72, at 365; *see also* Wyman & Spiegel-Feld, *supra* note 77, at 349; Sarah Fox, *Home Rule in an Era of Local Environmental Innovation*, 44 ECOLOGY L. Q. 575, 586–91 (2017).

80. *See* Nolon, *supra* note 72, at 365; s*ee also* Peter H. Lehner, *Act Locally: Municipal Enforcement of Environmental Law*, 12 STAN. ENV'T. L. J. 50, 50 (1993).

81. Nolon, *supra* note 72, at 365.

goals.[82] And legal scholars routinely celebrate and encourage local environmental efforts.[83]

Local government authority over the public trust doctrine, then, is just part of the broader framework of local authority in the environmental sphere. One could certainly imagine local governments acting within their zoning, land use, or land planning powers in ways that impact public trust resources.[84]

But there is also a feature of local government authority unique to the public trust doctrine: local governments can be trustees of the public trust.[85] A growing number of state courts have expressly recognized that through appropriate delegation from the state, whether constitutional or statutory, municipalities can be trustees of the public trust doctrine.[86] This formal designation is important because it both permits local governments to "administer public trust rights"—and the accompanying restrictions that may entail—as well as subjects local governments to the limitations and obligations of a trustee.[87] As trustees of the public trust doctrine, local governments can be just as much the central actors in the doctrine as the state.[88] Or, at least, local governments are in the same legal position as states in matters of the public trust doctrine.

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82. For example, in the absence of federal action on climate change, New York City and Boston have taken a number of actions to deal with the crisis. *See* Thomas M. Gremillon, *Setting the Foundation: Climate Change Adaptation at the Local Level*, 41 ENV'T L. 1221, 1244 (2011); *see also* Sarah J. Adams-Schoen, *Sink or Swim: In Search of a Model for Coastal City Climate Resilience*, 40 COLUM. J. ENV'T L. 433, 463–64 (2015).

83. *See* Adams-Schoen, *supra* note 82, at 463–64; *see also* Wyman & Spiegel-Feld, *supra* note 77, at 349; Nolon, *supra* note 72, at 377.

84. Indeed, this article explains *infra* how local government regulatory authority—often in the zoning, land use, or land planning spheres—impacts the public trust doctrine. *See infra* Section IV.B.

85. *See, e.g.*, John C. Dernbach, *The Potential Meaning of a Constitutional Public Trust*, 45 ENV'T L. 463, 482 (2015); *see also* Blumm & Roberts, *supra* note 23, at 1247.

86. *See, e.g.*, Robinson Twp., Washington Cnty. v. Commonwealth, 83 A.3d 901, 977 (Pa. 2013) ("With respect to the public trust, Article I, Section 27 of the Pennsylvania Constitution names not the General Assembly but "the Commonwealth" as trustee. . . . [A]s a result, all existing branches and levels of government derive constitutional duties and obligations with respect to the people."); *see also* Kramer v. City of Lake Oswego, 446 P.3d 1, 19 (Or. 2019) ("Because the state's authority to enact restrictions on the public's access to publicly-owned waters is limited [by the public trust doctrine], the same limitations apply to the authority of a city, to which the constitution has assigned a portion of the authority of the state."); Fafard v. Conservation Comm'n of Barnstable, 733 N.E.2d 66, 71 (Mass. 2000) ("This history of the origins of the Commonwealth's public trust obligations and authority, as well as jurisprudence and legislation spanning two centuries, persuades us that only the Commonwealth, or an entity to which the Legislature properly has delegated authority, may administer public trust rights."); State v. Village of Lake Delton, 286 N.W.2d 622, 629 (Wisc. Ct. App. 1979) ("[M]any cases recognize that this power may be delegated to other units of government, including municipalities, for purposes in furtherance of the trust."); Kelly v. 1250 Oceanside Partners, 140 P.3d 985, 1006 (Haw. 2006) ("Accordingly, the County's argument that it has "no attendant obligations" under the public trust doctrine and that public trust responsibilities arise out of state ownership only is not correct. We therefore hold that the County has a duty, as a political subdivision of the State, to protect the waters located adjacent to the Property."); Env't L. Found. v. State Water Res. Control Bd., 26 Cal. App. 5th 844, 854 (Ct. App. 2018) (holding that "[a]s a subdivision of the State, the County 'shares responsibility' for administering the public trust").

87. *Fafard*, 733 N.E.2d at 71.

88. *See supra* note 86.

However, some state courts have declined to declare that local governments are as much a trustee of the doctrine as the state is.[89] Whether this stems from judicial disapproval of municipal trustee status or judicial reluctance to confer a status more appropriately granted by state executive or legislative processes is unclear.[90] But, in any event, and more basically, simply reducing the phenomenon of the local public trust doctrine to local government's legal status as trustee does little to illuminate *how* local governments impact the doctrine. The next section interrogates this question.

## III. EVIDENCE OF THE LOCAL PUBLIC TRUST DOCTRINE

Local governments impact the public trust doctrine through three key roles: (A) through their ownership of land containing or abutting public trust resources; (B) through land use regulations that impact public trust resources; and (C) through civil and criminal enforcement in contexts affecting public trust resources. Although discussed separately *infra*, this framing is not intended to suggest that all three are necessarily distinct in every case. To the contrary, it is the interplay between these local government roles that results in local governments' impact on the doctrine.

### A. LOCAL GOVERNMENT AS LANDOWNER

At first glance, local governments might not seem likely candidates for landowners with enough property to impact the public trust doctrine. One report estimates local government-owned property constitutes a measly 0.5% of all land in the United States.[91] And in certain areas of the United States—like a number of Western states—it is the federal government that owns the bulk of public land.[92]

But dig a bit deeper and it becomes apparent that the property that local governments *do* own is located near, on, or abutting public trust resources.[93]

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89. For example, in *City of Montpelier v. Barnett*, a city's attempt to regulate access to a pond was rebuffed. 49 A.3d 120 at 128 (Vt. 2012). The Vermont Supreme Court reiterated several times that the State was the "trustee" but did not expressly extend such status to the municipality. *Id.* So too in Colorado, where a proposed (but ultimately withdrawn) state constitutional amendment would have ensured that both state and local governments were equal trustees of the public trust. *See In re* Title, Ballot Title, and Submission Clause for 2013-2014, #89, 328 P.3d 172, 175–76 (Colo. 2014).

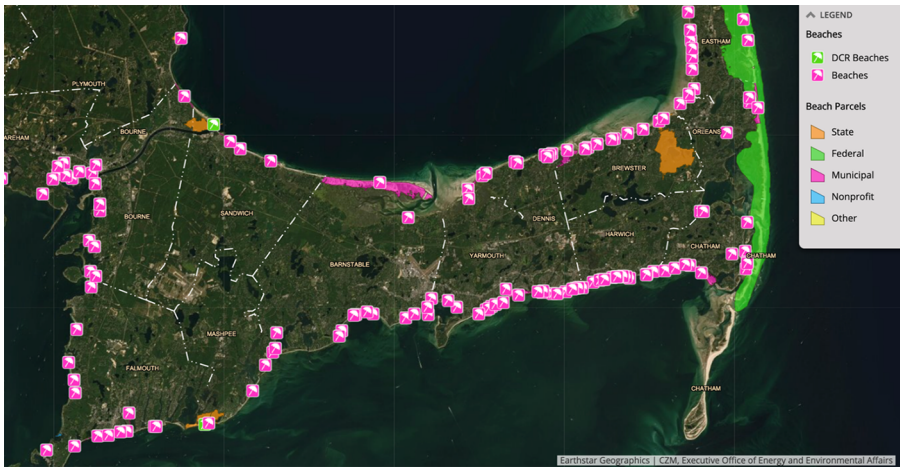
90. *See City of Montpelier*, 49 A.3d at 128.

91. Ray Rasker, *Public Land Ownership in the United States*, HEADWATERS ECON. (June 2019), https://headwaterseconomics.org/public-lands/protected-lands/public-land-ownership-in-the-us/ [https://perma.cc/2N4E-2YEE].

92. *See* CAROL HARDY VINCENT ET AL., CONG. RSCH. SERV., R42346, FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA 1, 20 (2020) ("[F]ederal land ownership is concentrated in Alaska (60.9%) and 11 coterminous western states (45.9%), in contrast with lands in the other states (4.1%).").

93. In Wisconsin, for example, county governments own over two and a half million acres of property—nearly seven and a half percent of the state—a million more acres than the state owns. Robert H. Nelson, *State-Owned Lands in the Eastern United States*, PERC, 1, 44 (March 2018), https://www.perc.org/2018/03/13/state-owned-lands-in-the-eastern-united-states/ https://perma.cc/TL6L-QQC8.

Consider, for example, the shoreline. As traditional notions of the public trust center on tidal and submerged lands, this makes shoreline ownership especially impactful in the public trust context.[94] In Massachusetts, for example, a quarter of the shoreline is publicly owned.[95] The Massachusetts Office of Coastal Zone Management's interactive mapping tool illustrates in vivid color that local governments own a considerable portion of the publicly-owned shoreline, with municipal-owned beaches shown with umbrella icons:[96]




A look at a number of Massachusetts municipalities confirms that municipalities own substantial portions of the shoreline. On the following maps, the municipal-owned property is shaded:[97]

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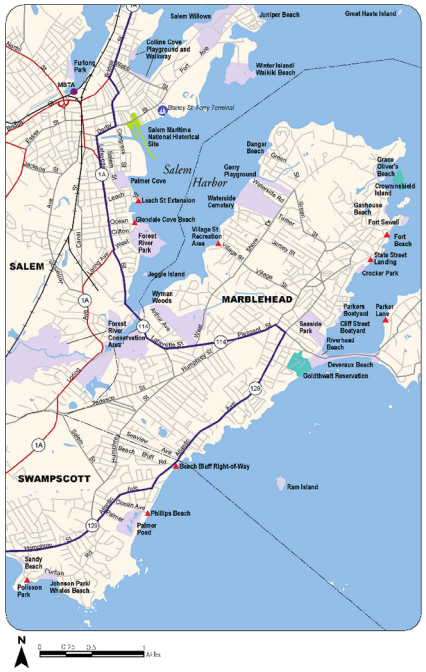
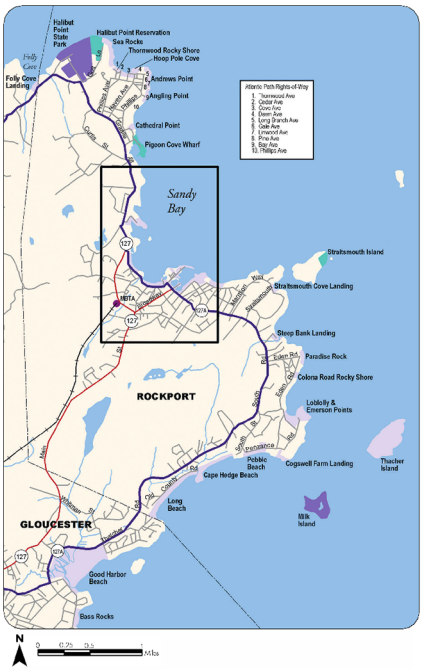
94. Richard M. Frank, *The Public Trust Doctrine: Assessing its Recent Past & Charting its Future*, 45 U.C.D. L. REV. 665, 671 (2012) ("The most traditional application of the public trust doctrine has been to tidal and submerged lands[.]").

95. Pamela Pogue & Virginia Lee, *Providing Public Access to the Shore: The Role of Coastal Zone Management Programs*, 27 COASTAL MGMT. 219, 222 (1999).

96. *Massachusetts Coast Guide Online - Beaches*, MASS. OFF. OF COASTAL ZONE MGMT., https://mass-eoeea.maps.arcgis.com/apps/MapSeries/index.html?appid=35ba833bdc704d49b71a71c511224eb6 [https://perma.cc/8NSN-2NSB] (last visited Oct. 22, 2021).

97. Map of Salem-Swampscott. *Massachusetts Coast Guide to Boston Harbor and the North Shore*, MASS.GOV, https://www.mass.gov/files/documents/2016/08/pk/salem-swampscott_0.pdf [https://perma.cc/FJ5P-CJQJ] (last visited Nov. 15, 2021); Map of Rockport, https://www.mass.gov/files/documents/2016/08/oo/rockport_0.pdf [https://perma.cc/ZB9P-RRNM] (last visited Nov. 15, 2021). *See* COAST GUIDE SYMBOLS AND COLOR KEY, https://www.mass.gov/files/documents/2017/11/08/map-key.pdf [https://perma.cc/E4JJ-FAUL] (last visited Nov. 3, 2021). *See generally* Mass. Off. of Coastal Zone Mgmt, *Massachusetts Coast Guide to Boston and the North Shore – print version from 2005*, MASS.GOV, https://www.mass.gov/service-details/massachusetts-coast-guide-to-boston-and-the-north-shore-print-version-from-2005 [https://perma.cc/S9JE-TR86] (last visited Nov. 15, 2021).




As these maps illustrate, local governments own significant amounts of land that contains or abuts public trust resources. One can hardly walk along the Rockport coast or boat into Salem harbor without encountering municipally-owned property.

But it is not just traditional town-owned beaches. Other sub-state entities also control large swathes of land containing or abutting public trust resources. In Rhode Island, for example, a number of misnamed "fire districts" own significant tracts of land along the shoreline.[98] Chartered by the state, these fire districts operate as quasi-governmental entities responsible for maintaining properties and

98. *See* Dale P. Faulkner, *State Agencies Commit to Improving Public Access to Shoreline at Weekapaug Breachway*, THE WESTERLY SUN (Oct. 6, 2020), https://www.thewesterlysun.com/news/westerly/state-agencies-commit-to-improving-public-access-to-shoreline-at-weekapaug-breachway/article_40d8e9ca-080b-11eb-875d-ff9a664b3460.html [https://perma.cc/7UWA-NUBP]; *see also* Alex Nunes, *In Coastal South County, Fire Districts Fight Shoreline Access Instead of Fires*, THE PUBLIC'S RADIO (Mar. 31, 2021), https://thepublicsradio.org/article/fire-districts [https://perma.cc/36P4-GS9W].

capable of taxing residents.[99] In Westerly, Rhode Island, the Weekapaug Fire District owns more than sixty acres of coastal property, including a right of way to Weekapaug Barrier Beach.[100] But the Fire District has often restricted access to the beach, limiting use to taxpaying residents of the Fire District.[101] Other fire districts in nearby towns own nearly four hundred acres of property.[102] The impact on the public's use of public trust doctrine resources is significant, with state regulators intervening to examine access.[103]

Lest I be accused of New England parochialism, the phenomenon of local government ownership of land containing or abutting public trust resources is nationwide. In Chicago, for instance, the construction of the Obama Presidential Center in Jackson Park was met with claims that the City violated the public trust doctrine by transferring control of parkland to the Obama Foundation.[104] It was the City's ownership of public trust resources—Jackson Park—and its alienation of components of that ownership—control—that impacted the public trust doctrine.[105] Although the suit was ultimately dismissed for lack of standing, the City's ownership of public trust resources was the centerpiece of the case.[106]

Indeed, so much of the public's experience with public trust resources is connected to local government ownership. Thus, although local governments may not own property on the scale of the federal government, the property they do own is singularly impactful on public trust resources.

The import of this ownership is that it provides local governments the opportunity to impact public trust resources.[107] Like any property owner, local governments continuously make land use decisions (or fail to make decisions) that influence the use of, access to, and maintenance of property. Those decisions—perhaps even without intending to—necessarily impact public trust resources. Thus, even outside of their roles as regulators and enforcers, local governments as landowners impact the public trust doctrine.

### B. LOCAL GOVERNMENT AS REGULATOR

Local governments also impact the public trust doctrine through their roles as regulators, particularly with respect to land use. Most local governments have been delegated authority over land use regulations.[108] These land use regulations

99. *See* Faulkner, *supra* note 98
100. *See* Nunes, *supra* note 98.
101. *Id.*
102. *Id.*
103. *See* Faulkner, *supra* note 98.
104. *See, e.g.*, Protect Our Parks, Inc. v. Chicago Park Dist., 971 F.3d 722, 728 (7th Cir. 2020).
105. *Id.* at 729–30.
106. *Id.* at 738.
107. *See infra* notes 147–54 and accompanying text.
108. *See generally* Charles Gottlieb, *Regional Land Use Planning: A Collaborative Solution for the Conservation of Natural Resources*, 29 J. ENV'T. L. & LITIG. 35 (2014); *see also* Village of Euclid v. Ambler Realty, 272 U.S. 365, 387 (1926).

allow local governments to control land development, permissible activities in a particular area, and access to land.[109] In many cases, this authority amounts to regulating how the public experiences the public trust doctrine.

Of course, nothing is to suggest that local governments are free to regulate public trust resources as they please, free from constraints. As the Rhode Island Supreme Court helpfully framed it, "the state *could* grant municipalities the authority to regulate tidal lands on its behalf[,]" but, of course, not all states do.[110] Although local governments cannot regulate public trust resources contrary to state law, they can nonetheless "'adopt more stringent controls' than those embodied in state law."[111] Indeed, the scope of the grant of authority presents an outer bound on permissible local government regulation.[112] But many states do—either through home rule authority or other statutes—grant local governments broad authority to regulate areas that include public trust resources.[113]

For example, in *Weden v. San Juan County*, a Washington county regulated all marine waters in the county by banning the use of motorized personal watercraft.[114] Containing over 170 islands, San Juan County includes 375 *miles* of shoreline.[115] For comparison, Rhode Island has 400 miles of shoreline.[116] The Washington Supreme Court upheld this sweeping regulation on hundreds of miles of public trust resources by noting that the state had failed to act in this arena and that, therefore, the county ordinance "cannot conflict with state laws that do not exist."[117] As the county's actions were "consistent with the goals of statewide environmental protection statutes[,]" the court found them

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109. *See generally* Sara C. Bronin, *The Quiet Revolution Revived: Sustainable Design, Land Use Regulation, and the States*, 93 MINN. L. REV. 231 (2008).

110. Champlin's Realty Assocs., L.P. v. Tillson, 823 A.2d 1162, 1167 (R.I. 2003) (emphasis added).

111. Fafard v. Conservation Comm'n of Barnstable, 733 N.E.2d 66, 72 (Mass. 2000) (quoting Golden v. Selectmen of Falmouth, 358 Mass. 519, 526, 265 N.E.2d 573 (1970)) (citing Lovequist v. Conservation Comm'n of Dennis, 379 Mass. 7, 393 N.E.2d 858 (1979)). For example, the Vermont Supreme Court has warned against "permit[ting] regulation where there is not a clear authorization from the Legislature." City of Montpelier v. Barnett, 49 A.3d 120, 136 (Vt. 2012)).

112. For example, the Vermont Supreme Court has warned against "permit[ting] regulation where there is not a clear authorization from the Legislature." City of Montpelier v. Barnett, 49 A.3d 120, 136 (Vt. 2012). Other state supreme courts have held similarly. *See* Fafard v. Conservation Com'n of Barnstable, 733 N.E.2d 66, 71 (Mass. 2000) ("Absent a grant of authority from the Commonwealth, a municipality may not claim powers to act on behalf of public trust rights.").

113. *See, e.g.*, Nelson v. De Long, 7 N.W.2d 342 (Minn. 1942) (finding municipal ordinance that regulated area as exclusively for swimming consistent with the public trust doctrine, noting that "[t]he state may delegate governmental functions to municipal corporations."); *see* Shoreline Shellfish, LLC v. Town of Branford, 246 A.3d 470, 477 (Conn. 2020) ("Although the legislature always retains ultimate responsibility for lands subject to the public trust doctrine, it may delegate authority to manage these lands to designees, including municipalities.").

114. Weden v. San Juan Cnty., 958 P.2d 273, 276 (Wash. 1998), *abrogated on other grounds by* Yim v. City of Seattle, 451 P.3d 694, 702 (Wash. 2019).

115. *See id*. at 723 (J. Sanders, dissenting).

116. *See* Rhode Island Historical Information, Rhode Island Government, https://www.ri.gov/facts/history.php [https://perma.cc/N8HE-CBLR].

117. *Weden,* 958 P.2d at 284.

permissible.[118] *Weden* thus illustrates the considerable latitude local governments are afforded in regulating public trust resources and the vast impact those regulations can have.

Massachusetts courts have been similarly tolerant of local government regulations that affect public trust resources in the name of environmental protection. The Massachusetts Appeals Court has twice upheld local regulations restricting certain activities in harbors.[119] And the Massachusetts Supreme Judicial Court has upheld municipal restrictions on wetland development as within the sphere of traditional municipal authority pursuant to delegated minimum state standards.[120] In each case, local regulatory action served to limit use of public trust resources.

Wisconsin courts, too, have upheld local government regulations of public trust resources.[121] Most strikingly, a Wisconsin appeals court did so in the face of strident state opposition.[122] In *State v. Village of Lake Delton*, two municipalities zoned an area of Lake Delton for the exclusive use of public water ski exhibitions at certain times.[123] The Wisconsin Department of Natural Resources sued to prevent these local regulations from violating the public trust doctrine, asserting that "the exclusion of the public could not be plainer nor could it be more complete."[124] The Wisconsin Appeals Court disagreed, holding that the local ordinance was permissible because it furthered a public interest.[125] The incidental effect of restricting access to public trust resources was, in the court's view, insufficient to outweigh the legitimate public purpose behind the ordinance (that of permitting a private company to hold a water ski exhibition).[126] Thus, the local government's regulation of public trust resources was upheld despite state opposition.[127]

These examples illuminate the significant delegated authority local governments wield in regulating the public's access to and experience with public trust resources. By controlling the types of activities permissible on or near public trust resources, local governments can, in effect, regulate the everyday realities of the

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118. *Id.*

119. *See* Commonwealth v. Muise, 796 N.E.2d 1289, 1291 (Mass. App. Ct., Essex 2003) (upholding Gloucester's prohibition on lobstering in the inner harbor); *see also* Mad Maxine's Watersports, Inc. v. Harbormaster of Provincetown, 858 N.E.2d 760, 767 (Mass. App. Ct., Barnstable 2006) (upholding Provincetown's restrictions on propelled personal watercrafts in the harbor).

120. *See* Golden v. Bd. of Selectmen of Falmouth, 265 N.E.2d 573, 577 (Mass. 1970) (noting that "local communities [are] free to adopt more stringent controls"); *see also* Fafard v. Conservation Comm'n of Barnstable, 733 N.E.2d 66, 76 (Mass. 2000).

121. *See, e.g.*, Menzer v. Elkhart Lake, 186 N.W.2d 290 (Wisc. 1971) (upholding local ordinance that prohibited the use of motor boats on a lake each summer Sunday and finding that ordinance did not violate the public trust doctrine).

122. State v. Village of Lake Delton, 286 N.W.2d 622 (Wisc. App. 1979).

123. *Id.* at 625.

124. *Id.* at 624–25, 633.

125. *Id.* at 636.

126. *Id.* at 635.

127. *Id.*

public trust doctrine. For the public, then, access to public trust resources is significantly shaped by local government regulation.

### C. LOCAL GOVERNMENT AS ENFORCER

Finally, and perhaps most visibly, local governments police—civilly, criminally, and informally—access to public trust resources. These efforts may penalize trespass or prohibit certain activities in or near public trust resources. More common, but less evidenced, local governments' enforcement efforts foster norms that impact how the public experiences the public trust doctrine.

Whether local governments enforce their own rules or back up a complaining landowner, the key feature of these local government actions is that they bring local government enforcement to the public's interaction with public trust resources. For many, the face of government in the public trust context is local law enforcement.

This section begins with a discussion on the limitations of collecting local enforcement data. It then examines two kinds of local enforcement affecting public trust resources: where the local government enforces private property disputes and where the local government enforces its own regulations and restrictions.

#### 1. Acknowledged Limitations

As a preface, numbers to conceptualize local government enforcement are hard to estimate with precision. Local governments do not uniformly keep data of enforcement efforts, much less those that specifically pertain to public trust resources.[128] And the sheer number of local governments—somewhere north of 38,000, depending on how you define a local government—frustrates efforts at manual collection.[129]

Attempts to work backward and estimate the revenue generated from local civil enforcement efforts likewise come up empty. Even municipalities that break down their revenues by category unhelpfully group large sums of revenue into "miscellaneous" buckets.[130] For example, the seaside town of Westerly, Rhode Island lists $257,925 of revenue in its fiscal year 2017 Annual Report as "Fines and penalties"

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128. For that matter, many states do not either. *See* Katherine Barrett & Richard Greene, *Bad Data Is At All Levels Of Government*, GOVERNING (July 9, 2015), https://www.governing.com/columns/smart-mgmt/gov-bad-data-affects-all-levels-government.html https://perma.cc/S5GC-MBQK.

129. *See Census Bureau Reports There are 89,004 Local Governments in the United States*, UNITED STATES CENSUS BUREAU, PRESS RELEASE (Aug. 30, 2012), https://www.census.gov/newsroom/releases/archives/governments/cb12-161.html [https://perma.cc/ZV7J-WG8V]. This number includes counties, municipalities, and townships, but does not include special districts and independent school districts. *See id.* The total number of local governments is a rapidly changing target and will likely change as result of the 2020 census. *See generally* Michelle Wilde Anderson, *Dissolving Cities*, 121 YALE L.J. 1364 (2012).

130. *See, e.g.*, TOWN OF WESTERLY, R.I. COMPREHENSIVE ANN. FIN. REP. 8 (2017), http://www.municipalfinance.ri.gov/documents/data/audits/2017/Westerly2017Audit.pdf [https://perma.cc/2PZN-Z8FA].

without further explanation.[131] Westerly has ordinances prohibiting trespass that have been used previously in the public trust context.[132] It stands to reason, then, that at least some of Westerly's revenues come from policing public trust resources. But the data are hard to ascertain.

Of course, even if data accurately depicted local government enforcement efforts at fine collection, such data would not capture the full picture of local government enforcement on public trust resources. Local government ordinances have deterrence effects that prevent would-be-users of the public trust from breaking an ordinance to begin with. Compliance with verbal warnings from local law enforcement also lowers the number of adjudicated enforcements. And historical enforcement efforts foster norms that guide the public's conduct, sometimes even without the physical presence of law enforcement. Finally, whether the result of discretion or happenstance, certainly not all violators are caught, fined, and prosecuted.[133]

2. Evidence of Local Government Enforcement

Notwithstanding these roadblocks to complete assessment of the issue, there *is* jurisprudential evidence that local governments enforce local ordinances and bylaws in ways that directly impact the public trust doctrine's substance and scope. These breadcrumbs come most often in the criminal flavor, as criminal enforcement is a frequent tool of municipal enforcement and criminal defendants have a strong incentive to dispute purported intrusions into their public trust rights.

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131. *See id*. at 17.

132. WESTERLY, R.I., CODE § 182-11 (2020) (prohibiting trespass generally), § 86-22 (restricting swimming in certain areas). This is no idle supposition. The Rhode Island Supreme Court upheld a conviction of a man who was swimming in a Westerly breachway and who believed he was exercising his public trust rights. *See* State *ex rel*. Town of Westerly v. Bradley, 877 A.2d 601 (R.I. 2005). The Supreme Court issued a full-throated endorsement of local regulation and enforcement even in areas near or containing public trust resources:

> Cities and towns with home rule charters, such as Westerly, are vested with the authority to legislate matters of public health and safety, including a prohibition against swimming in dangerous areas or in areas reserved for boat passage, as long as those regulations are not inconsistent with the constitution or statutes of the state or infringe upon [the Coastal Resources Management Council's] regulatory prerogatives.

*Id*. at 607–08 (citing De Buono v. NYSA–ILA Medical and Clinical Services Fund, 520 U.S. 806, 814, (1997); and then citing Hourihan v. Town of Middletown, 723 A.2d 790, 791 (R.I.1998)). Of particular import to the examination of civil fines, the *Bradley* defendant was subject to a fine of "not more than fifty dollars." *Id*. at 608 n.7 (quoting 23 R.I. Gen. Laws Ann. § 23-22.5-9 (West)).

133. In criminology the concept of the funnel or leaky sieve is used to describe this winnowing of those actually prosecuted. *See, e.g*., Susan P. Shapiro, *The Road Not Taken: The Elusive Path to Criminal Prosecution for White-Collar Offenders*, 19 LAW & SOC'Y REV. 179, 179 (1985) ("The metaphors of the funnel and leaky sieve are popular in criminological discourse. They capture the perception that few suspected criminals are ultimately incarcerated, while the majority are diverted from the criminal justice system by discretionary decisions of victims, police officers, prosecutors, juries, and judges."). The concept applies equally well to the civil enforcement context.

Courts correspondingly have the greatest opportunity to address local public trust enforcement in criminal cases.

The first set of cases is where the local government enforces private property disputes in the public trust context. This is aptly illustrated in the *Ibbison* case.[134] There, local police were asked to, in effect, enforce a private property owner's vision of the public trust doctrine.[135] The local police officer agreed to do so, arresting the purported trespassers and pursuing criminal charges for municipal violations.[136] As noted *supra*, the image of a local police officer determining the extent of the public trust doctrine while state environmental agency employees stood idly by is an encapsulation of the local public trust.[137]

But *Ibbison* is not alone. New Jersey local governments have similarly enforced a property owner's limited view of the public trust doctrine. In *Bubis v. Kassin*, for example, a private property owner called the local police on a purported trespasser who believed she was exercising her public trust rights along the shoreline.[138] The police officer was presented with two competing visions of where the public trust doctrine rights extended.[139] Like *Ibbison*, the local police sided with the private landowner and served a summons for defiant trespass.[140]

This theme repeats in *Raleigh Avenue Beach Association*, where a private New Jersey beach club used municipal legal processes to prevent members of the public from accessing the beach.[141] There, a member of the public who walked along the dry sand beach—believing he was exercising his public trust rights—was issued a summons for trespass.[142] Although the New Jersey Supreme Court subsequently vindicated the alleged trespasser's rights to travel the upland sands as a component of the public trust doctrine, other alleged trespassers—perhaps those not quite so sure of their public trust rights and unwilling or unable to vindicate them in court—were not so lucky.[143] Later vindication was likely cold comfort to the other members of the public who had previously been prosecuted for trespass by the private beach club in municipal court.[144]

In these examples the local government, chiefly local law enforcement, is asked to vindicate a private property owner's vision of the public trust doctrine at the expense of the alleged trespasser's vision. The resort to local enforcement in

134. *See supra* notes 1–13 and accompanying text.
135. *See id.*
136. *See id.*
137. *See id.*
138. Bubis v. Kassin, 960 A.2d 779, 781–82 (N.J. Super. Ct. App. Div. 2008).
139. *Id.*
140. *Id.* at 782; *see supra* notes 1–13 and accompanying text.
141. Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc., 879 A.2d 112, 116 (N.J. 2005).
142. *Id.* The decision does not state whether that particular summons was for a state or municipal trespass violation. But the Court later notes that the private beach club prosecuted trespass claims in municipal court. *See id.* at 124. We can thus fairly conclude that the operative trespass summons was for an alleged municipal violation.
143. *See id.* at 124.
144. *See id.*

these situations may be understandable; after all, who would call the state environmental agency or the state police to deal with a purported trespasser? Nonetheless, the result is that local law enforcement is often the first responder in resolving disputes involving public trust resources between private property owners and members of the public. And, of course, past enforcement shapes norms and expectations beyond just the cases that get litigated. Through their role as enforcer, then, local governments influence how many members of the public experience the public trust doctrine.

A second class of enforcement cases is where the local government enforces its own regulations and restrictions that bear on public trust resources. In these situations, the local government is the party enforcing its own vision of the public trust doctrine through its delegated police powers.[145] As these instances present more formal means of government action against individuals than policing private property, they often result in criminal charges.[146] These cases, therefore, present an even more marked illustration of local governments' role in managing the public's access to public trust resources.

Often, state courts endorse local government enforcement efforts in this arena. Courts have upheld municipal enforcement against would-be lobstermen,[147] nude beachgoers,[148] and surfers,[149] all of whom believed they were partaking in activities protected by the public trust doctrine. In each of these cases, state courts affirmed that local governments have broadly delegated police powers that permit local governments to manage resources—"even that falling within the Public Trust Doctrine"—for legitimate purposes.[150]

But, of course, not all municipal enforcement serves to restrict access to public trust resources. In Wisconsin, for example, the state Supreme Court upheld a county's enforcement action to prevent landowners from placing fill materials near Lake Noquebay.[151] And when a North Carolina town filed a public nuisance action against a homeowner who threatened public trust resources, the town's enforcement action was permissible as "an attempt to enforce the State's public trust rights."[152]

Exceptions to a local government's enforcement powers serve only to prove the general rule. In *City of Montpelier v. Barnett*, for example, the City was rebuffed in its attempt to police behavior on property not owned by the City and not expressly delegated by the state.[153] But even there, the state court was careful

145. *See supra* Part III.
146. *See infra* notes 147–54 and accompanying text.
147. *See* Commonwealth v. Muise, 769 N.E.2d 1289, 1291 (Mass. App. 2003).
148. *See* State v. Vogt, 775 A.2d 551, 561 (N.J. Super. Ct. App. Div. 2001).
149. *See* State v. Oliver, 727 A.2d 491, 494 (N.J. Super. Ct. App. Div. 1999).
150. *Id.* at 496.
151. *See* Just v. Marinette Cty., 201 N.W.2d 761, 766-69 (Wis. 1972).
152. Town of Nags Head v. Cherry, Inc., 723 S.E.2d 156, 161 (N.C. Ct. App. 2012) (quotations and citations omitted).
153. City of Montpelier v. Barnett, 49 A.3d 120, 142 (Vt. 2012).

to note that the local government *could* enforce restrictions on public trust resources on land it *did* own.[154]

The upshot is that, through their enforcement role, local governments impact the public trust doctrine. Whether restricting access, preventing deterioration, or establishing enforcement norms, local governments have considerable opportunities to influence the scope and substance of the doctrine.

## IV. THE PUBLIC TRUST DOCTRINE IS UNIQUELY SUSCEPTIBLE TO LOCAL GOVERNMENT INFLUENCE

One may look at the above evidence and attempt to explain away its import; surely other common law doctrines are similarly impacted by local governments. Don't all common law doctrines that involve land—adverse possession, public nuisance, and the like—necessarily involve a local situs and governmental discretion? How, then, is the public trust doctrine any different?

This Article contends that three codependent factors explain why the public trust doctrine is uniquely susceptible to local government influence: (A) the doctrine's legal foundations so often fluctuate that local governments have the opportunity to exercise substantial discretion in the wake of legal uncertainty; (B) the doctrine is purposefully malleable and adaptable, leaving it open to assertions of local government authority; and (C) the flashpoints for conflicts over public trust resources are almost uniformly within the purview of local governments. These three linked factors provide fertile grounds for local governments to exert significant influence on the public trust doctrine. This Part explains each factor and then demonstrates how Rhode Island's public trust doctrine—a case in point—illustrates their influence.

### A. CHANGING FOUNDATIONS

Despite decades of case law, research, and attention, the public trust doctrine's legal foundations remain elusive.[155] Paradoxically, the doctrine's long history makes it difficult for courts—never mind the public or local government officials—to ascertain the doctrine's precise legal foundations.[156] Even in states where the doctrine is codified either in statute or the state constitution, courts are reluctant to constrain their analysis of public trust doctrine claims to the codification alone.[157]

As noted *supra*, the result is that courts often revert to common law understandings of the doctrine.[158] And, accordingly, the public trust doctrine's reach

154. *Id.* at 141–42 ("As discussed above, we cannot find Berlin Pond to be a Montpelier public reservoir. *** To the extent that the City means trespass on the land surrounding Berlin Pond owned by the City, we agree with the City's point.").

155. *See supra* notes 35–48 and accompanying text.

156. *See supra* notes 42–46 and accompanying text.

157. *See supra* notes 59–63 and accompanying text.

158. *See supra* Section I.A.

can vacillate over time.[159] In some jurisdictions, the past century of public trust jurisprudence has ebbed and flowed as much as the shoreline it often applies to.[160]

A constantly changing doctrine inhibits a collective understanding of where, exactly, the doctrine applies. Reasonable actors proceeding in good faith can have wildly varying interpretations of where and how the public trust doctrine applies.[161] This nebulousness provides ample room for local government discretion in two main respects. First, as seen in the enforcement and regulatory contexts, *supra*, local governments enjoy considerable latitude in exercising their delegated police powers.[162] Working against a backdrop of legal uncertainty, local governments are empowered to wield that discretion to its limits.

Second, differing private expectations about the public trust doctrine lead to more conflicts calling for local government intervention. Consider the would-be shoreline walker who wishes to exercise his or her public trust rights by walking along the shore; the homeowner who seeks to prevent trespassers on his or her property; the recreational angler looking for the best spot to fish. Each may reasonably believe that they are acting consistently with the public trust doctrine. And, short of explicit judicial determination, each may have a colorable claim. The lack of bright lines inevitably fosters greater opportunity for local influence.

### B. PURPOSEFULLY MALLEABLE

Further, the doctrine is *purposefully* malleable.[163] Even the states that have codified the doctrine in state statute or constitution—and thus conceivably do not have a changing legal foundation for the doctrine—have done so in a way that maintains (or attempts to maintain) the doctrine's flexibility. In Vermont, for example, the state constitution provides a prescribed version of the public trust doctrine, affirming public rights "to fish in all boatable and other waters."[164] But the Vermont Supreme Court has never seen this provision as limiting, noting instead that "the doctrine is not 'fixed or static,' but one to 'be molded and extended to meet changing conditions and needs of the public it was created to

159. *See supra* Section I.A.

160. I have written on this topic in the context of the Rhode Island public trust doctrine. *See* Sean Lyness, *A Doctrine Untethered: "Passage Along the Shore" Under the Rhode Island Public Trust Doctrine*, 26 ROGER WILLIAMS U. L. REV. 671 (2021).

161. For example, State v. Ibbison, 448 A.2d 728 (R.I. 1982), discussed *supra* in the Introduction, illustrates that landowners, local law enforcement, would-be-public trust users, and state environmental agency personnel can all approach use of the public trust in good faith and come to wildly differing conclusions as to where it extends.

162. *See supra* Part III.

163. This section draws upon (and is heavily indebted to) the research conducted in Craig (Eastern), *supra* note 18, at 2–5, and Blumm et al., *supra* note 55.

164. VT. CONST. chapter II, § 67.

benefit.'"[165] In that sentence, the Vermont Supreme Court was quoting the New Jersey Supreme Court—a state with a common law public trust doctrine—further eroding any difference between common law and codified public trust states.[166]

Illinois also has a constitutionally codified public right to certain public trust resources.[167] The state also has a number of statutes that contain trust language and grant rights to the public.[168] And yet, the Illinois Supreme Court has affirmed that it is "not bound by inflexible standards."[169] There too, the Illinois Supreme Court quoted the New Jersey Supreme Court's language on the doctrine's intended lack of "fixed or static" boundaries.[170]

So too for states with statutorily codified public trust doctrines. Minnesota, for instance, has an environmental rights statute that codifies public trust principles.[171] But Minnesota still maintains a common law public trust doctrine, one that operates almost entirely independently of the statute.[172]

In short, even states that have conceivably limited their public trust doctrine by codifying it have nevertheless maintained flexible understandings of the doctrine.

Of course, a number of states have not codified the public trust doctrine.[173] In these states it appears that the choice to not codify was a conscious one to preserve the doctrine's common law flexibility.[174] Thus, codified or not, the public trust doctrine remains a flexible doctrine by design.

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165. State v. Cent. Vt. Ry., Inc., 571 A.2d 1128, 1130 (Vt. 1989) (quoting Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355, 365 (N.J. 1984); and then quoting Borough of Neptune City v. Borough of Avon-by-the-Sea, 61 N.J. 296, 309, 294 A.2d 47, 54 (1972)).

166. *Id.*

167. ILL CONST. art XI, § 1 ("The public policy of the State and the duty of each person is to provide and maintain a healthful environment for the benefit of this and future generations."). The Illinois Supreme Court has discussed this constitutional provision in the context of the public trust doctrine. People ex rel. Scott v. Chicago Park Dist., 360 N.E.2d 773, 780 (Ill. 1976).

168. *See* Blumm et al., *supra* note 55, at 249–50.

169. People ex rel. Scott v. Chicago Park Dist., 360 N.E.2d 773, 780 (Ill. 1976).

170. *Id.* (quoting Borough of Neptune City v. Borough of Avon-By-The-Sea 294 A.2d 47, 54 (N.J. 1972)).

171. *See supra* note 62 and accompanying text.

172. *See* White Bear Lake Restoration Ass'n. *ex rel.* State v. Minn. Dep't of Nat. Res., 946 N.W.2d 373, 385–87 (Minn. 2020); *see also* Klass, *supra* note 62, at 436 ("[T]he goal in this Article is to explore how the case law has developed in Minnesota and to *encourage* litigants in future cases to use the common law in efforts to protect the environment so a more robust common law jurisprudence can develop alongside judicial decisions interpreting MERA.").

173. For example, "Maryland first established the [public trust doctrine] as a matter of common law . . . [and] continuously declined to expand the purposes and scope of this common law doctrine in any significant fashion." Blumm et al., *supra* note 55, at 344; *see also id.* at 551 (describing New Jersey's public trust doctrine as rooted in common law).

174. New Jersey's common law public trust doctrine fits this model, as New Jersey courts have time and again used the doctrine's flexibility to expand the scope of the doctrine. *See, e.g.*, Borough of Neptune City v. Borough of Avon-By-The-Sea, 294 A.2d 47, 48–49 (N.J. 1972) (holding that all publicly owned beaches must be open to the public on equal terms); *see also* Matthews v. Bay Head Imp. Ass'n, 471 A.2d 355, 365 (N.J. 1984), *cert. denied*, 469 U.S. 821 (1984) (holding that "where use of dry sand is essential or reasonably necessary for enjoyment of the ocean, the doctrine warrants the public's use of the upland dry sand area subject to an accommodation of the interests of the owner"). In

This designed adaptability supports a local public trust doctrine in two ways. First, it permits local governments to bend the doctrine to suit their goals. Courts have upheld local government decisions to prevent non-residents from accessing the shoreline,[175] to ban personal watercraft on all marine waters,[176] and to limit a portion of a lake for exclusive use of waterski exhibitions,[177] all of which pertain to public trust resources. The through line of these decisions is that local governments have molded the public trust doctrine around their goals—parochial, environmental, economic, or otherwise—not the other way around.

Second, the doctrine's designed adaptability contributes to the sense, described *supra*, that the precise contours of the public trust doctrine are hard to define.[178] Both of these factors afford local governments ample discretion to make determinations within the bounds of the doctrine.

### C. CONFLICTS OVER THE DOCTRINE OCCUR IN THE PROVINCE OF LOCAL GOVERNMENTS

The shifting legal grounding for the public trust doctrine and its intended adaptability are background principles that play out in the third factor; by and large, public trust disputes arise in contexts that are the province of local governments. As Professor Wilkinson aptly put it, the public trust doctrine features an inherent "collision between two treasured sets of expectancy interests:" private property and public rights.[179] That collision often manifests in disputes over public access to areas including or abutting public trust resources, as well as public recreation in those areas.[180] Crucially, these conflicts between public and private rights are precisely the kinds of disputes that have been delegated to local governments to resolve.

For evidence, look to the coast. The tensions inherent in the convergence of public and private rights are exacerbated in the coastal context. As Professor J. Peter Byrne reiterates, "property and environmental conflicts are most acute where land meets the sea."[181] Adding in the ongoing and inevitable sea level rise

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fact, as recently as 2005 the New Jersey Supreme Court reaffirmed that "we perceive the public trust doctrine not to be fixed or static, but one to be molded and extended to meet changing conditions and needs of the public it was created to benefit." Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc., 879 A.2d 112, 121 (N.J. 2005) (quoting *Matthews*, 471 A.2d at 355).

175. *See* Kramer v. City of Lake Oswego, 446 P.3d 1, 19 (Or. 2019) (holding that the City's residents-only swim park policy did not run afoul of the public trust doctrine).

176. *See* Weden v. San Juan County, 958 P.2d 273, 283–84 (Wash. 1998) (upholding county ordinance that banned personal watercraft use on all marine waters and one lake in the county and deeming it consistent with the public trust doctrine).

177. *See* State v. Village of Lake Delton, 286 N.W.2d 622, 635–36 (Wis. 1979) (upholding local ordinance that zoned area of lake for waterski exhibition licenses).

178. *See supra* Section IV.A.

179. *See* Wilkinson, *supra* note 15, at 426.

180. *See id*.

181. *See* Byrne, *supra* note 27, at 71 (citing Richard Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources Law: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 647 (1986)).

only "cataly[zes] [] this already bubbling brew."[182] Because the public trust doctrine has often applied in the shoreline context[183]—where waterfront properties tend to be expensive—the doctrine is singularly susceptible to escalating public and private property disputes.

Tensions exist elsewhere too. Increasing droughts and water scarcity heighten frictions over the use of surface and ground waters, often with implications for public trust resources.[184] In California, Siskiyou County was sued over its extraction of groundwater and the resulting impact on the Scott River.[185] The California Court of Appeals held that such extraction implicated the public trust doctrine, at least insofar as it had adverse impacts on the river.[186] In Minnesota too, groundwater extraction caused lower surface water levels, which led to public trust litigation.[187] In that case, two municipalities moved to intervene as defendants; both had state permits that permitted groundwater pumping.[188] The common denominator in these cases is the presence of local governments at the center of the dispute.

Whether in the land use, zoning, or enforcement arena, local governments are the arbiters of these collision points.[189] And local governments' responses to these collision points routinely engender litigation.[190] As climate change worsens and these collision points exacerbate, local governments will only be more empowered to act.[191]

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182. Byrne, *supra* note 27, at 71 .

183. *See, e.g.*, Lazarus, *Changing Conceptions*, *supra* note 48, at 647, *cited in* Byrne, *supra* note 27, at 71 n.7.

184. *See, e.g.*, Ryan B. Stoa, *Droughts, Floods, and Wildfires: Paleo Perspectives on Disaster Law in the Anthropocene*, 27 GEO. INT'L. ENV'T L. REV. 393, 394 (2015) ("Meanwhile, by February 2015, 822 counties in the United States had been declared 'drought disaster counties' by the U.S. Department of Agriculture, including all counties in California, Nevada, New Mexico, Arizona, and Utah, and most counties in Texas, Oklahoma, Kansas, Colorado, Idaho, Washington, and Oregon.").

185. *See* Env't. Law Found. v. State Water Res. Control Bd., 237 Cal.Rptr. 3d 393, 395–96 (Cal. App. 5th 2018).

186. *See id*. at 401–05.

187. *See* White Bear Lake Restoration Assoc. *ex rel*. State v. Minn. Dept. of Nat. Res., 946 N.W.2d 373, 385–87 (Minn. 2020).

188. *See id*. at 378.

189. *See supra* Part II; Wilkinson, *supra* note 15, at 426 (describing the public trust doctrine as a "collision").

190. *See, e.g.*, Lauridsen Fam. Ltd. P'ship v. Zoning Bd. of Appeals of Greenwich, LNDCV176080201S, 2018 WL 3715674, at *1 (Conn. Super. Ct. July 12, 2018) (considering challenge to "several variances in order to raze and rebuild a cottage destroyed by Hurricane Sandy."). However, this is not to suggest that local governments are alone in responding to the inevitable public versus private property conflicts; states too play a crucial role. *See, e.g.*, Severance v. Patterson, 370 S.W.3d 705, 709 (Tex. 2012) (noting in the context of a challenge to state authority the "continuous and natural physical changes in the West Galveston shoreline.").

191. *See* Sean B. Hecht, *Local Governments Feel the Heat: Principles for Local Government Adaptation to the Impacts of Climate Change*, 47 J. MARSHALL L. REV. 635, 635 (2013) (noting that local governments are "on the front lines of addressing climate change impacts.").

In sum, the public trust doctrine often lacks clear or stable doctrinal underpinnings, is intended to be adaptable to incorporate new assertions of government authority, and its application is frequently tested in contexts dominated by local governments. These factors combine to empower local discretion and foster greater opportunities for local involvement. The net result is increased local impact on the public's everyday experience with the public trust doctrine.

### D. RHODE ISLAND'S PUBLIC TRUST DOCTRINE: A CASE IN POINT

Rhode Island's public trust doctrine is a case in point. It illustrates how these three codependent factors permit local governments to exert their influence on the public trust doctrine.

First, Rhode Island's public trust doctrine has vacillated widely.[192] Remarkably, Rhode Island's public trust doctrine has been codified since the colony's founding in 1663.[193] All subsequent state constitutions continued this codification.[194]

In the mid-twentieth century, the Rhode Island Supreme Court pronounced an enhanced public trust doctrine that encompassed the right to passage along the shore.[195] This came despite the relevant constitutional provision remaining unchanged since its 1843 inception.[196] Not forty years later, the Rhode Island Supreme Court changed course again, proclaiming that the public trust doctrine only extended to the mean high water mark, a designation that all-but foreclosed a continuous right to passage along the shore.[197] In response, the 1986 Rhode Island Constitutional Convention amended the codified constitutional provision

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192. I have written about this in more detail in Lyness, *supra* note 160.

193. *See* RHODE ISLAND STATE ARCHIVES, R.I. ROYAL CHARTER OF 1663 (1663), https://www.sos.ri.gov/assets/downloads/documents/RI-Charter-annotated.pdf [https://perma.cc/PEZ8-HA8P] ("[O]ur express will and pleasure is, and we do, by these presents, for us, our heirs and successors, ordain and appoint that these presents, shall not, in any manner, hinder any of our loving subjects, whatsoever, *from using and exercising the trade of fishing upon the coast of New England*, in America; but that they, and every or any of them, shall have full and free power and liberty *to continue and use the trade of fishing upon the said coast*") (emphasis added).

194. *See* R.I. CONST. art I, § 17 (1843), http://sos.ri.gov/archon/?p=digitallibrary/digitalcontent&id=435 ("The people shall *continue to enjoy and freely exercise all the rights of fishery, and the privileges of the shore*, to which they have been heretofore entitled under the charter and usages of this State") (emphasis added); s*ee also* R.I. CONST. art. I, § 17 ("The people shall continue to enjoy and freely exercise all the rights of fishery, and the privileges of the shore, to which they have been heretofore entitled under the charter and usages of this state, *including but not limited to fishing from the shore, the gathering of seaweed, leaving the shore to swim in the sea and passage along the shore*") (emphasis added).

195. *See* Jackvony v. Powel, 21 A.2d 554, 558 (R.I. 1941) (finding a right of "passage along the shore" within the state's public trust doctrine).

196. *See* R.I. CONST. art I, § 17, available at http://sos.ri.gov/archon/?p=digitallibrary/digitalcontent&id=435.

197. *See* State v. Ibbison, 448 A.2d 728, 732 (R.I. 1982) (citing Borax Consolidated Ltd. v. City of Los Angeles, 296 U.S. 10, 26–27) (using "the mean-high-tide line as the landward boundary of the shore for the purposes of the privileges guaranteed to the people of this state by our constitution").

to explicitly include a right to "passage along the shore."[198] In the years since, the Rhode Island Supreme Court has not addressed the constitutional change.[199] This leaves shoreline access advocates, local governments, and private property owners with conflicting understandings of the scope of the doctrine, which has led to increased opportunities for local involvement.

Second, Rhode Island's public trust doctrine is purposefully malleable. Notwithstanding the doctrine's codification in the state constitution, the public trust doctrine has always been framed as flexible. From its very start in 1663, the doctrine was intended to preserve already existing public rights.[200] By the time Rhode Island transitioned to a new state constitution in 1843, the doctrine was codified in language that expressly maintained a panoply of unenumerated rights.[201] When the language changed significantly in 1986 to its present-day version, the language retained its intended flexibility, enumerating a list of public trust rights but noting that the list was non-exhaustive.[202] Rhode Island courts have accordingly retained this flexibility in applying the doctrine.

Third, against this backdrop, Rhode Island municipalities have had immense opportunities to impact the public trust doctrine as enforcers,[203] regulators,[204] and landowners.[205] And although not every assertion of municipal authority has been upheld,[206] neither is every assertion of municipal authority legally challenged. The fact remains that time and again local governments are the focal point of

198. *See* R.I. CONST. art. I, § 17; *see also* PATRICK T. CONLEY & ROBERT G. FLANDERS, JR., THE RHODE ISLAND STATE CONSTITUTION: A REFERENCE GUIDE, 103 (G. Alan Tarr ed., 2007).

199. *See generally* Lyness, *supra* note 160.

200. *See* R.I. ROYAL CHARTER OF 1663, *supra* note 193 (granting the right "to continue and use the trade of fishing upon the said coast").

201. *See* R.I. CONST. art I, § 17 (1843), available at http://sos.ri.gov/archon/?p=digitallibrary/digitalcontent&id=435. According to this document, The people shall continue to enjoy and freely exercise all the rights of fishery, and the privileges of the shore, to which they have been heretofore entitled under the charter and usages of this State. But no new right is intended to be granted, nor any existing right impaired by this declaration. *Id*. (emphasis added).

202. R.I. CONST. art. I, § 17. According to the Rhode Island Constitution, "[t]he people shall continue to enjoy and freely exercise all the rights of fishery, and the privileges of the shore, to which they have been heretofore entitled under the charter and usages of this state, *including but not limited to fishing from the shore, the gathering of seaweed, leaving the shore to swim in the sea and passage along the shore . . . .*" *Id*. (emphasis added).

203. *See, e.g.*, State *ex rel*. Town of Westerly v. Bradley, 877 A.2d 601, 606–08 (R.I. 2005) (upholding town's enforcement of ordinance prohibiting swimming in area near shoreline).

204. *See, e.g.*, Town of Warren v. Thornton-Whitehouse, 740 A.2d 1255, 1259–60 (R.I. 1999) (denying town's attempt to require state agency to obtain permit to build a wharf on tidal land).

205. *See, e.g.*, Champlin's Realty Assocs., L.P. v. Tillson, 823 A.2d 1162, 1165–67 (R.I. 2003) (denying town's attempt to assert ownership over pond).

206. *See supra* notes 204–05.

conflicting visions of public and private rights. Rhode Island's large coastline and vulnerability to climate change will only exacerbate these flashpoints.[207]

Perhaps the best recent example of these factors in practice is the 2019 arrest of Scott Keeley for collecting seaweed on the beach in front of private homes in South Kingstown, Rhode Island.[208] In a near déjà vu of the facts of *Ibbison*,[209] Mr. Keeley traveled the shoreline in Southern Rhode Island, gathering seaweed on what he believed to be public trust land.[210] A private homeowner, with a decidedly different opinion as to where the public trust extended, called the local police on Mr. Keeley.[211] Local law enforcement arrested Mr. Keeley on a willful trespassing charge, apparently agreeing with the homeowner's interpretation of the public trust doctrine.[212] But the local government later dropped the criminal charge, acknowledging that it can be difficult to ascertain the line between public trust access and private property.[213]

This incident showcases the differing notions and expectations as to the public trust doctrine's scope, the malleability inherent in the doctrine, and how local governments are called to arbitrate these disputes. Rhode Island's public trust doctrine thus illustrates how local governments can uniquely impact the everyday realities of the doctrine.

## V. RECOMMENDATIONS

Understanding that local governments play a significant role in the everyday experience of the public trust doctrine elicits the question: what are we to do about it?

This Article makes three recommendations. First, courts, advocates, and academics alike need to pay more attention to the role of local governments in the

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207. As the smallest state in the union, Rhode Island measures less than fifty miles in length and width. Yet, remarkably, the state has more than four hundred miles of coastline. *See, e.g.* HISTORICAL INFORMATION, RI.GOV https://www.ri.gov/facts/history.php [https://perma.cc/UG72-UAAA] (last visited Oct. 24, 2021). This renders the state uniquely vulnerable to the effects of climate change, particularly sea level rise and extreme weather events. *See* Leanna Heffner, et al., *Climate Change & Rhode Island's Coasts: Past, Present, and Future*, Rhode Island Sea Grant (2012), https://www.researchgate.net/profile/Leanna-Heffner-2/publication/263008850_CLIMATE_CHANGE_RHODE_ISLAND%27S_COASTS_PAST_PRESENT_AND_FUTURE/links/55e9bc4308aeb6516264b8dc/CLIMATE-CHANGE-RHODE-ISLANDS-COASTS-PAST-PRESENT-AND-FUTURE.pdf [https://perma.cc/8SYT-ZMYU]; *see also* Steven Mufson, et al., *America's Hot Spots: R.I. Among the Fastest-Warming States in U.S.*, THE PROVIDENCE JOURNAL, Aug. 14, 2019, https://www.providencejournal.com/news/20190814/americas-hot-spots-ri-among-fastest-warming-states-in-us [https://perma.cc/8XFZ-832F].

208. *See* Brian Amaral, *R.I. Beach Access Case Settled for $25,000, But Underlying Issue is Still in the Weeds*, THE PROVIDENCE JOURNAL, Dec. 13, 2019, https://www.providencejournal.com/news/20191213/ri-beach-access-case-settled-for-25000-but-underlying-issue-is-still-in-weeds [https://perma.cc/8XFZ-832F].

209. *See supra* Introduction.

210. *See* Amaral, *supra* note 208.

211. *Id.*

212. *Id.*

213. *Id.*

public trust arena. Though the long-standing focus on the state level of the public trust doctrine is understandable, inattention to the local level is not. Local governments are key players in the everyday realities of the public trust doctrine, including how many members of the public experience the doctrine. Recognition of this fact necessitates increased scrutiny of local governments and further study. After all, this Article is neither intended to be comprehensive nor the final word on the subject.

Second, local governments should consciously and carefully integrate their impacts on the public trust doctrine with their traditional roles in planning and zoning and law enforcement. Many states require local governments to think critically about their planning and zoning powers.[214] For example, Rhode Island municipalities are required to submit a comprehensive plan every ten years for state approval that identifies, among others, the goals, policies, and implementation techniques for the municipality to protect and conserve its natural resources.[215] Consideration of and for the local public trust doctrine should be incorporated into these plans.

Local law enforcement should also take cognizance of the local public trust doctrine. As this Article demonstrates, local law enforcement is often the face of the public trust doctrine. Law enforcement officials need to understand that role and be mindful of how their actions impact the doctrine. This likely involves better training. But it also involves a recognition of the weighty responsibility placed on law enforcement agencies to be the first responders in many public trust disputes.

Third, state governments need to contend with the local public trust doctrine. Part of this is recognizing that local governments are just as much the trustees of the public trust doctrine as the state is. State agencies that routinely deal with public trust resources—environmental agencies, coastal agencies, transportation agencies—need to involve affected local governments in discussions and decisions that impact public trust resources. And, overall, state actors need to reorient their conception of the public trust doctrine as that of shared responsibility with local governments.

## CONCLUSION

Local governments play a significant role in the substance and scope of the public trust doctrine. Through their roles as landowner, regulator, and enforcer, local governments wield considerable discretion that impacts the public's experience with the doctrine. What remains, then, is for courts and academics, state and local governments, to fully acknowledge and best employ the local public trust doctrine.

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214. *See, e.g.*, MASS. GEN. LAWS. ch. 41 § 81D (requiring municipal planning boards to maintain a comprehensive plan).

215. R. I. GEN. LAWS. § 45-22.2-6(3).