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# TRUST ISSUES: USING STATES' PUBLIC TRUST DOCTRINES TO ADVANCE ENVIRONMENTAL JUSTICE CLAIMS

ALICIA MUIR\*

## INTRODUCTION

Instances of environmental injustice are more evident now than ever before.<sup>1</sup> As people are calling for societal change and social equality,<sup>2</sup> it is important to include environmental justice in the conversation. When evaluating institutional sources of racism, the United States must evaluate how industrial development, environmental policies, and regulatory actions disproportionately affect minorities and low-income populations.<sup>3</sup> In 2018, the U.S. Environmental Protection Agency (“EPA”) conclusively reported that “results at national, state, and county scales all indicate that non-[w]hites tends to be burdened disproportionately to [w]hites.”<sup>4</sup> Racial minorities account for more than half of people who live within 1.86 miles of a toxic waste facility.<sup>5</sup> While only 2.3% of white children are

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<sup>1</sup> See Alejandra Borunda, *The Origins of Environmental Justice—And Why It’s Finally Getting the Attention It Deserves*, NAT’L GEOGRAPHIC (Feb. 24, 2021), <https://www.nationalgeographic.com/environment/article/environmental-justice-origins-why-finally-getting-the-attention-it-deserves> [<https://perma.cc/HC6V-666W>].

<sup>2</sup> *Id.*

<sup>3</sup> See generally Bravo et al., *Racial Isolation and Exposure to Airborne Particulate Matter and Ozone in Understudied US Populations: Environmental Justice Applications of Downscaled Numerical Model Output*, 92–93 ENV’T INT’L 247 (2016).

<sup>4</sup> See Vann R. Newkirk II, *Trump’s EPA Concludes Environmental Racism Is Real*, ATLANTIC (Feb. 28, 2018), <https://www.theatlantic.com/politics/archive/2018/02/the-trump-administration-finds-that-environmental-racism-is-real/554315/> [<https://perma.cc/R2VA-G3VG>] (exploring a variety of pollutants including particulate matter, smog, oil smoke, ash, construction dust).

<sup>5</sup> See Jasmine Bell, *5 Things to Know About Communities of Color and Environmental Justice*, CTR. AM. PROGRESS (Apr. 25, 2016, 9:04 AM), <https://www.americanprogress.org>

exposed to lead poisoning, 11.2% of Black children are exposed.<sup>6</sup> There are many other statistics which demonstrate the disproportionate effects. It is evident that a population's proximity to polluting facilities and level of exposure to particulate matter or other harmful pollutants directly affects health.<sup>7</sup>

As a result of these injustices, the environmental justice movement was born.<sup>8</sup> Environmental injustice is simply the idea that minority populations are disproportionately subjugated to environmental harms.<sup>9</sup> Historically, environmental decisions have been made to the detriment of minority communities.<sup>10</sup> Like other institutions in the United States, the environmental regulation scheme, regardless of intent, has perpetuated the oppression of minorities.<sup>11</sup> This disparity is more prevalent in mainstream discussions today, resulting in focused topics under the umbrella of the environmental justice movement—like environmental racism.<sup>12</sup> Environmental racism refers to the “form of systematic racism whereby communities of colour are disproportionately burdened with health hazards through policies and practices that force them to live in proximity to sources of toxic waste such as sewage works, mines, landfills, power stations, major roads and emitters or airborne particulate matter.”<sup>13</sup> Similar to other manifestations of long-term, systematic oppression, environmental decisions directly impacted past generations and the impacts of those past decisions continue to plague minority communities today.<sup>14</sup>

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*/issues/race/news/2016/04/25/136361/5-things-to-know-about-communities-of-color-and-environmental-justice/* [https://perma.cc/W3BG-5PUZ].

<sup>6</sup> *Id.*

<sup>7</sup> See *supra* notes 4–5 and accompanying text.

<sup>8</sup> See Borunda, *supra* note 1.

<sup>9</sup> Brian Palmer, *The History of Environmental Justice in Five Minutes*, NAT. RES. DEF. COUNCIL (May 18, 2016), <https://www.nrdc.org/stories/history-environmental-justice-five-minutes> [https://perma.cc/92S3-PCY2]. Those living in poverty often live in hazardous environments, which can lead to a myriad of health issues like asthma, lead exposure, and cancer. See Gabriela Dominguez-Cortinas et al., *Assessment of Environmental Health Children's Population Living in Environmental Injustice Scenarios*, 39 J. CMTY. HEALTH 1999, 1999–2000 (2012).

<sup>10</sup> See Borunda, *supra* note 1; Palmer, *supra* note 9.

<sup>11</sup> Palmer, *supra* note 9.

<sup>12</sup> Peter Beech, *What Is Environmental Racism and How Can We Fight It?*, WORLD ECON. F. (July 31, 2020), <https://www.weforum.org/agenda/2020/07/what-is-environmental-racism-pollution-covid-systemic/> [https://perma.cc/YL73-B39K].

<sup>13</sup> *Id.*

<sup>14</sup> See Daniel Cusick, *Past Racist “Redlining” Practices Increased Climate Burden on Minority Neighborhoods*, SCI. AM. (Jan. 21, 2020), <https://www.scientificamerican.com/article/past-racist-redlining-practices-increased-climate-burden-on-minority-neighborhoods/> [https://perma.cc/SMZ7-PX4V].

The cycle of harm needs to come to an end and restorative measures must be implemented. While these communities must carry the lifelong effects laid upon them by decades of harmful developments, there is still time to alleviate the burden.<sup>15</sup> Decisions can be made now to course-correct and place future generations in a better position than they find themselves at the present.

While the environmental justice movement has experienced some success, its goals have not been fully realized.<sup>16</sup> Although this concept took root in political culture in the 1990s,<sup>17</sup> the existing methods used to bring environmental justice claims, like the Equal Protection Clause (“EPC”) and the Civil Rights Act, have proven to be rather unsuccessful.<sup>18</sup> The fact that these methods often fail to produce results leads to dire consequences for minority communities.<sup>19</sup> One is forced to question why the movement has failed to produce desirable results. It is clear that one fatal flaw is the significant burden plaintiffs bringing environmental justice claims in court face when using the EPC or the Civil Rights Act.<sup>20</sup> With that in mind, it is evident that a new, outside-of-the-box approach needs to emerge to successfully leverage environmental justice claims in an effort to achieve greater equality and secure environmental justice for both present and future generations. To begin, it is critical that the right to a clean and healthy environment for current and future generations is recognized for all, regardless of one’s race.

The primary purpose of this Note is to evaluate a new method one could use to bring an environmental justice claim. This Note suggests that the solution can be found within the reinvigorated public trust doctrine.<sup>21</sup> Instead of pursuing environmental justice claims on the federal level,

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<sup>15</sup> See Borunda, *supra* note 1.

<sup>16</sup> See, e.g., Vann R. Newkirk II, *The EPA’s Failure to Protect People from the Environment*, THE ATLANTIC (Sept. 30, 2016), <https://www.theatlantic.com/politics/archive/2016/09/epa-civil-rights-environmental-justice-report/502427/> [<https://perma.cc/U8NQ-94EZ>].

<sup>17</sup> Renee Skelton & Vernice Miller, *The Environmental Justice Movement*, NAT. RES. DEF. COUNCIL (Mar. 17, 2016), <https://www.nrdc.org/stories/environmental-justice-movement> [<https://perma.cc/Q2BP-A3W5>].

<sup>18</sup> See discussion *infra* Sections II.A–B.

<sup>19</sup> See, e.g., Brian Willis, *New Study Shows Environmental Racism and Economic Injustice in Health Burdens of Particulate Pollution in the U.S.*, SIERRA CLUB (Feb. 22, 2018), <https://www.sierraclub.org/press-releases/2019/08/new-study-shows-environmental-racism-and-economic-injustice-health-burdens> [<https://perma.cc/7PXX-SANF>] (discussing new EPA report which found that particulate air matter disproportionately affects minorities and those of low income).

<sup>20</sup> See discussion *infra* Sections II.A–B.

<sup>21</sup> See discussion *infra* Part III.

plaintiffs could utilize the sleeping giant that is states' public trust doctrines.<sup>22</sup> Pennsylvania courts, the pioneers of this new path, held that its public trust should be evaluated using private trust law principles.<sup>23</sup> By interpreting state-created public trusts through the lens of private trust concepts, citizens in a number of states are capable of bringing environmental justice claims, as beneficiaries, against the state, as trustee.<sup>24</sup> Thus, environmental justice claims could evolve into a sophisticated breach of fiduciary duties claim.<sup>25</sup> By raising environmental justice issues in state courts via a breach of fiduciary duty claim, plaintiffs will be able to raise socio-economic and racial issues and at the very least, force a greater evaluation process, without having to demonstrate an intent to discriminate.

In Part I, the origins and recent history of environmental justice will be explored.<sup>26</sup> This part will provide the reader with context and an understanding of the motivations behind crafting a new approach to obtain environmental justice. In Part II, the existing means of levying environmental justice claims, namely the Fourteenth Amendment's EPC and the Civil Rights Act, will be analyzed to demonstrate the weaknesses in the existing approaches. Upon reading about the weaknesses of the leading bases of environmental justice claims, it will become evident to the reader that there is a need for a new path forward.<sup>27</sup>

After providing a background of the environmental justice<sup>28</sup> and the existing means to allege said injustices,<sup>29</sup> the Note will shift towards explaining the solution. In Part III, the public trust doctrine will be explained in detail.<sup>30</sup> First, the modest beginnings of the public trust doctrine will be discussed.<sup>31</sup> Second, the evolution of the public trust doctrine in states will be explored.<sup>32</sup> Although the doctrine has expanded, states have not done so uniformly.<sup>33</sup> States have created a public trust in reliance on constitutional provisions, common law, or a combination of both constitutional provisions and common law jurisprudence.<sup>34</sup> After analyzing the

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<sup>22</sup> See discussion *infra* Part III.

<sup>23</sup> See discussion *infra* Sections V.A–B.

<sup>24</sup> See discussion *infra* Section IV.D.

<sup>25</sup> See discussion *infra* Section IV.D.

<sup>26</sup> See discussion *infra* Part I.

<sup>27</sup> See discussion *infra* Sections II.A–B.

<sup>28</sup> See discussion *infra* Part I.

<sup>29</sup> See discussion *infra* Sections II.A–B.

<sup>30</sup> See discussion *infra* Section III.A.

<sup>31</sup> See discussion *infra* Sections III.A–B.

<sup>32</sup> See discussion *infra* Sections III.B.1–3.

<sup>33</sup> See discussion *infra* Sections III.B.1–3.

<sup>34</sup> See discussion *infra* Sections III.B.1–3.

different flavors of public trusts, it will become clear that the strongest public trust doctrines are those which derive support from a combination of both constitutional law and common law jurisprudence.<sup>35</sup>

In Part IV, a summary and analysis of the private trust law principles will be provided since environmental public trusts should be interpreted using private trust law principles.<sup>36</sup> By exploring how trusts are created, the various fiduciary duties owed to beneficiaries (prudence, impartiality, and loyalty), standing, the mechanics of a breach of fiduciary duty claim, and potential remedies, this proposal will materialize into a workable environmental justice cause of action.<sup>37</sup> In Part V, Pennsylvania will be examined as the case exemplar.<sup>38</sup> In an attempt to set forth a model other states to follow, there will be a summary of key cases, the modern public trust doctrine, and a practical application using the facts of an environmental justice claim.<sup>39</sup> At the end of this Note, it will be evident that the public trust doctrine provides an alternative path to achieve environmental justice.

## I. ENVIRONMENTAL JUSTICE

Environmental justice aims to ensure that every American, regardless of race or socio-economic status, possesses equal rights to a clean environment including land, air, and water.<sup>40</sup> To achieve this, those developing, implementing, and enforcing environmental regulations and laws need to be mindful of the effects of a project or operation on *all* inhabitants.<sup>41</sup> It is undeniable that regulators and enforcement agencies are often caught in between industry and local residents,<sup>42</sup> but federal and state agencies must protect the environment for everyone equally.<sup>43</sup> While some utilize the term “environmental racism,” meaning “any policy,

<sup>35</sup> See discussion *infra* Section III.C.

<sup>36</sup> See discussion *infra* Part IV.

<sup>37</sup> See discussion *infra* Sections IV.A–E.

<sup>38</sup> See discussion *infra* Part V.

<sup>39</sup> See discussion *infra* Sections V.A–C.

<sup>40</sup> Barry E. Hill, *Time for a New Age of Enlightenment for U.S. Environmental Law and Policy: Where Do We Go from Here?*, 49 ENV'T L. REP. NEWS & ANALYSIS 10362, 10384 (2019).

<sup>41</sup> Robert R. Kuehn, *A Taxonomy of Environmental Justice*, 30 ENV'T L. REP. NEWS & ANALYSIS 10681, 10683 (2000).

<sup>42</sup> See, e.g., Will Kenton, *Regulatory Capture*, INVESTOPEDIA (Mar. 1, 2021), <https://www.investopedia.com/terms/r/regulatory-capture.asp> [<https://perma.cc/HAA5-4JZK>]; Bryan Bowman, *Captured: How the Fossil Fuel Industry Took Control of the EPA*, GLOBE POST (Mar. 12, 2019), <https://theglobepost.com/2019/02/01/epa-regulatory-capture/> [<https://perma.cc/2WA4-W389>].

<sup>43</sup> Kuehn, *supra* note 41, at 10684.

practice or directive that differentially affects or disadvantages (whether intended or unintended) individuals, groups, or communities based on race or color,”<sup>44</sup> this Note will adopt the term environmental justice as it theorizes under a larger lens—considering both race and socio-economic class. In addition to the health effects that can result from unequal environmental protection,<sup>45</sup> minority and low-income communities are harmed in other ways including, but not limited to, “[n]oise, odors, blowing trash, aesthetic concerns, increased traffic, termites, decreased property values and uses, fires, accidents, psychological harm, and other nuisance[s].”<sup>46</sup>

The 1960s marked the beginning of a new era of environmental activism as the public became more aware of increasing pollution and environmental damage.<sup>47</sup> It is also worth noting that the environmental movement coincided with the Civil Rights Movement.<sup>48</sup> This increased awareness and scholarly discussion about the harm of pollution resulted in a mass movement.<sup>49</sup> Most of the environmental laws today were created during the 1970s.<sup>50</sup> Yet, environmental justice is a relatively newly accepted idea.

Environmental justice—as we know it today—arose out of a series of legal claims alleging that low-income and minority communities were being unequally and unfairly exposed to environmental hazards.<sup>51</sup> In 1982, a Black community fought against a waste landfill being placed in Warren County, North Carolina;<sup>52</sup> this is considered to be the birth of the environmental justice movement.<sup>53</sup> These grassroots community movements

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<sup>44</sup> *Id.* at 10682 (explaining how scholars frame their studies of environmental justice within categories of concerns like procedural justice, social justice, distributive justice, and social justice).

<sup>45</sup> Claire Gillespie, *Environmental Racism Is a Health Issue—How Experts Are Addressing It*, HEALTH (Nov. 30, 2020), <https://www.health.com/mind-body/health-diversity-inclusion/environmental-racism> [<https://perma.cc/CSL4-TZMH>].

<sup>46</sup> Kuehn, *supra* note 41, at 10687.

<sup>47</sup> See Hill, *supra* note 40, at 10364.

<sup>48</sup> See Camille Vincent, *Dr. King, Civil Rights and Environmental Justice: Reflections from the MLK National Historic Site in Atlanta, GA*, STUDENT CONSERVATION ASS'N, <https://www.thesca.org/connect/blog/dr-king-civil-rights-and-environmental-justice#:~:text=King%20recognized%20that%20social%20justice,that%20all%20life%20is%20interrelated> [<https://perma.cc/Z37G-JRM5>].

<sup>49</sup> See Hill, *supra* note 40, at 10364 (stating that, in fact, the very first Earth Day on April 22, 1970, was attended by over twenty million people).

<sup>50</sup> *Id.*

<sup>51</sup> Tom Stephens, *An Overview of Environmental Justice*, 20 T.M. COOLEY L. REV. 229, 229 (2003).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

created a stir in the nation.<sup>54</sup> Soon there was a national conference, the First National People of Color Environmental Leadership Summit in 1991, to discuss environmental justice.<sup>55</sup> At the Summit, delegates created seventeen principles of environmental justice, including demands for increased education, protection of health, a mandate for universal environmental rights, and a grant of remedies for damages.<sup>56</sup> In 1994, President Clinton issued an executive order to address the disproportionate environmental impacts on minority and low-income populations, using the term environmental justice.<sup>57</sup> In 1998, the EPA published the definition for environmental justice.<sup>58</sup> While there is not a universally accepted definition of environmental justice, there are common principles.<sup>59</sup> Due to the complexity of environmental justice, some have proposed a categorization of issues including: “(1) distributive justice; (2) procedural justice; (3) corrective justice; and (4) social justice.”<sup>60</sup>

## II. EXISTING WAYS PLAINTIFFS CAN BRING ENVIRONMENTAL JUSTICE CLAIMS

The two primary ways plaintiffs can bring environmental justice claims are: (1) the Fourteenth Amendment’s EPC and (2) the Civil Rights Act.<sup>61</sup> There are some other avenues that have been created through statute, like the National Environmental Policy Act.<sup>62</sup> However, due to the

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<sup>54</sup> Skelton & Miller, *supra* note 17.

<sup>55</sup> *Principles of Environmental Justice*, FIRST NAT’L PEOPLE OF COLOR ENV’T LEADERSHIP SUMMIT (Apr. 6, 1996), <http://www.ejnet.org/ej/principles.html> [<https://perma.cc/WU2C-YJLW>].

<sup>56</sup> *Id.*

<sup>57</sup> See Exec. Order No. 12,898, 32 C.F.R. § 651.17 (1994), *reprinted as amended* in 42 U.S.C. § 4321 (1994); Kuehn, *supra* note 41, at 10682.

<sup>58</sup> The fair treatment of people of all races, cultures, incomes, and educational levels with respect to the development and enforcement of environmental laws, regulations, and policies. Fair treatment implies that no population should be forced to shoulder a disproportionate share of exposure to the negative effects of pollution due to lack of political or economic strength.

Kuehn, *supra* note 41, at 10682–83.

<sup>59</sup> Stephens, *supra* note 51, at 233.

<sup>60</sup> *Id.*

<sup>61</sup> Daniel V. Madrid, *Can the Environmental Justice Movement Survive without Title VI of the Civil Rights Act?*, 14 VILL. ENV’T L.J. 123, 130–41 (2003).

<sup>62</sup> See *Environmental Justice and National Environmental Policy Act*, EPA, <https://www.epa.gov/environmentaljustice/environmental-justice-and-national-environmental-policy-act> [<https://perma.cc/68F6-UKYW>].

constraints of this Note, this Section focus on the primary avenues through which plaintiffs levy environmental justice claims. For both the EPC and the Civil Rights Act, key cases alleging environmental injustice will be analyzed to understand the elements to establish, and obstacles to success with, such claims.<sup>63</sup>

A. *Fourteenth Amendment's Equal Protection Clause ("EPC")*

The Fourteenth Amendment of the U.S. Constitution expresses that:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.<sup>64</sup>

The EPC, with its anti-discriminatory purpose, would appear to be an appropriate vehicle to bring environmental justice claims against government actors.<sup>65</sup> Commonly, one alleging an EPC violation will bring suit under 42 U.S.C. section 1983.<sup>66</sup> Via section 1983, a person can bring an action against a municipality or state agency seeking damages and injunctive relief.<sup>67</sup> When bringing these claims, one must comply with the statute of limitations and possess standing, which requires plaintiffs to demonstrate actual or imminent injury.<sup>68</sup>

Generally, when evaluating whether there is an EPC violation, the court will utilize a rational basis standard of review.<sup>69</sup> However, when the government action relies on racial classifications, courts will evaluate it under strict scrutiny as racial classifications are inherently suspect.<sup>70</sup> The strict standard of review for such classifications makes it much more difficult for the government to successfully defend the classifications,

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<sup>63</sup> See discussion *infra* Sections II.A–B.

<sup>64</sup> U.S. CONST. amend. XIV.

<sup>65</sup> See MICHAEL B. GERRARD, *THE LAW OF ENVIRONMENTAL JUSTICE: THEORIES AND PROCEDURES TO ADDRESS DISPROPORTIONATE RISKS* 3 (Michael B. Gerrard & Sheila R. Foster eds., 2d ed. 2008).

<sup>66</sup> *Id.* at 18.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 19.

<sup>69</sup> *Id.* at 5.

<sup>70</sup> *Id.* at 6.

because to succeed, the government needs to demonstrate “that the regulation is narrowly tailored to serve a compelling governmental interest.”<sup>71</sup>

While the government is burdened through strict scrutiny review, plaintiffs now face an evidentiary burden. Due to rules that emerged from EPC cases, plaintiffs are required to demonstrate discriminatory intent.<sup>72</sup> As laws today rarely discriminate explicitly on race, plaintiffs must show that a law or policy—which is facially neutral—has discriminatory intent.<sup>73</sup> In order to prove discriminatory intent, a plaintiff can demonstrate “proof of disparate impact, discrimination in applying statutory criteria, shifts in agency procedure, and statements evincing an intent to discriminate.”<sup>74</sup> “Mere evidence of a disparate, or greater, impact on one class than another” is insufficient to show an intent to discriminate.<sup>75</sup> Meaning, statistical evidence of disparities alone is insufficient.<sup>76</sup> If the statistical disparities can be explained on grounds other than race, then there cannot be a clear pattern of racial discrimination.<sup>77</sup> Considering that plaintiffs need to demonstrate such circumstances in order to prompt the court to evaluate the government action using strict scrutiny, discriminatory intent is a high burden for plaintiffs.<sup>78</sup> No plaintiff has succeeded in demonstrating that a facially neutral law was discriminatory through the nature of its enforcement since 1886.<sup>79</sup>

The requirement for plaintiffs to prove discriminatory intent presents a true roadblock for environmental justice claims under the Civil Rights Act. For example, in *Bean v. Southwestern Waste Management Corp.*, plaintiffs brought an environmental justice claim using the EPC and challenged the state’s approval of a specific waste landfill outside of Houston.<sup>80</sup> As described above, the plaintiffs needed to provide evidence of racial discrimination to trigger strict scrutiny.<sup>81</sup> To support their claim

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<sup>71</sup> GERRARD, *supra* note 65, at 6.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 7.

<sup>74</sup> *Id.* at 13.

<sup>75</sup> *Id.* at 7. *See generally* *Washington v. Davis*, 426 U.S. 229 (1976); *Metro. Housing Dev. Co. v. Village of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977).

<sup>76</sup> GERRARD, *supra* note 65, at 9.

<sup>77</sup> *Id.* at 11. *See generally* *Metro. Housing Dev. Co.*, 558 F.2d 1283; *East Bibb Twiggs Neighborhood Ass’n v. Macon Bibb Planning & Zoning Comm’n*, 896 F.2d 1264 (11th Cir. 1989).

<sup>78</sup> GERRARD, *supra* note 65, at 11 (explaining that if plaintiffs cannot prove discriminatory intent, courts will evaluate the issue using rational basis standard, which makes it easier for government to succeed).

<sup>79</sup> *Id.* at 9 (referencing *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)).

<sup>80</sup> *Id.* at 10.

<sup>81</sup> *Id.*

that there was a history of racial discrimination, plaintiffs emphasized the fact that sixty-eight percent of the solid waste sites were located in east Houston, where sixty-two percent of the minority population resided.<sup>82</sup> Despite these statistics, the court held that the plaintiffs failed to provide evidence of discriminatory intent; the statistics were insufficient.<sup>83</sup>

While there are some limited instances where the EPC proved a valid path to achieve environmental justice, it is the exception rather than the rule.<sup>84</sup> In fact, environmental justice suits on EPC grounds almost always fail because plaintiffs struggle to identify racial animus behind facially neutral government actions.<sup>85</sup> Requiring plaintiffs to prove an intent to discriminate is a heavy burden. This is especially the case regarding instances of environmental injustice, where the laws, policies, and government actions are neutral on their face while disproportionately harming minority and low-income populations.<sup>86</sup>

### B. *Civil Rights Act*

The Civil Rights Act was passed in 1964.<sup>87</sup> The Civil Rights Act made it illegal to discriminate against someone because of their race, sex, religion, or national origin.<sup>88</sup> In the 1990s, plaintiffs started to use Title VI to bring environmental justice complaints against recipients of federal funds and administrative agencies.<sup>89</sup> The two most relevant provisions of the Civil Rights Act to discuss in the environmental justice context are

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<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> GERRARD, *supra* note 65, at 13 (citing *Miller v. City of Dallas*, 2002 WL 230834 at \*8 (N.D. Tex. Feb. 14, 2002) (finding that the effect of the city's practices coupled with its "sordid history of . . . racially-segregative zoning and related policies . . . offers substantial circumstantial evidence of discriminatory intent," but the case settled outside of court)); see also Nicholas C. Christiansen, *Environmental Justice: Deciphering the Maze of a Private Right of Action*, 81 MISS. L.J. 843, 854 (2012).

<sup>85</sup> Christiansen, *supra* note 84, at 852.

<sup>86</sup> Sheila R. Foster, *Environmental Justice and the Constitution*, 35 ENV'T L. REP. 10347, 10348 (2009).

<sup>87</sup> See *A Brief History of Civil Rights in the United States: Civil Rights Acts*, GEORGETOWN L. LIBR. (Jan. 27, 2021, 11:42 AM), <https://guides.ll.georgetown.edu/c.php?g=592919&p=4172702> [<https://perma.cc/UTM7-NDVP>].

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

<sup>89</sup> See Albert Huang, *Title VI of the Civil Rights Act: A Critical Crossroads*, AM. BAR ASS'N (Mar. 1, 2012), [https://www.americanbar.org/groups/environment\\_energy\\_resources/publications/trends/2011\\_12/march\\_april/environmental\\_justice\\_title\\_vi\\_civil\\_rights\\_act/](https://www.americanbar.org/groups/environment_energy_resources/publications/trends/2011_12/march_april/environmental_justice_title_vi_civil_rights_act/) [<https://perma.cc/H9N7-9BKG>].

Section 601 and Section 602.<sup>90</sup> However, plaintiffs alleging discrimination through the Civil Rights Act face similar roadblocks as plaintiffs who attempted to use the EPC.<sup>91</sup>

Section 601 of Title VI states that, “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”<sup>92</sup> Plaintiffs must prove intentional discrimination to obtain relief under Section 601.<sup>93</sup> Since decisions causing environmental injustice are more likely to display disparate impact rather than discriminatory intent, it is virtually impossible for plaintiffs to provide the smoking gun courts require.<sup>94</sup> Thus, Section 601 fails to provide environmental justice plaintiffs a successful path to obtain a remedy for the harms they suffered as a result of environmental injustice.<sup>95</sup>

The second method one could use to potentially bring an environmental justice claim within the Civil Rights Act is Section 602.<sup>96</sup> Section 602 states that, “[e]ach Federal department and agency which is empowered to extend Federal financial assistance to any program or activity . . . is authorized to effectuate the provisions of section 601 . . . by issuing rules, regulations, or orders.”<sup>97</sup> While this framework offers promise for environmental justice claims, the Supreme Court limited the viability of this course in 2001.<sup>98</sup> In *Alexander v. Sandoval*, the Supreme Court held that Section 602 does not include a private right of action through which plaintiffs can bring disparate impact claims.<sup>99</sup>

These two issues have blocked environmental justice plaintiffs from receiving and/or pursuing civil rights remedies.<sup>100</sup> While there is a private right of action in Section 601, plaintiffs must demonstrate intentional

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<sup>90</sup> See *Title VI and Environmental Justice*, EPA, <https://www.epa.gov/environmentaljustice/title-vi-and-environmental-justice> [<https://perma.cc/D4LH-MSB8>] (last visited Apr. 3, 2022).

<sup>91</sup> GERRARD, *supra* note 65, at 23.

<sup>92</sup> Civil Rights Act of 1964 § 601, 42 U.S.C. § 2000(d) (2006).

<sup>93</sup> Christiansen, *supra* note 84, at 871. See *generally* Guardians Ass’n v. Civil Service Comm’n, 463 U.S. 582 (1983).

<sup>94</sup> GERRARD, *supra* note 65, at 23.

<sup>95</sup> Wyatt G. Sassman, *Environmental Justice as Civil Rights*, 18 RICH. J.L. & PUB. INT. 441, 451 (2015).

<sup>96</sup> See Huang, *supra* note 89.

<sup>97</sup> 42 U.S.C.A. § 2000d-1.

<sup>98</sup> See *generally* *Alexander v. Sandoval*, 532 U.S. 275 (2001).

<sup>99</sup> See *id.* at 293; Christiansen, *supra* note 84, at 871.

<sup>100</sup> Sassman, *supra* note 95, at 450–51.

discrimination.<sup>101</sup> Alternatively, plaintiffs could, in theory, just demonstrate disparate impact via Section 602,<sup>102</sup> but there is no private right of action through Section 602.<sup>103</sup> *Sandoval* greatly changed the legal landscape as it left civil rights lawyers, specifically environmental justice advocates, without many tools to assist their clients.<sup>104</sup> In addition to eliminating options for plaintiffs, the Supreme Court bound the hands of lower courts.<sup>105</sup>

Currently, if one cannot prove intentional discrimination, the best course of action is to rely on federal and state directives instructing agencies to consider environmental justice when making decisions.<sup>106</sup> While scholars and legal experts attempt to resuscitate the Civil Rights Act of 1968 by altering the standards of judicial review or using other parts of the Act, like Section 1983 or Title VIII,<sup>107</sup> the trend of the Supreme Court is to limit the expansiveness of the Civil Rights Act.<sup>108</sup> Thus, environmental justice plaintiffs are in need of a new legal action through which to bring their claims.

### III. PROPOSED SOLUTION: THE MODERN-DAY PUBLIC TRUST DOCTRINE PROVIDES A NEW MEANS OF BRINGING ENVIRONMENTAL JUSTICE CLAIMS

Today, discrimination is less likely to take place overtly.<sup>109</sup> Instead, it is more common that laws appear neutral on their face and yet result in environmental injustice.<sup>110</sup> Because of the burden for plaintiffs to prove an intent to discriminate when bringing environmental justice claims under the Fourteenth Amendment's EPC or the Civil Rights Act,<sup>111</sup> it is

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<sup>101</sup> *Id.* at 453.

<sup>102</sup> *Id.* at 452–53.

<sup>103</sup> *Id.* at 452.

<sup>104</sup> *Id.* at 453.

<sup>105</sup> *Id.* at 455.

<sup>106</sup> See MIKE EWALL, ENERGY JUST., LEGAL TOOLS FOR ENVIRONMENTAL EQUITY VS. ENVIRONMENTAL JUSTICE 23 (2012), <http://www.ejnet.org/ej/ejlaw.pdf> [<https://perma.cc/V54V-JJM5>].

<sup>107</sup> See Sassman, *supra* note 95, at 455–59 (arguing for the use of Title VIII to bring environmental justice claims). See generally Rachel Calvert, *Reviving the Environmental Justice Potential of Title VI through Heightened Judicial Review*, 90 U. COLO. L. REV. 868 (2019) (arguing for use of arbitrary and capricious standard when plaintiffs challenge environmental decisions of agencies).

<sup>108</sup> Sassman, *supra* note 95, at 452–53.

<sup>109</sup> Christiansen, *supra* note 84, at 851; GERRARD, *supra* note 65, at 6.

<sup>110</sup> Christiansen, *supra* note 84, at 851–52.

<sup>111</sup> See *supra* notes 41–53, 57–72 and accompanying text.

a worthwhile endeavor to explore alternative means of raising environmental justice claims.

After the environmental protection movement in the 1960s to the 1970s, many states codified their commitment to protect the environment for its present and future generations through constitutional amendments.<sup>112</sup> These constitutional amendments often include language indicative of a public trust.<sup>113</sup> Other states have moved to protect the environment and its natural resources by adopting the public trust doctrine through common law measures,<sup>114</sup> like court decisions.<sup>115</sup> This Note will evaluate states that put in place environmental protections and recognized and adopted the public trust doctrine.<sup>116</sup> In order to evaluate the viability of using the public trust doctrine to advance environmental justice claims, the public trust doctrine's origin and modern resurgence will first be explored.<sup>117</sup> After exploring the public trust doctrine broadly, the various renditions that exist throughout states will be analyzed to determine where these environmental justice claims will have the highest likelihood of success.<sup>118</sup>

#### A. *The Public Trust Doctrine*

The public trust doctrine is an ancient concept; its roots can be traced back to Roman civil law.<sup>119</sup> Its influence can be seen in the English common law system as well.<sup>120</sup> The common law system adopted the public trust doctrine from the Romans to distinguish private property, *jus privatum*, and property held in trust for the public, *jus publicum*.<sup>121</sup> In the United States, the public trust doctrine began to manifest after the Revolutionary War when leaders sought a way to protect the waterways that would be used by all in commerce.<sup>122</sup> However, the doctrine did not officially enter the public consciousness until *Illinois Central Railroad Co.*

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<sup>112</sup> See discussion *infra* Sections III.B.1, III.B.3.

<sup>113</sup> See discussion *infra* Sections III.B.1, III.B.3.

<sup>114</sup> See discussion *infra* Sections III.B.2, III.B.3.

<sup>115</sup> See discussion *infra* Sections III.B.2, III.B.3.

<sup>116</sup> See discussion *infra* Sections III.B.1–3.

<sup>117</sup> See discussion *infra* Section III.A.

<sup>118</sup> See discussion *infra* Sections III.B.1–3, III.C.

<sup>119</sup> See George P. Smith & Michael W. Sweeney, *The Public Trust Doctrine and Natural Law: Emanations Within a Penumbra*, 33 B.C. ENV'T AFF. L. REV. 307, 310 (2006).

<sup>120</sup> See James L. Huffman, *The Public Trust Doctrine: A Brief (and True) History*, 10 GEO. WASH. J. ENERGY & ENV'T L. 15, 19 (2019).

<sup>121</sup> *Id.*; Smith & Sweeney, *supra* note 119, at 311.

<sup>122</sup> Smith & Sweeney, *supra* note 119, at 311–13.

*v. Illinois*.<sup>123</sup> In *Illinois Central*, the Supreme Court “placed an affirmative duty on states to assist with protecting the people’s common law right to access waterways” because states hold title to submerged waters in trust for the inhabitants of the state.<sup>124</sup> Historically, the public trust doctrine was a means to protect commerce; it established legal means to preserve the benefits of water resources, coastal waterways, and water-dependent industries like fishing, for the public in the United States.<sup>125</sup>

The public trust doctrine has also been used as a mechanism to protect environmental interests.<sup>126</sup> As environmental concerns expanded, so did the public trust doctrine.<sup>127</sup> Scholars turned to the public trust doctrine to serve as the tool to preserve the planet for future generations.<sup>128</sup> Today, trusts are being proposed as a means to reach environmental goals, including the conservation of resources,<sup>129</sup> and as a means to fight climate change.<sup>130</sup> It is evident that the public trust doctrine possesses the ability to be a tool to solve resource management problems<sup>131</sup> and, as this Note argues, the looming problem of environmental injustice. In fact, an expert on the public trust doctrine explained that the doctrine provides a means to supplement or correct the actions of legislatures or administrative bodies.<sup>132</sup> For this reason, Professor Joseph L. Sax stated that “the public trust concept is, more than anything else, a medium for democratization.”<sup>133</sup> The fight for environmental justice is indeed a democratic

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<sup>123</sup> *Id.* at 312–14.

<sup>124</sup> *Id.* at 314.

<sup>125</sup> *Id.* at 307–08.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 308.

<sup>128</sup> See Edith Brown Weiss, *The Planetary Trust: Conservation and Intergenerational Equity*, 11 *ECOLOGY L.Q.* 495, 499 (1984). Preeminent scholar Mary Wood argues that nature should be reframed as a trust as a means to ensure its protection against political pressures and self-interested decision-making. See MARY CHRISTINA WOOD, *NATURE’S TRUST: ENVIRONMENTAL LAW FOR A NEW ECOLOGICAL AGE* 166–67 (2014).

<sup>129</sup> Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 *MICH. L. REV.* 471, 474 (1970).

<sup>130</sup> See Kacie Couch, *After Juliana: A Proposal for the Next Atmospheric Trust Litigation Strategy*, 45 *WM. & MARY ENV’T L. & POL’Y REV.* 219, 219–26 (2020).

<sup>131</sup> Sax, *supra* note 129, at 474 (“Of all the concepts known to American law, only the public trust doctrine seems to have the breadth and substantive content which might make it useful as a tool of general application for citizens seeking to develop a comprehensive legal approach to resource management problems.”).

<sup>132</sup> Kylie Wha Kyung Wager, *In Common Law We Trust: How Hawaii’s Public Trust Doctrine Can Support Atmospheric Trust Litigation to Address Climate Change*, 20 *HASTINGS W.-NW. J. ENV’T L. & POL’Y* 55, 76 (2014).

<sup>133</sup> *Id.*

movement;<sup>134</sup> it aims to rectify the inequality in environmental regulations and prevent the unequal assignment of negative environmental effects upon minority and low-income communities.<sup>135</sup> As a doctrine that calls for sound administration and equality,<sup>136</sup> the public trust doctrine aligns with the environmental justice movement.

The public trust doctrine is centered around the notion that certain resources are “the inalienable property right of people.”<sup>137</sup> These resources belonging to the people are often held by a sovereign body for the benefit of the people.<sup>138</sup> While this sovereign power can be the U.S. federal government, it is often the state governments who hold these resources “in trust’ for the people.”<sup>139</sup>

### B. States as Public Trustees of the Environment

In response to the increasing awareness of environmental issues in the 1970s,<sup>140</sup> many states accepted the call to action and, like the federal government, enacted environmental protections.<sup>141</sup> At least sixteen states have some form of the public trust doctrine that is meant to protect the environment.<sup>142</sup> Many states have “explicit trustee provisions in their constitutions related to natural resources.”<sup>143</sup> While there are common traits and principles, “each state has the authority and responsibility for

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<sup>134</sup> *Learn About Environmental Justice*, EPA, <https://www.epa.gov/environmentaljustice/learn-about-environmental-justice> [<https://perma.cc/EC6Q-MBHY>] (last visited Apr. 3, 2022).

<sup>135</sup> *Id.*

<sup>136</sup> Sax, *supra* note 129, at 475.

<sup>137</sup> SALLY K. FAIRFAX & DARLA GUENZLER, CONSERVATION TRUSTS 18 (2001).

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Seventies 1970–79*, ENVIRONMENTAL HISTORY, <https://environmentalhistory.org/20th-century/seventies-1970-79/> [<https://perma.cc/S2QR-R23A>] (last visited Apr. 3, 2022).

<sup>141</sup> See Matthew Thor Kirsch, *Upholding the Public Trust in State Constitutions*, 46 DUKE L.J. 1169, 1170 (1997); see, e.g., Alexandra B. Klass, *The Public Trust Doctrine in the Shadow of State Environmental Rights Laws: A Case Study*, 45 ENV'T L. 431, 433–34 (2015). In the 1970s, Minnesota passed the Minnesota Environmental Rights Act which codified the public trust that previously existed in the common law. *Id.*; see also Robin Kundis Craig, *Adapting to Climate Change: The Potential Role of State Common-Law Public Trust Doctrines*, 34 VT. L. REV. 781, 835 (2010) (discussing how other states like Mississippi and Tennessee adopted public trust principles through statutes).

<sup>142</sup> Craig, *supra* note 141, at 850. These include but are not limited to: Alaska, California, Washington, Pennsylvania, Rhode Island, Louisiana, Vermont, Hawaii, Illinois, Mississippi, North Dakota, South Carolina, and New Jersey. *Id.* at 829–50.

<sup>143</sup> KEGAN A. BROWN & ANDREA M. HOGAN, ENVIRONMENTAL LITIGATION: LAW AND STRATEGY 221 (2d ed. 2019).

applying the public trust doctrine to trust lands and waters.”<sup>144</sup> For this reason, the expansion of the public trust doctrine has not transpired uniformly amongst the states,<sup>145</sup> some states have more robust public trust doctrines than others.<sup>146</sup> For example, some states with developed public trust doctrines are still limited primarily to the context of water.<sup>147</sup> Since there is not one standard public trust doctrine, it is imperative to evaluate each state’s public trust doctrine.<sup>148</sup> In this Section, states will be divided into three categories based on the source and the expansiveness of the public trust doctrine within the state.<sup>149</sup> The first group includes states that possess public trusts through constitutional amendments, but have yet to fully utilize the doctrine.<sup>150</sup> The second group includes states that may have constitutional provisions, but have primarily relied upon common law and courts to expand the public trust doctrine.<sup>151</sup> The third and final category includes states which have constitutional provisions that established a public trust, but also where the doctrine was expanded, through common law, to protect the environment and natural resources.<sup>152</sup> The following analysis is conducted in an effort to evaluate the feasibility of bringing an environmental justice claim through the public trust doctrine in various states.<sup>153</sup>

### 1. Source—Constitutional Law

In many states, including Rhode Island, Louisiana, Illinois, Massachusetts, and Wisconsin, the public trust doctrine is embedded in the state constitution.<sup>154</sup> Having public trust language within a constitution

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<sup>144</sup> MICHAEL C. BLUMM & MARY CHRISTINA WOOD, *THE PUBLIC TRUST DOCTRINE IN ENVIRONMENTAL AND NATURAL RESOURCES LAW* 12 (2d ed. 2015).

<sup>145</sup> See discussion *infra* Sections III.B.1–3.

<sup>146</sup> See discussion *infra* Sections III.B.1–3.

<sup>147</sup> Craig, *supra* note 141, at 836–38 (“California maintains a connection between its ecological public trust doctrine and a classic public trust doctrine principle: state ownership of the beds and banks of navigable waters.”).

<sup>148</sup> BLUMM & WOOD, *supra* note 144, at 12.

<sup>149</sup> See discussion *infra* Sections III.B.1–3.

<sup>150</sup> See discussion *infra* Section III.B.1.

<sup>151</sup> See discussion *infra* Section III.B.2.

<sup>152</sup> See discussion *infra* Section III.B.3.

<sup>153</sup> See discussion *infra* Section III.C.

<sup>154</sup> See R.I. CONST. art. I, § 17; LA. CONST. art. IX, § 1 (“[t]he natural resources of the state, including air and water, and the healthful, scenic, historic, and esthetic quality of the environment shall be protected, conserved, and replenished insofar as possible and consistent with the health, safety, and welfare of the people”); ILL. CONST. art. XI, § 1; MASS.

is impactful as it opens the door for increased environmental rights which, in turn, can lead to increased environmental protection.<sup>155</sup> It is important to note that, unlike these states' constitutions, the U.S. Constitution does not have a provision concerning environmental rights.<sup>156</sup> While it is beyond the scope of this Note, a popular movement within environmental law is the call for green amendments.<sup>157</sup> This movement—which can function symbiotically with environmental justice and this Note's proposal<sup>158</sup>—aims to place environmental rights amendments in state and federal constitutions.<sup>159</sup> In sum, this movement is evidence of the power that constitutional provisions possess.

This part of the Note aims to explore states with public trust doctrines located within their constitution,<sup>160</sup> like Rhode Island.<sup>161</sup> Rhode Island's constitution in part states:

It shall be the duty of the general assembly to provide for the conservation of the air, land, water, plant, animal, mineral and other natural resources of the state, and to adopt all means necessary and proper by law to protect the natural environment of the people of the state by providing adequate resource planning for the control and regulation of the use of the natural resources of the state and for the

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CONST. art. XCVII; WIS. CONST. art. XI § 1; Jason J. Czarnecki, *Environmentalism and the Wisconsin Constitution*, 90 MARQ. L. REV. 465, 467–68 (2007).

<sup>155</sup> See Lynda L. Butler, *State Environmental Programs: A Study in Political Influence and Regulatory Failure*, 31 WM. & MARY L. REV. 823, 846 (1990); Samuel L. Brown, *Green Amendments: A Fundamental Right to a Healthy Environment*, NAT'L L. REV. (Mar. 30, 2021), <https://www.natlawreview.com/article/green-amendments-fundamental-right-to-healthy-environment> [<https://perma.cc/76M2-SE4D>].

<sup>156</sup> Unlike other countries across the globe and some states within the United States, the U.S. Federal Constitution lacks an environmental protection provision. See Luis Jose Torres Asencio, *Greening Constitutions: A Case for Judicial Enforcement of Constitutional Rights to Environmental Protection*, 52 REV. JURIDICA U. INTER. P.R. 277, 277 (2017).

<sup>157</sup> *Green Amendment*, NAT'L CAUCUS OF ENV'T LEGISLATORS [hereinafter *Green Amendment*], <https://www.ncelenviro.org/issues/green-amendment/> [<https://perma.cc/J57X-SGXU>] (last visited Apr. 3, 2022).

<sup>158</sup> *Green Amendments: Transforming Environmental Justice From Rhetoric to Reality*, GREEN AMENDMENTS FOR THE GENERATIONS, <https://forthe generations.org/wp-content/uploads/Green-Amendment-Roots-of-Strength-for-Environmental-Justice.pdf> [<https://perma.cc/6VJZ-PXQB>] (last visited Apr. 3, 2022).

<sup>159</sup> See generally GREEN AMENDMENT FOR THE GENERATIONS, <https://forthe generations.org/> [<https://perma.cc/8NS2-94B6>] (last visited Apr. 3, 2022).

<sup>160</sup> See discussion *infra* Sections III.B.1–3.

<sup>161</sup> See R.I. CONST. art. I, § 17.

preservation, regeneration and restoration of the natural environment of the state.<sup>162</sup>

While the constitutional provision appears powerful, Rhode Island's codification of the public trust doctrine has not led to groundbreaking results.<sup>163</sup> In evaluating this provision, courts have held that while the constitutional amendment did create a public trust, the doctrine extends only to navigable waters and shorelines.<sup>164</sup> While Rhode Island possesses the ingredients for a strong public trust doctrine, at this time, the doctrine remains confined to its traditional form.

Another state worth noting is Illinois. Its environmental provision places a duty upon the state and all people "to provide and maintain a healthful environment for the benefit of this and future generations."<sup>165</sup> However, the provision hinges on public health rather than general environmental harm.<sup>166</sup> Yet, it does grant individuals environmental rights upon which they can bring suit to enforce.<sup>167</sup> While it has yet to be interpreted too broadly, Illinois has the foundation to expand the doctrine.<sup>168</sup>

Like the other state constitutions within this Section,<sup>169</sup> Massachusetts's constitution grants individuals environmental rights.<sup>170</sup> Article XCVII of the Massachusetts Constitution states:

The people shall have the right to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment, and the protection of the people in their right to the conservation, development, and utilization of the agricultural, mineral, forest, water, air, and other natural

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<sup>162</sup> *Id.*; see also R.I. CONST. art. I, § 16 (articulating that state regulatory authority to protect public trust uses is a legitimate use of the police power).

<sup>163</sup> Craig, *supra* note 141, at 831.

<sup>164</sup> See, e.g., State *ex rel.* Town of Westerly v. Bradley, 877 A.2d 601, 606–07 (R.I. 2005) (denying the argument that a rule regulating swimming violates the public trust doctrine); Town of Warren v. Thornton-Whitehouse, 740 A.2d 1255, 1259 (R.I. 1999) (holding that the public trust doctrine entitles citizens to water resources).

<sup>165</sup> See ILL. CONST. art. XI, § 1.

<sup>166</sup> Alexandra B. Klass, *Modern Public Trust Principles: Recognizing Rights and Integrating Standards*, 82 NOTRE DAME L. REV. 699, 717 (2006).

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

<sup>168</sup> Kacy Manahan, *The Constitutional Public Trust Doctrine*, 49 ENV'T L. 263, 299–300 (2019).

<sup>169</sup> See discussion *infra* Section III.B.1.

<sup>170</sup> See MASS. CONST. art. XCVII.

resources is hereby declared to be a public purpose. The general court shall have the power to enact legislation necessary or expedient to protect such rights.<sup>171</sup>

Essentially, it provides that individuals have a right to a healthy environment and that the state should manage and conserve the environment.<sup>172</sup> In interpreting this provision, courts have limited the applicability of Article XCVII by holding that the resources are not regulated by classic trust principles.<sup>173</sup> However, courts have not evaluated the scope and application of the grant of environmental rights in Article XCVII.<sup>174</sup>

While Rhode Island, Illinois,<sup>175</sup> and Massachusetts all have constitutional provisions indicative of a public trust,<sup>176</sup> they are not identical.<sup>177</sup> Thus, it is important to evaluate the differences to understand what could lead a court to evaluate the provision as a strong public trust. One difference between these states is where the public trust language is placed within the constitution. Rhode Island is one of the few states to place its environmental rights amendment in the same part as political rights.<sup>178</sup> It is significant to have the public trust in the political rights part of a constitution because it either implies or explicitly asserts that inhabitants possess environmental rights.<sup>179</sup> Alternatively, Louisiana's environmental trust is located within Article IX, Natural Resources, instead of Article I, Declaration of Rights.<sup>180</sup> Illinois's public trust language is in Article XI of its constitution, the article focused on the environment, rather than Article I, which is the bill of rights.<sup>181</sup>

While there is room to develop the public trust doctrine in any state by amending the state constitution,<sup>182</sup> the best venues for environmental

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<sup>171</sup> *Id.*

<sup>172</sup> *Id.*; Manahan, *supra* note 168, at 302.

<sup>173</sup> Manahan, *supra* note 168, at 302–03 (“the state may dispose of this property by a simple vote, rather than pursuant to trust principles.”).

<sup>174</sup> *Id.* at 305.

<sup>175</sup> For further discussion of the public trust doctrine in Illinois, see Craig, *supra* note 141, at 834–45.

<sup>176</sup> See R.I. CONST. art. I, § 17; ILL. CONST. art. XI, § 1; MASS. CONST. art. XCVII.

<sup>177</sup> See *supra* notes 160–74 and accompanying text.

<sup>178</sup> *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 962 (Pa. 2013). Only Pennsylvania, Montana and Rhode Island placed their environmental rights on equal footing as other political rights within their state constitutions.

<sup>179</sup> *Id.*

<sup>180</sup> LA. CONST. art. IX, § 1.

<sup>181</sup> See ILL. CONST. art. XI, § 1; *contra* ILL. CONST. art. I.

<sup>182</sup> *Green Amendment*, *supra* note 157.

justice claims are states which currently possess an established constitutional provision.<sup>183</sup> After reviewing states where there is a constitutional provision creating a public trust, it is clear that while a constitutional provision may be helpful in providing a legal cause of action, it alone may be insufficient.<sup>184</sup>

## 2. Source—Common Law

The public trust doctrine is a creature of the common law.<sup>185</sup> Therefore, it is not surprising that some states' public trust doctrines developed through common law—including California, Vermont, North Dakota, and South Carolina.<sup>186</sup> The key feature of these states is that the public trust doctrine has been expanded primarily through the courts.<sup>187</sup> Another common feature is that the public trust doctrines in these states are generally restricted to water resources instead of protecting *all* natural resources.<sup>188</sup>

California is a great example of this model. Although California has no public trust language within its state constitution, it is considered to have one of the most robust public trust doctrines in the United States.<sup>189</sup> In *National Audubon Society v. Superior Court of Alpine County* (“Mono Lake Case”), the California Supreme Court held that the public trust doctrine applied to all navigable lakes and streams and non-navigable tributaries, not just tidelands.<sup>190</sup> Through this holding, California expanded the public trust doctrine to protect all recreational and ecological values instead of simply protecting traditional uses of water like navigation, commerce, and fishing.<sup>191</sup> The court instructed the state to consider ecological and aesthetic interests in its decision-making processes.<sup>192</sup>

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<sup>183</sup> Jeremy Cox, *Push Is on for ‘Green Amendments’ in Four Bay State Constitutions*, BAY J. (July 14, 2021), [https://www.bayjournal.com/news/policy/push-is-on-for-green-amendments-in-four-bay-state-constitutions/article\\_6bea6c4e-de78-11eb-a03e-37aac2b667b0.html](https://www.bayjournal.com/news/policy/push-is-on-for-green-amendments-in-four-bay-state-constitutions/article_6bea6c4e-de78-11eb-a03e-37aac2b667b0.html) [<https://perma.cc/7LJT-F8N8>].

<sup>184</sup> See discussion *infra* Section III.B.2.

<sup>185</sup> See Arnold L. Lum, *How Goes the Public Trust Doctrine: Is the Common Law Shaping Environmental Policy?*, 18 NAT. RES. & ENV'T 73, 73 (2003).

<sup>186</sup> See discussion *infra* Section III.B.2. For a discussion of North Dakota's and South Carolina's court expansion of the public trust doctrine, see Craig, *supra* note 141, at 841–43.

<sup>187</sup> See *infra* notes 190–93, 196–97, and accompanying text.

<sup>188</sup> See *infra* notes 190–93, 196–97, and accompanying text.

<sup>189</sup> Wager, *supra* note 132, at 77.

<sup>190</sup> *Id.* at 77.

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

<sup>192</sup> Klass, *supra* note 166, at 710–11.

While this was a huge expansion, the public trust doctrine is still limited to the confines of water.<sup>193</sup>

Another example of a state whose public trust doctrine primarily rests in common law is Vermont. Vermont's constitution possesses trust language that protects hunting and fishing.<sup>194</sup> In evaluating Chapter II, Section 67, the Vermont Supreme Court initially adopted a limited interpretation of the public trust because the provision lists out specific things to conserve.<sup>195</sup> However, in a later case, the court favored a more expansive interpretation, remarking on the doctrine's ability to "be molded and extended to meet changing conditions and needs of the public it was created to benefit."<sup>196</sup> Thus, the courts strengthened Vermont's public trust doctrine, as their decisions have expanded its application and provided citizens with a cause of action.<sup>197</sup>

The biggest issue with states whose public trust falls within the common law category is that the trust does not protect the environment generally.<sup>198</sup> Since it is still tied to the common law interpretation, which is limited to water,<sup>199</sup> these states may be less hospitable venues to advance environmental justice claims using the public trust doctrine. Thus, it is necessary to explore states in which the public trust protects the environment and a variety of natural resources.<sup>200</sup>

### 3. Source—Combination of Constitutional and Common Law

In some states, there is both public trust language within constitutional provisions and case law that has reaffirmed and expanded the doctrine.<sup>201</sup> Examples of states whose public trust doctrine derives from

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<sup>193</sup> Huffman, *supra* note 120, at 28.

<sup>194</sup> See VT. CONST. ch. II § 67 ("The inhabitants of this State shall have liberty in seasonable times, to hunt and fowl on the lands they hold, on other lands not enclosed, and in like manner to fish in all boatable and other waters (not private property) under proper regulations to be made and provided by the General Assembly.").

<sup>195</sup> Craig, *supra* note 141, at 833–34.

<sup>196</sup> *Id.* at 850.

<sup>197</sup> *Id.* at 834 (citing *State v. Cent. Vt. Ry., Inc.*, 571 A.2d 1128, 1130 (Vt. 1989)).

<sup>198</sup> See Craig, *supra* note 141, at 841 ("North Dakota has considered the role of the public trust doctrine with regard to more general ecological considerations, but has nevertheless continued to confine the doctrine's application to water resources.").

<sup>199</sup> See, e.g., Huffman, *supra* note 120, at 28 (discussing the limitation of California's public trust doctrine).

<sup>200</sup> See discussion *infra* Section III.B.3.

<sup>201</sup> Lum, *supra* note 185, at 73–74.

its constitution and common law include Pennsylvania,<sup>202</sup> Hawaii,<sup>203</sup> Montana,<sup>204</sup> Alaska,<sup>205</sup> and New York.<sup>206</sup> Pennsylvania is a unique and vital case study, and it will be discussed at length later in this Note.<sup>207</sup> For that reason, this Section will focus on Hawaii and Montana.

Hawaii is recognized as having an expansive interpretation of the public trust doctrine.<sup>208</sup> Hawaii's constitution explicitly created a public trust by stating that:

For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State.<sup>209</sup>

Hawaii's public trust doctrine is also extremely rooted in common law as a result of historical practices.<sup>210</sup> Hawaiian courts interpret the constitutional language broadly.<sup>211</sup> The Supreme Court of Hawaii clarified that its state constitution created an enforceable public trust that can limit the legislature's ability to act.<sup>212</sup> Furthermore, the court adopted a broad interpretation of natural resources to include groundwater.<sup>213</sup> While Hawaii's jurisprudence focuses on water, its public trust is broader than California's

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<sup>202</sup> PA CONST. art. I, § 27; *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 957 (Pa. 2013).

<sup>203</sup> HAW. CONST. art. IX, § 8; Wager, *supra* note 132, at 77.

<sup>204</sup> See MONT. CONST. art. IX, § 1; MONT. CONST. Art. II, § 3. See generally Gregory S. Munro, *The Public Trust Doctrine and the Montana Constitution as Legal Bases for Climate Change Litigation in Montana*, 73 MONT. L. REV. 123 (2012).

<sup>205</sup> See ALASKA CONST. Art. VIII §§ 1–4, 17; see also Edward A. Fitzgerald, *The Alaskan Wolf War: The Public Trust Doctrine Missing in Action*, 15 ANIMAL L. 193, 197–200 (2009).

<sup>206</sup> Lum, *supra* note 185, at 73 (remarking on the expansion of the public trust doctrine in New York); Steven C. Russo, *Beware of the Public Trust: New York's Highest Court Stops Retail Expansion on Citi Field's Parking Lot Under Public Trust Doctrine*, GREENBERG TRAURIG (June 14, 2017), <https://www.gtlaw-environmentalandenergy.com/2017/06/articles/state-local/new-york/beware-the-public-trust-new-yorks-highest-court-stops-retail-expansion-on-citi-fields-parking-lot-under-public-trust-doctrine/> [https://perma.cc/ZBW3-CTNJ].

<sup>207</sup> See discussion *infra* Part V.

<sup>208</sup> Wager, *supra* note 132, at 77.

<sup>209</sup> HAW. CONST. art. XI, § 1.

<sup>210</sup> Craig, *supra* note 141, at 839.

<sup>211</sup> *Id.* at 839–41.

<sup>212</sup> Manahan, *supra* note 168, at 271.

<sup>213</sup> Wager, *supra* note 132, at 77.

public trust because of the scope of its constitutional provision.<sup>214</sup> Article XI is interpreted to include environmental and biodiversity protections.<sup>215</sup> Importantly, the public trust has been interpreted as placing “an affirmative duty [on both the legislative and executive branches] to consider the public trust uses in the planning and allocation of water resources and . . . protect them where feasible.”<sup>216</sup> In these necessary considerations, the rights through the public trusts are given greater importance than private economic interests.<sup>217</sup>

Like Hawaii, Montana is a state that possesses a public trust doctrine that expanded as a result of both constitutional and common law. Montana amended its constitution to give its inhabitants environmental rights, stating that “[t]he state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations.”<sup>218</sup> Montana is progressive, as its constitutional language grants its citizens the constitutional right to a clean and healthy environment.<sup>219</sup> In Montana, the public trust doctrine functions as a check on government actions because the degradation of natural resources can be deemed unconstitutional.<sup>220</sup> This anti-degradation claim could survive even if there is not a conclusive link to negative health effects.<sup>221</sup> However, Montana’s public trust doctrine does not give individual citizens a remedy; instead it serves as a check on legislative and agency action by requiring greater review.<sup>222</sup>

As evident through both Hawaii and Montana, states that have a more established public trust doctrine will be more hospitable to plaintiffs bringing environmental justice claims in the future.<sup>223</sup> After exploring the different variations of the public trust doctrine, it is clear that some iterations of the public trust doctrine are much more progressive and expansive than others. Thus, it is critically important for environmental

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<sup>214</sup> Craig, *supra* note 141, at 840–41.

<sup>215</sup> *Id.* at 841.

<sup>216</sup> Manahan, *supra* note 168, at 272–75 (while the state is entitled to some deference, decisions are evaluated using a “close look.”).

<sup>217</sup> *Id.* at 272.

<sup>218</sup> MONT. CONST. art. IX, § 1; *see* MONT. CONST. art. II, § 3; Klass, *supra* note 141, at 440.

<sup>219</sup> Jack Tuholske, *The Legislature Shall Make No Law . . . Abridging Montanans’ Constitutional Rights to a Clean and Healthful Environment*, 15 SE. ENV’T L.J. 311, 312 (2007).

<sup>220</sup> *See* Montana Env’t Info. Ctr. v. Dep’t of Env’t Quality, 988 P.2d 1236, 1249 (Mont. 1999).

<sup>221</sup> *Id.*

<sup>222</sup> Clark Fork Coal. v. Mont. Dep’t of Nat. Res. & Conservation, 481 P.3d 198, 217–19 (Mont. 2021).

<sup>223</sup> *See* discussion *supra* notes 218–22 and accompanying text.

justice plaintiffs and their attorneys to evaluate the history of the public trust doctrine, its modern application, and its limits within a specific state to determine whether an environmental justice claim would likely be successful.

C. *Reflection About States' Public Trust Doctrines*

Multiple scholars point to the public trust language within state constitutions as an area situated for continued growth and a means to check government actions.<sup>224</sup> Even though the public trust doctrine exists in some form in many states,<sup>225</sup> some have yet to expand the application of the doctrine beyond navigable waters and submerged land to natural resources and the environment in general.<sup>226</sup> Yet, there are a lot of states with viable constitutional provisions through which courts could reinvigorate the doctrine.<sup>227</sup> Furthermore, even courts that interpreted the doctrine narrowly in the past admit that the doctrine has much more flexibility and purpose than they previously expected.<sup>228</sup>

A state that codifies the public trust doctrine, grants their citizens environmental rights, and expands the doctrine through case law to protect more than water resources would be the best venue for plaintiffs to bring an environmental justice claim. Not every state discussed in this Note is *currently* a hospitable venue for an environmental justice plaintiff to bring a claim using the public trust doctrine.<sup>229</sup> However, states can expand their public trust doctrines by amending their constitutions, and individuals and organizations can propel the development forward through strategic litigation.<sup>230</sup> Through both constitutional reform efforts and purposeful litigation, more states can become amenable venues for

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<sup>224</sup> See Manahan, *supra* note 168, at 284; Lum, *supra* note 185, at 73 (noting the influx of legal research on the public trust doctrine).

<sup>225</sup> See generally Craig, *supra* note 141 (discussing the public trust doctrine in the following states: Alaska, California, Pennsylvania, Rhode Island, Louisiana, Oregon, Washington, Vermont, Illinois, Mississippi, Tennessee, Hawaii, North Dakota, South Carolina, Texas, South Dakota, Utah, Wisconsin, and New Jersey).

<sup>226</sup> See Manahan, *supra* note 168, at 292–96 (noting how both Virginia and North Carolina have the broad foundation for the public trust doctrine, but courts have yet to hold that such language is self-executing or that it provides a cause of action to citizens); Klass, *supra* note 141, at 439.

<sup>227</sup> See *supra* Sections III.B.1–3.

<sup>228</sup> See generally *supra* Sections III.B.1–2.

<sup>229</sup> See discussion *supra* notes 218–23 and accompanying text.

<sup>230</sup> See, e.g., PA. CONST. art. I, § 27; *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 957 (Pa. 2013).

environmental justice claims based on the public trust doctrine and the state's fiduciary duties. Thus, this Note's proposed method of bringing environmental justice claims is immediately useful in some states and could become more pertinent as states evolve their public trusts over time.

To analyze and describe the way environmental justice plaintiffs could bring legal claims using the public trust doctrine, this Note will utilize Pennsylvania as a case study.<sup>231</sup> Pennsylvania is one of the states where an environmental justice claim through the public trust doctrine could succeed today.<sup>232</sup> Pennsylvania interprets its public trust broadly, using private trust law, and provides citizens an actionable right to bring suit under the doctrine.<sup>233</sup>

#### IV. ENVIRONMENTAL JUSTICE COMMUNITIES CAN UTILIZE TRUST LAW AND THE PUBLIC TRUST DOCTRINE TO CHALLENGE A STATE'S ACTIONS

The public trusts, created through constitutional amendments and case law, create a trust.<sup>234</sup> Public trusts are judicially enforceable.<sup>235</sup> These public trusts bear significant differences from charitable trusts,<sup>236</sup> and thus should be evaluated using private trust law doctrines.<sup>237</sup> The res or corpus is the environment and natural resources within a state.<sup>238</sup> The beneficiaries are living residents of the state and, depending on the public trust, future generations.<sup>239</sup> The trustee is the state, which would include all branches of government and administrative agencies.<sup>240</sup> As trustee,

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<sup>231</sup> See discussion *infra* Part V.

<sup>232</sup> See discussion *infra* Part V.

<sup>233</sup> See discussion *infra* Part V.

<sup>234</sup> Manahan, *supra* note 168, at 263.

<sup>235</sup> *Id.* at 268.

<sup>236</sup> While a charitable trust may appear to have similarities to trusts created by the public trust doctrine, the public trusts are not necessarily created for a charitable purpose—rather they recognize rights of individuals concerning the environment. For more information on charitable trusts, see Jessica Smith, *Charitable Trusts and the Cy Pres Doctrine: Overview*, NAT'L L. REV. (Jan. 30, 2017), <https://www.natlawreview.com/article/charitable-trusts-and-cy-pres-doctrine-overview> [<https://perma.cc/68VA-77SR>].

<sup>237</sup> There is already case law supporting the use of private trust law to interpret public trusts. See *Pa. Env't Def. Found. v. Commonwealth*, 161 A.3d 911, 911 (Pa. 2017) (holding that Art. I, Section 27 created an environmental trust and that Pennsylvania trust law should be the used to understand it).

<sup>238</sup> See discussion *infra* Section IV.A.

<sup>239</sup> See discussion *infra* Section IV.A.

<sup>240</sup> See *id.*; Manahan, *supra* note 168, at 264.

the state must adhere to the duties of a trustee, including prudence, impartiality, and loyalty.<sup>241</sup> The trustee can be sued by the beneficiaries for breaching these duties.<sup>242</sup>

The public trust doctrine exists in several states and provides a new path for environmental justice plaintiffs to obtain relief without having to demonstrate discriminatory intent. To illustrate the viability of such a suggestion, this Section will explore how trusts are created,<sup>243</sup> the duties of trustees,<sup>244</sup> and the rights of beneficiaries.<sup>245</sup> Then, the mechanics of the claim will be evaluated through a discussion of standing,<sup>246</sup> the elements of breach of a fiduciary duty,<sup>247</sup> and the remedies available.<sup>248</sup>

#### A. *The Existence of a Trust*

To create a trust, there must be an intent to create a trust.<sup>249</sup> There are three key components of a trust: the res, a beneficiary, and the trustee.<sup>250</sup> “Almost all the relevant uses of the word *trust* are associated with a fiduciary relationship—that is, when one person holds and manages property or acts on behalf of another.”<sup>251</sup> A trustee is one who “holds and manages property, under exacting rules, for the exclusive benefit of another.”<sup>252</sup> There are a variety of duties that arise from the creation of a trust including the duty of prudence, the duty of loyalty, and the duty of impartiality.<sup>253</sup> Beneficiaries can bring claims against their trustees to ensure adherence to their duties.<sup>254</sup>

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<sup>241</sup> See discussion *infra* Section IV.B.

<sup>242</sup> See discussion *infra* Sections IV.B, IV.D.

<sup>243</sup> See discussion *infra* Section IV.A.

<sup>244</sup> See discussion *infra* Sections IV.B.1–3.

<sup>245</sup> See discussion *infra* Section IV.C.

<sup>246</sup> See discussion *infra* Section IV.D.

<sup>247</sup> See discussion *infra* Section IV.E.

<sup>248</sup> See discussion *infra* Section IV.E.

<sup>249</sup> FAIRFAX & GUENZLER, *supra* note 137, at 27.

<sup>250</sup> *Id.* at 25.

<sup>251</sup> *Id.* at 18.

<sup>252</sup> *Id.* at 25.

<sup>253</sup> See CHARLES E. ROUNDS JR. & ERIC P. HAYES, LORING: A TRUSTEE'S HANDBOOK 109, § 6.1 (1998) (“A trust relationship brings with it five fundamental duties: 1. the duty to be generally prudent; 2. the duty to carry out the terms of the trust; 3. the duty to be loyal to the trust; 4. the duty to give personal attention to the affairs of the trust; 5. the duty to account to the beneficiary.”).

<sup>254</sup> FAIRFAX & GUENZLER, *supra* note 137, at 31 (“[T]rustees’ duties are *obligations* that are legally enforceable. The basic format is that the beneficiary is entitled to sue a trustee in order to enforce the principle of undivided loyalty or any other obligation of the trustee.”).

In evaluating an environmental justice breach of fiduciary duties claim, a court will first have to identify if there is a public trust.<sup>255</sup> Plaintiffs will have to demonstrate that there was an intent to create a trust,<sup>256</sup> and then evaluate the trust using traditional labels of trust law like res, trustee, and beneficiary.<sup>257</sup>

Applying private trust terms to a public trust would likely result in the following. The res, the property of the trust, would likely be the environment and the natural resources of the state.<sup>258</sup> This is because the state constitution provisions include such language.<sup>259</sup> The state would hold the “res” in trust for the public and generations to come.<sup>260</sup> It is likely that the “state” would include the judicial, executive, and legislative branches as well as the entities which the legislative branch grants power to.<sup>261</sup> Therefore, the state is akin to the trustee and the public and future generations are like the beneficiaries.

Proving the creation of a trust will place an additional burden on environmental plaintiffs who first utilize this type of claim. However, environmental justice plaintiffs can meet this burden. “The foundational principle for the public trust doctrine rests on the premise that the government serves as the steward for the land and natural resources of our nation, acting as trustee for the benefit of the public.”<sup>262</sup> The plaintiffs can turn to the legislative history and the constitutional provisions of the state to show that the legislators manifested an intent to give the benefits of the environment to the people. Furthermore, once state courts find that a public trust protecting the environment and natural resources was created, future plaintiffs will not have to litigate over its existence.

Once the environmental justice plaintiffs demonstrate that the public trust is a trust under private trust law principles, a new means of bringing environmental justice claims will be available. If environmental resources and recreation are protected through the public trust for all the inhabitants of the state, the state and its agencies would have a duty to

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<sup>255</sup> BROWNE C. LEWIS, *Chapter 2—Creation of Private Trust*, in LAW OF TRUSTS (2013), available at <http://lewislawoftrusts.lawbooks.cali.org/chapter/creation-of-a-private-trust/> [<https://perma.cc/C2AR-KYPM>].

<sup>256</sup> *Id.* § 2.1.

<sup>257</sup> *Id.* § 2.2.

<sup>258</sup> WOOD, *supra* note 128, at 143; *see, e.g.*, HAW. CONST. art. X (“All public natural resources are held in trust by the State for the benefit of the people.”).

<sup>259</sup> *See* discussion *infra* Sections IV.A, C.

<sup>260</sup> BLUMM & WOOD, *supra* note 144, at 12.

<sup>261</sup> Manahan, *supra* note 168, at 265; BLUMM & WOOD, *supra* note 144, at 12.

<sup>262</sup> BROWN & HOGAN, *supra* note 143, at 221.

preserve the resources for future generations.<sup>263</sup> Furthermore, the state and its agencies must properly administer the trust by complying with their duties as trustee, including prudence, impartiality, and loyalty.<sup>264</sup> “Under these concepts of fiduciary duty, trustees are not only obligated to react to contaminating events, they may also be obligated to take affirmative action when necessary to protect natural resources for the benefit of future generations.”<sup>265</sup> If the environment must be protected for all current and future inhabitants, the state must protect the environment equally for all beneficiaries.<sup>266</sup> Thus, decisions that disproportionately impact minorities or those of lower socio-economic status could constitute a violation of such duties. With the existence of a public trust and through an evaluation of the public trust through private trust principles, citizens would be empowered to make certain that the state is regulating the environment—the trust—pursuant to its duties as trustee. This means, environmental justice plaintiffs in states with a robust public trust doctrine could sue the state for violating its duties as trustee and achieve a remedy for environmental injustice.

### B. *Fiduciary Duties of Trustees*

To understand this cause of action for environmental justice plaintiffs, it is important to first discuss the fiduciary duties of a trustee. Private trust law places a variety of duties upon trustees.<sup>267</sup> When a trust is created, trustees receive a great amount of power and discretion to manage the res of the trust.<sup>268</sup> Per the common axiom, “with great power comes great responsibility,” trustees are held to a high standard through a variety of fiduciary duties.<sup>269</sup> Fiduciary duties limit the power of the

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<sup>263</sup> See, e.g., *Robinson Twp. v. Commonwealth*, 83 A.3d at 957 (noting that “[a] trustee, the Commonwealth has a duty to refrain from permitting or encouraging the degradation, diminution, or depletion of public natural resources, whether such degradation, diminution, or depletion would occur through direct state action or indirectly.”).

<sup>264</sup> BROWN & HOGAN, *supra* note 143, at 222 (“Because the public trust doctrine relies on the fundamental concepts of property held in trust for the benefit of others, trustees owe fiduciary responsibilities to the public beneficiaries, such as duties of good faith and loyalty, as well as duties to avoid waste and maximize value.”).

<sup>265</sup> *Id.*

<sup>266</sup> *Id.*

<sup>267</sup> BLUMM & WOOD, *supra* note 144, at 7–8.

<sup>268</sup> Sidney Kess & Edward Mendlowitz, *Understanding the Duties of a Trustee in Administering a Trust*, CPA J. (June 2019), <https://www.cpajournal.com/2019/06/03/understanding-the-duties-of-a-trustee-in-administering-a-trust/> [<https://perma.cc/69QC-SC48>].

<sup>269</sup> SPIDER-MAN (Columbia Pictures 2002). See also BLUMM & WOOD, *supra* note 144, at 7–8.

trustee by providing clear duties and responsibilities.<sup>270</sup> The duties provide beneficiaries with the capability to monitor the trustee and challenge the trustee's actions if they think a duty was violated. For environmental justice litigation, a trustee's fiduciary obligations would give citizens the power "to protect their public *property* rights."<sup>271</sup> Often, in disputes between a trustee and a beneficiary, the court will place a burden on the trustee; there is a "rebuttable presumption of fraud or undue influence."<sup>272</sup> Generally, courts evaluate a trust strictly against the trustee and in favor of beneficiaries.<sup>273</sup> In an effort to understand the fiduciary duties of trustees that a claimant can propose the state has violated in an environmental justice claim, a discussion of the duty of prudence, impartiality, and loyalty will follow.<sup>274</sup>

### 1. Duty of Prudence

The primary purpose of a trustee is to preserve the res of the trust; the duty of prudence is the duty that corresponds to this essential purpose.<sup>275</sup> It is sometimes referred to as the duty to protect or the duty to care.<sup>276</sup> This means that the state must manage the trust in such a manner that future generations of beneficiaries may benefit as well. In managing and maintaining the trust, a trustee must exercise ordinary skill and care.<sup>277</sup> When evaluating compliance, the courts use an objective standard of care.<sup>278</sup> This duty is often explicitly named in constitutional provisions

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<sup>270</sup> See Seth Davis, *The False Promise of Fiduciary Government*, 89 NOTRE DAME L. REV. 1145, 1146 (2014).

<sup>271</sup> WOOD, *supra* note 128, at 167.

<sup>272</sup> FAIRFAX & GUENZLER, *supra* note 137, at 29.

<sup>273</sup> *Id.* at 31.

<sup>274</sup> See discussion *infra* Sections IV.B.1–3. While there are other duties that bind trustees, like the duty to account and inform, they are not reviewed in depth within this Note because the duty is somewhat duplicative of states' versions of the Freedom of Information Act ("FOIA"), like the right to know laws in Pennsylvania and other states. See, e.g., OFFICE OF OPEN RECORDS, RIGHT TO KNOW LAW CITIZENS' GUIDE (Jan. 8, 2021), <https://www.openrecords.pa.gov/RTKL/CitizensGuide.cfm> [<https://perma.cc/4F8B-PRQG>].

<sup>275</sup> WOOD, *supra* note 128, at 167.

<sup>276</sup> *Id.*

<sup>277</sup> See UNIF. TR. CODE § 804 (UNIF. L. COMM'N 2000).

<sup>278</sup> See *Trustee Duties and Liabilities*, JUSTIA [hereinafter *Trustee Duties and Liabilities*], <https://www.justia.com/estate-planning/trusts/trustee-duties-and-liabilities/#:~:text=The%20duty%20of%20prudence%20requires,in%20managing%20the%20trust%20property.&text=Under%20common%20law%2C%20the%20trustee,be%20required%20to%20personally%20perform> [<https://perma.cc/G24N-CTNN>] (last visited Apr. 3, 2022).

creating trusts.<sup>279</sup> The duty of prudence is a broad duty through which the general or specific management of the trust can be challenged. Thus, it is foreseeable that an environmental justice plaintiff could bring a claim alleging that the state, as trustee, has breached its duty of prudence.

## 2. Duty of Impartiality

Because of the duty of impartiality, a trustee must balance the competing interests of differently situated beneficiaries fairly and reasonably.<sup>280</sup> Quite plainly, this duty forbids favoritism between classes of beneficiaries.<sup>281</sup> This duty is especially relevant in the environmental resource management context because a trustee must balance the interest of current and future generations. As a result, in the environmental context, this encourages states to be proactive in protecting the environment and its resources so the trust is being preserved for future beneficiaries as well.<sup>282</sup> In environmental justice cases brought through the public trust doctrine, this could bolster current beneficiaries' claims opposing a government's action or decision.<sup>283</sup>

## 3. Loyalty

Loyalty is often considered the fundamental duty of trust law.<sup>284</sup> The duty of loyalty requires the trustee to exercise undivided loyalty to the beneficiaries by placing their interests above his own.<sup>285</sup> This duty is meant to force the trustee to take actions with the beneficiaries' interests and needs in mind.<sup>286</sup> Since this is a bedrock of trust law,<sup>287</sup> the duty of loyalty is interpreted strictly by courts.<sup>288</sup> The strict interpretation by courts

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<sup>279</sup> See PA CONST. art. I, § 27 (duty to “conserve and maintain” public natural resources); see also John C. Dernbach, *The Potential Meanings of a Constitutional Public Trust*, 45 ENV'T L. 463, 487 (2015).

<sup>280</sup> See *Duty of Impartiality*, in LEWIS LAW OF TRUSTS, CALI, <http://lewislawoftrusts.lawbooks.cali.org/chapter/duty-of-impartiality/> [<https://perma.cc/2CCS-RMJZ>] (last visited Apr. 3, 2022).

<sup>281</sup> See *Trustee Duties and Liabilities*, *supra* note 278.

<sup>282</sup> WOOD, *supra* note 128, at 169.

<sup>283</sup> See discussion *infra* Section V.C.

<sup>284</sup> See Vincent R. Johnson, *The Fiduciary Obligations of Public Officials*, 9 ST. MARY'S J. LEGAL MAL. & ETHICS 300, 312 (2019).

<sup>285</sup> *Id.*; see UNIF. TR. CODE § 232; FAIRFAX & GUENZLER, *supra* note 137, at 25–26.

<sup>286</sup> John H. Langbein, *Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?*, 114 YALE L.J. 929, 931 (2005).

<sup>287</sup> See Johnson, *supra* note 284, at 312.

<sup>288</sup> See, e.g., *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928) (Justice Cardozo expressed

is evident through the “no further inquiry” rule.<sup>289</sup> According to this rule, if a trustee engages in specified misconduct, courts will automatically find that the trustee breached his duty of loyalty.<sup>290</sup> When considering this duty through a public trust lens, the state would owe loyalty to its citizens. If a trustee, and its officials, were to use their office to favor industry to the detriment of the beneficiaries, they would breach their duty of loyalty.

C. *Citizens Have Standing as Beneficiaries to Challenge the Government's Management of the Public Trust*

To bring a legal claim, a plaintiff must possess standing.<sup>291</sup> Thus, environmental justice plaintiffs must also demonstrate standing to bring a breach of fiduciary duty claim. This Section will explore potential issues with standing, but ultimately conclude that beneficiaries would have standing when states interpret the public trust through private trust law.<sup>292</sup>

One potential issue with standing could arise if the courts interpreted the public trust to be a discretionary trust. Some courts have been keen to deny beneficiaries standing to pursue their breach claims under a discretionary trust because they do not believe beneficiaries possess a property interest.<sup>293</sup> In such trusts, a beneficiary may only have a “mere hope or probability of inheriting,” so the beneficiary lacks standing to protect his interest until such a trust is distributed.<sup>294</sup> Although this interpretation would prevent environmental justice plaintiffs from successfully bringing a breach of fiduciary duty claim, this interpretation is not the binding law.<sup>295</sup> In fact, scholars and the Seventh Circuit have held that such an interpretation would go against the key principle of trust law: to empower beneficiaries to hold trustees responsible for their actions.<sup>296</sup> Therefore, even if the trust is deemed discretionary, it is not a death sentence for environmental justice claims because of the importance of allowing beneficiaries to challenge trustees.<sup>297</sup>

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that “[a] trustee is held to something stricter than the morals of the marketplace. . . . Uncompromising rigidity has been the attitude of courts of equity when petitioned to under the rule of undivided loyalty.”)

<sup>289</sup> See Alan Newman, *Trust Law in the Twenty-First Century: Challenges to Fiduciary Accountability*, 29 QUINN. PROB. L.J. 261, 274 (2016).

<sup>290</sup> *Id.*

<sup>291</sup> See generally *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 555 (1992).

<sup>292</sup> See discussion *infra* Section IV.C.

<sup>293</sup> See Newman, *supra* note 289, at 281–82.

<sup>294</sup> *Id.*

<sup>295</sup> *Id.* at 284–85.

<sup>296</sup> *Id.*

<sup>297</sup> *Id.*

Another issue could arise if courts decide to interpret public trusts like charitable trusts.<sup>298</sup> In charitable trust law, beneficiaries do not have the power to challenge the trustee; instead, the power is given to a public official, like the attorney general, since beneficiaries' interests are likely uniform and too small to be privately enforceable.<sup>299</sup> This poses a few issues. If charitable trust principles are imported to evaluate public trusts, the citizens may lose standing.<sup>300</sup> If citizens lose standing it's unlikely that the goals of environmental justice will be achieved because citizens would have to appeal and convince a government official to challenge a government action. Thus, for environmental justice claims to succeed, it is critical that courts evaluate public trusts using private trust law principles.<sup>301</sup>

If the courts interpret the public trust using private trust law, then all beneficiaries who meet the typical elements of standing would have standing to bring suit.<sup>302</sup> An environmental justice plaintiff could demonstrate injury in fact, causation, and redressability.<sup>303</sup> Thus, the citizens—the *beneficiaries*—can and should be empowered to ensure that the state—the trustee—is managing the environment and natural resources in the interest of its present and future citizens. The foundation of trust law is the ability of beneficiaries to hold trustees accountable.<sup>304</sup> Environmental justice plaintiffs will have standing, as beneficiary of the public trust, to sue the state government for breaching its fiduciary duties so long as the public trust is evaluated using private trust principles.<sup>305</sup>

#### D. *Elements of the Claim*

After demonstrating standing, to succeed on a breach of fiduciary duty claim and obtain relief, the plaintiffs will need to demonstrate: (1) the existence of a trust and a fiduciary relationship; (2) breach of a fiduciary duty; (3) causation; and (4) harm.<sup>306</sup>

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<sup>298</sup> John Dernbach, *The Role of Trust Law Principles in Defending Public Trust Duties for Natural Resources*, 54 U. MICH. J. L. REFORM, 77, 77 (2021).

<sup>299</sup> FAIRFAX & GUENZLER, *supra* note 137, at 31.

<sup>300</sup> *Id.* Citizens would lose standing to challenge a government's decisions or actions that could result in environmental injustice because the power to make such a challenge is vested with the attorney general.

<sup>301</sup> This is not an unprecedented interpretation. Pennsylvania evaluated its public trust using private trust law principles. See discussion *infra* Part V.

<sup>302</sup> See generally *Lujan v. Defs. of Wildlife*, 504 U.S. 555 (1992); *Massachusetts v. EPA*, 549 U.S. 497, 498 (2007).

<sup>303</sup> See *Lujan*, 504 U.S. at 559–63.

<sup>304</sup> See Newman, *supra* note 289, at 261–62.

<sup>305</sup> See discussion *infra* Section V.C.

<sup>306</sup> See *4 Elements of Breach of Fiduciary Duty Claim*, GRIFFITHS LAW PC [hereinafter 4

First, to bring a breach of fiduciary duty claim against the state, plaintiffs must prove that a trust and a fiduciary relationship exist.<sup>307</sup> The plaintiffs can demonstrate that a trust exists by providing relevant constitutional provisions and past court interpretations of such language.<sup>308</sup> If there is a constitutional provision, plaintiffs can utilize the tools of statutory interpretation (e.g., plain meaning, substantive canons, and legislative history) to argue that the constitutional provision creates an enforceable public trust. Plaintiffs can identify what the res is, who the trustee is, and who the beneficiaries are.<sup>309</sup> Then, the plaintiffs need to explain that, as a matter of law, a fiduciary relationship exists between the state and the citizens.<sup>310</sup> This element will be fairly easy to establish, as many states have definitively held that a public trust exists,<sup>311</sup> and that it imposes duties and responsibilities on the state.<sup>312</sup>

Second, plaintiffs will have to demonstrate that the state breached its fiduciary duties.<sup>313</sup> Plaintiffs must show that the trustee—the state—breached its duty (e.g., prudence, loyalty, or impartiality).<sup>314</sup> Generally, a breach occurs when a trustee fails to act in the best interests of the trust's beneficiaries.<sup>315</sup> The exact manner of demonstrating will differ depending on the nature of the relationship and the breach.<sup>316</sup> Importantly, courts would give less deference to a government agency in a breach of fiduciary analysis than they would in a statutory interpretation issue.<sup>317</sup>

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*Elements of Breach*], <https://www.griffithslawpc.com/resources/elements-breach-fiduciary-duty-claim/> [<https://perma.cc/8RG5-AJUX>] (last visited Apr. 3, 2022).

<sup>307</sup> See *supra* notes 255–66 and accompanying text.

<sup>308</sup> See *supra* notes 255–66 and accompanying text.

<sup>309</sup> See *supra* notes 255–66 and accompanying text.

<sup>310</sup> See *supra* Section III.A.

<sup>311</sup> See discussion *supra* Sections III.B.1–3.

<sup>312</sup> See discussion *supra* Sections III.B.1–3.

<sup>313</sup> See *Breach of Fiduciary Duty: Everything You Need to Know*, KLENK LAW [hereinafter *Breach of Fiduciary Duty*], <https://www.klenklaw.com/practices/trust-and-estate-litigation/breach-of-fiduciary-duty/> [<https://perma.cc/LWS2-Y9HC>] (last visited Apr. 3, 2022).

<sup>314</sup> See discussion *supra* Section IV.B.

<sup>315</sup> See Nicole Haff, *Understanding Breach Fiduciary Duties Claims*, ROMANO LAW (Nov. 7, 2019), <https://www.romanolaw.com/2019/11/07/understanding-breach-of-fiduciary-duties-claims/> [<https://perma.cc/B8LF-SZYA>].

<sup>316</sup> Adam Barone, *What Are Some Examples of Fiduciary Duty?*, INVESTOPEDIA (Nov. 19, 2020), <https://www.investopedia.com/ask/answers/042915/what-are-some-examples-fiduciary-duty.asp> [<https://perma.cc/PMC7-T7VU>]. For further discussion of how a plaintiff can show breach of the various duties, see discussion *infra* Section V.C.

<sup>317</sup> Mary Christina Wood, *Advancing the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations (Part II): Instilling a Fiduciary Obligation in Governance*, 39 ENV'T L. 91, 112–13 (2009).

Third, a plaintiff needs to successfully show the court that they suffered a harm as a result of the trustee's misconduct. If there is no harm, a plaintiff cannot succeed in a breach of a fiduciary duty claim.<sup>318</sup> Thus, plaintiffs need to identify the damages that resulted from the trustee's breach of duty.<sup>319</sup> The more specific one can be with one's calculation of damages the better.<sup>320</sup>

Fourth, a plaintiff needs to show causation.<sup>321</sup> A plaintiff must show the court that the breach of the fiduciary duty caused the damages he or she alleges in the claim.<sup>322</sup> In order to show causation, the claimant will need to demonstrate that the damages were a foreseeable result of the breach of the fiduciary duty.<sup>323</sup>

### *E. Remedies Available*

There are a few remedies that would be available to environmental justice plaintiffs bringing a breach of fiduciary duties claim. First, plaintiffs could seek declaratory relief.<sup>324</sup> Declaratory relief is when a court states "the rights of the parties without ordering any specific action or listing awards for damages."<sup>325</sup> Declaratory relief would be a victory for environmental justice since, in granting such relief, the court would affirm that citizens are the beneficiaries of the public trust and that as a result, the states have fiduciary duties.<sup>326</sup> Despite the fact that it would not result in compensatory damages, this potential remedy would create better case law for future environmental justice plaintiffs.

Plaintiffs could seek injunctive relief as well. Injunctive relief would postpone, temporarily revoke, or stop the cause of the injury until further review can occur.<sup>327</sup> This would stop the state from continuing to breach its fiduciary duties.<sup>328</sup> For environmental justice plaintiffs, this could be very significant: it could halt the issuance of a permit, the development of a project, or the operations of a detrimental site or facility.

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<sup>318</sup> Haff, *supra* note 315.

<sup>319</sup> Barone, *supra* note 316.

<sup>320</sup> *Id.*

<sup>321</sup> *Id.*

<sup>322</sup> *Id.*

<sup>323</sup> *Id.*

<sup>324</sup> Haff, *supra* note 315.

<sup>325</sup> *Declaratory Relief*, CORNELL L. SCH., [https://www.law.cornell.edu/wex/declaratory\\_relief](https://www.law.cornell.edu/wex/declaratory_relief) [<https://perma.cc/9S3Q-76M8>] (last visited Apr. 3, 2022).

<sup>326</sup> Wood, *supra* note 317, at 113.

<sup>327</sup> Haff, *supra* note 315.

<sup>328</sup> *Id.*

In addition to declaratory relief, a court could issue an order to the state, compelling the trustee to perform its duties.<sup>329</sup> An order to compel the trustee to perform its duties could mean that the government must complete an additional review of the action at issue or that the state must better consider environmental justice concerns in their decision-making processes.<sup>330</sup>

Also, restoration plans could be implemented as a result of the breach.<sup>331</sup> A court could require a restoration plan to recover the part of the res that was harmed through the breach.<sup>332</sup> The policy behind such a remedy is to “return the beneficiaries to their rightful position.”<sup>333</sup> This is an interesting remedy because a court can give a government or its agencies deference concerning the means of how to recover the asset while clearly requiring the recovery.<sup>334</sup> Mary Christina Wood, a preeminent scholar in this field, explained that such a remedy is not unprecedented, as it is used frequently in Endangered Species Act and zoning lawsuits.<sup>335</sup>

Furthermore, if a trustee benefited financially from its breach of fiduciary duty, the court would likely order the trustee to relinquish these gains.<sup>336</sup> As an example, if the state sold a tract of land or mineral rights, they could have to discharge those profits. Lastly, if a trustee breaches their duty of loyalty, it is generally considered to be fraud, so compensatory and punitive damages would be available.<sup>337</sup>

Clearly, there are a wide range of remedies available that could advance the goals of environmental justice. There are a plethora of remedies available to environmental justice plaintiffs bringing a breach of fiduciary duty claim against a state. Importantly, the remedy can be tailored to best meet the needs of the plaintiffs and specific circumstances of the case at hand.

## V. PENNSYLVANIA AS A CASE EXEMPLAR

In this Section, the viability of using the modern public trust doctrine to bring environmental justice claims will be evaluated using

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<sup>329</sup> *Breach of Fiduciary Duty*, *supra* note 313.

<sup>330</sup> *Id.*

<sup>331</sup> Wood, *supra* note 317, at 114.

<sup>332</sup> *Id.*

<sup>333</sup> WOOD, *supra* note 128, at 182.

<sup>334</sup> Wood, *supra* note 317, at 114.

<sup>335</sup> *Id.* at 115.

<sup>336</sup> Paul Miller, *Justifying Fiduciary Remedies*, 63 UNIV. TORONTO L.J. 570, 570 (2013).

<sup>337</sup> Tamar Frankel, *Fiduciary Duties as Default Rules*, 74 OR. L. REV. 1209, 1225 (1995).

Pennsylvania as an example because it has a robust public trust doctrine.<sup>338</sup> On May 18, 1971, Pennsylvania adopted its Environmental Rights Amendment, which states:

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.<sup>339</sup>

Although the provision was adopted in 1971, the Environmental Rights Amendment laid dormant for many years.<sup>340</sup> However, new life was breathed into the public trust doctrine in Pennsylvania with the *Robinson Township* and *Pennsylvania Environmental Defense* cases.<sup>341</sup> Today, it is understood that Article I, Section 27 grants environmental rights to individuals and that Article I, Section 27 created a public trust to which the citizens are the beneficiaries.<sup>342</sup> This evolution is indicative of the growth that could occur in any state, but specifically in those states explored in this Note who possess a constitutional amendment and supporting case law.

A. *The Revitalization of the Public Trust Doctrine: Robinson Township v. Commonwealth*

In *Robinson Township v. Commonwealth*, the Supreme Court of Pennsylvania interpreted Article I, Section 27 as having three distinct purposes.<sup>343</sup> The primary, overarching purpose and duty for the state is to “conserve and maintain” the natural resources, the corpus of the trust.<sup>344</sup>

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<sup>338</sup> See generally Richard Rinaldi, *Dormant for Decades, the Environmental Rights Amendment of Pennsylvania's Constitution Recently Received a Spark of Life from Robinson Township v. Commonwealth*, 24 WIDENER L.J. 435 (2015).

<sup>339</sup> See PA. CONST. art. I, § 27; see also Craig, *supra* note 141, at 831.

<sup>340</sup> See generally Rinaldi, *supra* note 338.

<sup>341</sup> See discussion *infra* Sections V.A–B.

<sup>342</sup> Manahan, *supra* note 168, at 276.

<sup>343</sup> *Id.*

<sup>344</sup> See *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 957 (Pa. 2013) (noting that “[a]s trustee, the Commonwealth has a duty to refrain from permitting or encouraging the degradation, diminution, or depletion of public natural resources, whether such degradation, diminution, or depletion would occur through direct state action or indirectly.”).

In doing so, the court adopted a broad interpretation of what constituted natural resources.<sup>345</sup> The court held that the second clause of Article I, Section 27 created a public trust since it asserted common ownership of the state's public natural resources for people today and for future generations.<sup>346</sup> Thus, the beneficiaries of the trust are the people—both those presently living and those to come.<sup>347</sup>

The court interpreted the third clause of Article I, Section 27 to mean that the state must follow its fiduciary duties when administering the public trust.<sup>348</sup> As the trustee, Pennsylvania must manage the res of the trust with prudence, loyalty, impartiality.<sup>349</sup> Furthermore, “[t]he Commonwealth’s obligations as trustee to conserve and maintain the public national resources for the benefit of the people, including generations yet to come, create a right in the people to seek to enforce the obligations.”<sup>350</sup> The court noted that the duty of impartiality requires the state to balance the interests of all beneficiaries.<sup>351</sup> This includes balancing the interests of present and future beneficiaries.<sup>352</sup>

*Robinson Township* also provides insight into standing under the public trust doctrine because the plaintiffs included individuals, political organizations, and municipalities.<sup>353</sup> The court determined that all of the parties had standing.<sup>354</sup> The Supreme Court held that individuals possessed both a substantial and direct interest in the outcome of the litigation and that there was injury in fact since the legislation would affect aesthetic and recreational values of an area in which they lived.<sup>355</sup>

### B. *The Public Trust Doctrine in Pennsylvania Today*

Article I, Section 27 and recent case law interpreting it has provided an actionable environmental rights amendment.<sup>356</sup> The evaluation

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<sup>345</sup> “Natural resources” was interpreted to include “not only state-owned lands, waterways, and mineral reserves, but also resources that implicate the public interest, such as ambient air, surface and ground water, wild flora, and fauna.” *Id.* at 955.

<sup>346</sup> *Id.* at 954; BLUMM & WOOD, *supra* note 144, at 90.

<sup>347</sup> *Robinson Twp.*, 83 A.3d at 956 (“The terms of the trust are construed according to the intent of the settlor which, in this instance, is ‘the people.’”).

<sup>348</sup> *Id.* at 955–57.

<sup>349</sup> *Id.* at 957.

<sup>350</sup> *Id.* at 974.

<sup>351</sup> *Id.*

<sup>352</sup> *Id.* at 959.

<sup>353</sup> *Robinson Twp.*, 83 A.3d at 919–23.

<sup>354</sup> *Id.*

<sup>355</sup> *Id.*

<sup>356</sup> *Id.* at 950–51 (“A legal challenge pursuant to Section 27 may proceed upon alternative

of the public trust through private trust law principles established a fiduciary relationship between the state and its citizens.<sup>357</sup> The state's primary duty, included in Article I, Section 27, is to conserve and maintain the public natural resources.<sup>358</sup> Although this duty does not prevent *any* use of natural resources, it requires the state "to prevent and remedy the degradation, diminution, or depletion of . . . natural resources."<sup>359</sup> Furthermore, state and local governments must adhere to private trust law duties like loyalty, prudence, and impartiality.<sup>360</sup>

As explained earlier in this Note, many states recognize the public trust doctrine, albeit to varying degrees.<sup>361</sup> Pennsylvania provides a framework for how states can amend their constitution and how plaintiffs can develop the public trust through strategic litigation. Also, the current jurisprudence in Pennsylvania provides a guide for how plaintiffs can advance environmental justice claims. Right now, it is possible for Pennsylvania's citizens to challenge environmental injustice by bringing a breach of fiduciary duty claim against the state or its agencies. A plaintiff can argue that a government action—like a permit, regulation, or law—disproportionately impacts minorities and low-income populations, and thus constitutes a violation of the state's fiduciary duties as trustee.

C. *Using Chester Residents Concerned for Quality Living v. Seif to Illustrate an Environmental Justice Claim Based on the Public Trust Doctrine*

Armed with an understanding of the pitfalls of the EPC and the Civil Rights Act, the history of the public trust doctrine, and the modern public trust doctrine in a variety of states, it is apparent that there is a better way for environmental justice plaintiffs to recover for past wrongs and prevent future injustices. This Note explained how a public trust can be interpreted to grant citizens with a private cause of action.<sup>362</sup> It

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theories that either the government has infringed upon citizens' rights, or the government has failed in its trustee obligations, or upon both theories, given that the two paradigms, while serving different purposes . . . are also related and overlap to a significant degree.").

<sup>357</sup> Craig, *supra* note 141, at 831.

<sup>358</sup> See PA CONST. art. I, § 27; Kenneth T. Kristl, *The Devil Is in the Details: Articulating Practical Principles for Implementing the Duties in Pennsylvania's Environmental Rights Amendment*, 28 GEO. ENV'T L. REV. 589, 599–60 (2016).

<sup>359</sup> *Id.* at 599 (quoting *Robinson Twp.*, 83 A.3d at 957).

<sup>360</sup> Kristl, *supra* note 358, at 602–03.

<sup>361</sup> See *supra* Sections III.B.1–3.

<sup>362</sup> See *supra* Part IV.

proceeded to explore the mechanics of a breach of fiduciary duty claim, and current laws in Pennsylvania, to transform a proposed idea into a concrete solution.<sup>363</sup> This final Section provides an analysis of the concrete solution using an environmental justice fact pattern.<sup>364</sup> Since Pennsylvania's constitutional and case law concerning public trust has been fully explored, this Note will proceed to evaluate a potential claim using a famous Pennsylvania environmental justice case—*Chester Residents Concerned for Quality Living v. Seif*.<sup>365</sup>

In *Chester Residents Concerned for Quality Living v. Seif*, the residents of Chester, the plaintiffs, alleged that the state made Chester the singular location to dump the waste of nearby affluent communities.<sup>366</sup> The plaintiffs cited that Chester, despite being just one town and one-twelfth of Chester County, was home to five waste facilities while the rest of the county only had two waste facilities.<sup>367</sup> Specifically, sixty percent of the county's waste facilities were located in Chester, a primarily Black community.<sup>368</sup> Furthermore, Chester made up only eight percent of the population.<sup>369</sup> Due to the great disparity, the residents of Chester believed the state was racially discriminating against Chester.<sup>370</sup>

If the public trust doctrine existed in Pennsylvania at the time, the Residents of Chester (“Residents”) could have brought a breach of fiduciary duty claim against Pennsylvania and the Department of Environmental Protection (“DEP”). The Residents could have alleged that both

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<sup>363</sup> See *supra* Section IV.D; *supra* Part V.

<sup>364</sup> Although the plaintiffs in *Chester Residents Concerned for Quality Living v. Seif* sued using the Civil Rights Act, for the purposes of this Note, the facts of the case will be used to frame the proposed form of litigation: citizens bringing a breach of fiduciary duty claim against the state and the relevant agency. See *generally* *Chester Residents Concerned for Quality Living v. Seif*, 132 F.3d 925 (3d Cir. 1997).

<sup>365</sup> It is such an important case in the field of environmental justice because it seemed to establish a private right of action under Title VI (which prohibits the grant of federal funds to programs that discriminate based on a protected classification), but it was eventually dismissed as moot when the state revoked the waste permit. See Rick Kearns, *Chester Lawsuit Declared Moot by the U.S. Supreme Court, Environmental Justice Still Doable Through Court Despite Recent Supreme Court Decision*, EJNET (Oct. 6, 1998), <https://www.ejnet.org/chester/moot.html#:~:text=Chester%20Residents%20Concerned%20for%20Quality%20Living%2C%201998%20WL%20477242%2C%20an,of%20residents%20in%20Chester%2C%20Pennsylvania> [<https://perma.cc/5M88-Y8FU>].

<sup>366</sup> See *Chester Residents*, 132 F.3d at 927–28.

<sup>367</sup> Barry E. Hill, *Chester, Pennsylvania—Was It a Classic Example of Environmental Injustice?*, 23 VT. L. REV. 479, 524 (1999).

<sup>368</sup> Kearns, *supra* note 365.

<sup>369</sup> *Id.*

<sup>370</sup> *Chester Residents*, 132 F.3d at 927.

entities were violating minorities' rights to a clean and healthy environment. As this Note suggests, the Residents could have brought a breach of fiduciary duty claim and alleged that the state and DEP violated their duties as trustee by preserving the environment, the trust, unequally.

The Residents would have standing as beneficiaries of the public trust. Since Pennsylvania interprets the trust using private trust law,<sup>371</sup> a court would recognize that the Residents possessed a property interest in the natural resources of the state. Furthermore, they would meet the traditional requirements of standing.<sup>372</sup> The Residents have a concrete injury because they would have increased exposure to harmful pollutants and dirtier air.<sup>373</sup> These permitting decisions had real health affects as residents of Chester were more likely to develop cancer and were exposed to higher levels of air pollution.<sup>374</sup> Additionally, they could show causation because the permitting decision directly increased their exposure to pollutants. Lastly, the injury is redressable because the court can overturn the state's permit issuance and require the state to further consider environmental justice concerns in its decision-making process.

Since the Residents would have standing, they could bring a breach of fiduciary duty claim. As previously explained, they would have to demonstrate the existence of a fiduciary relationship, breach of a fiduciary duty, an injury, and causation.<sup>375</sup> In Pennsylvania, there is existing case law supporting that Article I, Section 27 created a public trust of which the state is trustee,<sup>376</sup> so the Residents would not have to labor to prove its existence. The Residents would need to prove that the state's decision concerning the res would cause harm.<sup>377</sup> Although the Residents may not be able to put a firm price on the amount of harm, they could reasonably calculate the damages that would result from placing another waste facility in Chester County. They could provide details of their own health impairments or scientific studies about the medical harms of living close to waste facilities.<sup>378</sup> Additionally, the Residents could cite the previously described statistics to show the disparity in treatment between

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<sup>371</sup> See Pa. Env't Def. Found. v. Commonwealth, 161 A.3d 911, 911 (Pa. 2017).

<sup>372</sup> See *supra* notes 302–05 and accompanying text.

<sup>373</sup> Hill, *supra* note 367, at 523.

<sup>374</sup> *Id.*

<sup>375</sup> See 4 *Elements of Breach*, *supra* note 306.

<sup>376</sup> See *supra* Sections V.A–B.

<sup>377</sup> See *supra* notes 318–20 and accompanying text.

<sup>378</sup> See Oxford University Press, *Living Near a Landfill Could Damage Your Health*, SCI. DAILY (May 24, 2016), <https://www.sciencedaily.com/releases/2016/05/160524211817.htm> [<https://perma.cc/XXG2-D5TF>].

beneficiaries of the trust.<sup>379</sup> Through this discussion, the Residents could demonstrate to the court the value of clean air and the harm that results from the government's decision to grant a permit to a waste facility to operate in Chester.

To succeed on their breach of fiduciary duty claim, the Residents would need to show causation.<sup>380</sup> In describing the harm they would suffer from the operation of the additional waste facility, the Residents would need to emphasize that the state is the cause of the harm. Although the waste facility would be the party emitting the harmful pollutants, the state and regulating agency caused the harm through their decision to grant approval to the facility to operate. Thus, the permitting decision and approvals are the cause of the Residents' injury.

The most difficult element for the Residents to prove would be that the state breached its fiduciary duties. In this case, the Residents could claim that the state violated its duty of prudence by approving the permit for the waste facility.<sup>381</sup> The Residents could argue that the agency improperly managed the trust by creating such a high concentration of pollutants in an insular area. The Residents could also argue that the state plainly failed to consider the disproportionate impacts of its decision. While a state environmental agency should utilize neutral decision-making processes,<sup>382</sup> that does not mean it is proper for an agency to ignore the disproportionate impacts on races from their environmental decisions.<sup>383</sup> As trustee, DEP has an increased burden to review decisions about the res of the trust, the environment, and natural resources carefully. Thus, when there is a history of discrimination that created inequality, the state, as trustee, could not continue to manage the trust "neutrally" when it would still give more to some beneficiaries than others.

In addition, the Residents could argue that the state breached its fiduciary duty by violating its duty of impartiality.<sup>384</sup> While the public trust doctrine doesn't prevent pollution or the expenditure of natural resources, it does require the trustee to preserve and maintain the environment and resources for future generations.<sup>385</sup> Here, the Residents could argue that by granting a permit to operate another waste facility

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<sup>379</sup> See notes 366–69 and accompanying text.

<sup>380</sup> See 4 *Elements of Breach*, *supra* note 306.

<sup>381</sup> See *supra* notes 275–79 and accompanying text.

<sup>382</sup> Hill, *supra* note 367, at 524.

<sup>383</sup> *Id.*

<sup>384</sup> See *supra* notes 280–83 and accompanying text.

<sup>385</sup> PA CONST. art. I, § 27; *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 957 (Pa. 2013).

in Chester, current inhabitants would suffer more than other beneficiaries of the trust in Chester County. The Residents could argue that by putting so many waste facilities in one area,<sup>386</sup> the area would have lingering issues for years to come which would disproportionately affect the interests of current and future beneficiaries of the environmental trust.

Lastly, the Residents could argue that the state violated its duty of loyalty.<sup>387</sup> The Residents could argue that the state placed the interests of industry above the interests of the beneficiaries by granting a permit to operate in an already highly polluted area.<sup>388</sup> In their claim, the Residents could emphasize their environmental rights under Article I, Section 27. The public trust doctrine of Pennsylvania bestows environmental rights by granting "a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment" and instructing the Commonwealth to "conserve and maintain them for the benefit of all the people."<sup>389</sup> Thus, the incalculable benefits and general interests of the beneficiaries should be the motivating factor behind all government decisions regarding the environment.

As evident through this example, environmental justice plaintiffs would not need to prove discriminatory intent to obtain a remedy through a breach of fiduciary duty claim. This hypothetical application illustrates how the public trust doctrine can be used to the benefit of environmental justice plaintiffs. Pennsylvania is the model example, but there are other states where such action is currently possible or will likely be in the future. In summary, using the public trust doctrine to advance environment justice is a viable course of action.

## CONCLUSION

"Injustice anywhere is a threat to justice everywhere."<sup>390</sup> While there is awareness about environmental justice and its goals, minorities and low-income communities are still suffering from disproportionate exposures to pollution and other environmental hazards.<sup>391</sup> These communities are in need of an additional means of bringing environmental

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<sup>386</sup> Kearns, *supra* note 365.

<sup>387</sup> See *supra* notes 284–90 and accompanying text.

<sup>388</sup> Kearns, *supra* note 365.

<sup>389</sup> *Id.*

<sup>390</sup> Martin Luther King Jr., *Letter from Birmingham Jail*, 26 U.C. DAVIS L. REV. 835, 836 (1993).

<sup>391</sup> See *supra* notes 4–6 and accompanying text.

justice claims to assist them in obtaining meaningful results and furthering the goals of the movement. As the law stands, heavy burdens are placed upon plaintiffs bringing suit through the EPC or the Civil Rights Act.<sup>392</sup> Both the EPC and the Civil Rights Act have proven to be unfit tools through which to achieve change due to the requirement to show discriminatory intent to succeed and obtain a remedy.<sup>393</sup> Thus, it is imperative that a new legal avenue is paved to remedy discriminatory decisions and prevent minorities and low income populations from being disproportionately subjected to harmful effects moving forward.

As John Dernbach eloquently expressed, “[t]o vindicate public trusts for natural resources, environmental and natural resources lawyers need to become better trust lawyers.”<sup>394</sup> States’ public trust doctrines can provide environmental justice litigants with new hope. What once was an antiquated and limited common law doctrine is now an expanding and increasingly applicable legal doctrine.<sup>395</sup> Over time, his doctrine has been adopted across the United States through constitutional provisions and common law.<sup>396</sup> In its modern form, the public trust gives citizens a right to a clean and healthy environment and places various duties upon the states to preserve and maintain the environment.<sup>397</sup> Thus, this Note proposes that plaintiffs fight against environmental injustice in state courts by alleging that a state, with an environmental public trust, breached its fiduciary duties pursuant to the public trust doctrine. By analyzing the public trust through private trust law, citizens are empowered to challenge the decisions or actions of the state. Citizens could sue the state for breaching its fiduciary duties as trustee of the environment.<sup>398</sup> If the state is found to have violated these duties, citizens—including environmental justice plaintiffs—would be entitled to relief.<sup>399</sup>

Applying private trust law to determine how states should manage their environmental trusts is not an abstract or far-fetched concept, but a new reality. Pennsylvania has already adopted such an interpretation.<sup>400</sup> While Pennsylvania is at the forefront of this movement, the structure necessary to create a broad, actionable public trust doctrine

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<sup>392</sup> See *supra* Part II.

<sup>393</sup> See *supra* notes 72–86, 101–05 and accompanying text.

<sup>394</sup> Dernbach, *supra* note 298, at 84.

<sup>395</sup> See *supra* Section III.A.

<sup>396</sup> See *supra* Sections III.B.1–3.

<sup>397</sup> See *supra* Sections III.A and III.B.1–3.

<sup>398</sup> See *supra* Part IV.

<sup>399</sup> See *supra* Section IV.E.

<sup>400</sup> See *supra* Part V.

like Pennsylvania's exists in several other states. As previously expressed, there are several states with strong public trust constitutional provisions or with a robust application of the doctrine based on case law;<sup>401</sup> these states have the foundation to expand the doctrine. Through strategic litigation, meaningful court decisions, and legislative action, the public trust doctrine can continue to evolve and ultimately function as a tool for environmental justice advocates. By evaluating trust law through private trust law concepts, environmental justice plaintiffs obtain a clear path, without significant obstacles, to obtain relief and take a step toward true equality.

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<sup>401</sup> See *supra* Sections III.B.1–3.