

Localizing the Public Trust

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The public trust doctrine is the manifestation of a simple principle: certain natural resources are too important to entrust to private parties. Instead, those natural resources are held by the government in trust for the public. When we think of the contemporary public trust doctrine, we usually think of the doctrine as a state-level phenomenon. After all, the State is the sovereign entrusted with ownership of the public trust.

But the doctrine also includes local governments, which play important and substantive, if under-appreciated, roles. Missing from the conversation, however, is how local governments should be incorporated into the doctrine. Should local governments be permitted autonomy as co-trustees of the public trust? Do we trust local governments to safeguard public trust assets?

This Article develops a framework for the normative relationship between state and local governments in the public trust context. Doing so formally recognizes the role of local governments, thus localizing a doctrine that exists almost exclusively at the state level. This Article begins by reframing the doctrine as part of the lived experience of the public rather than merely a tool of the judiciary. Next, this Article catalogs the benefits of localizing the public trust doctrine, including the impacts local actors already have on the doctrine, localism's traditional benefits, environmental justice, and environmental federalism.

This Article then proposes localizing the public trust doctrine through three principles: (1) minimum state requirements; (2) in-

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creased local autonomy; and (3) shared responsibilities between local and state governments. This framework mirrors cooperative federalism and shares its advantages. Finally, the Article looks at local climate adaptation as a case study of how states and local governments can begin localizing the public trust doctrine.

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“Failure of the [state] Commission to approve the Town’s impermanent seasonal access decking would render a significant hardship to the Town’s long-term efforts to afford the physically disabled public with convenient and safe access to the dry and wet sand public beach.”²

Town of Carolina Beach, North Carolina, in a variance petition to North Carolina Coastal Resources Commission

2. Letter from Christine A. Goebel to the Coastal Res. Comm’n, attach. C (Feb.5, 2021) (on file with N.C. Dep’t of Env’t Quality).

“The public has expressed a legitimate concern that homeowners have been illegally placing signs on public property with the goal of excluding the public from the public beaches . . . It’s disappointing that the people who were elected to serve the public have responded to this concern by adopting an ordinance which only makes it easier to exclude the public from areas in which they are constitutionally permitted to be.”³

Aaron Getty, Sarasota County Assistant Public Defender

“Last year, city officials discovered that waterfront neighborhoods were full of fake ‘No Parking’ signs. Now, a new ordinance will allow the City Council to create designated parking spots near rights of way that provide public access to Narragansett Bay.”⁴

Antonia Noori Farzan, *The Providence Journal*

I. INTRODUCTION

In September 2022, California passed a law to prohibit hard mineral extraction from tidelands and submerged lands.⁵ The law notes that existing law allowed the State Lands Commission to grant leases for hard minerals located in tidelands and submerged lands.⁶ Such seabed mineral mining was, according to the law, “not consistent with the public interest, public trust, or public rights to navigation and fishing that are three key principles of the common law public trust doctrine embodied in the California Constitution[.]”⁷ The law mirrors similar laws in Oregon and Washington that likewise prohibit seabed mining.⁸

California’s law is significant, however, in its explicit recognition of the role of local governments. The law expressly targets the State

3. Isaac Eger, *Sarasota Just Lost Some More of its Public Beaches*, SARASOTA MAGAZINE (Oct. 26, 2021), <https://www.sarasotamagazine.com/news-and-profiles/2021/10/sarasota-beach-privatization-laws> [<https://perma.cc/UR4U-MHEZ>].

4. Antonia Noori Farzan, *Warwick Is Looking at Creating More Parking Near Shoreline Rights of Way*, PROVIDENCE J. (July 19, 2022), <https://www.providencejournal.com/story/news/local/2022/07/19/warwick-beach-parking-shoreline-rights-of-way-public-access/10085602002/> [<https://perma.cc/G6AM-SBJW>].

5. California Seabed Mining Prevention Act, 2022 Cal. Stat. ch. 433.

6. *Id.* § 2(k).

7. *Id.* § 2(a).

8. *See id.* § 2(i) (“The legislatures of the States of Oregon and Washington have both passed analogous legislation to prohibit seabed mining in their state waters, in 1991 and 2021, respectively.”).

Land Commission *and* local governments as “local trustee[s] of granted public trust lands[.]”⁹

While the practice of seabed mineral mining is increasingly popular,¹⁰ the attention given to local governments in the context of the public trust doctrine is not. Indeed, as a state-level doctrine, the public trust doctrine and its intersection with local governments is rarely discussed.¹¹ I have written previously on the impacts of local governments on the doctrine and the need to include substate entities in the conversation.¹² I previously argued that local governments have substantial, if unrecognized, impacts on the public trust doctrine through their roles as landowners, regulators, and enforcers.¹³ These local impacts on the doctrine are inherent (and perhaps inevitable) in how the doctrine has been formulated—with its changing legal foundations, purposefully malleable scope, and situs at conflict points we have chosen to delegate to local governments to resolve.¹⁴ In short, there *is* a local public trust doctrine, but my earlier work did not attempt to formulate *how* local governments should be incorporated into the public trust doctrine. This Article seeks to do just that.

First, let us define our terms. The public trust doctrine is the principle that certain natural resources are so important we entrust them to the sovereign for the benefit of the public.¹⁵ Although it is an ancient principle,¹⁶ the breadth of that premise—and the “radical po-

9. *Id.* § 5(a).

10. See Katherine A. Miller et al., *An Overview of Seabed Mining Including the Current State of Development, Environmental Impacts, and Knowledge Gaps*, 4 FRONTIERS IN MARINE SCI. 1, 2 (Jan. 10, 2018), <https://www.frontiersin.org/articles/10.3389/fmars.2017.00418/full> [<https://perma.cc/LT73-53SY>] (“Rising demand for minerals and metals, in tandem with the depletion of land-based resources, has led to a surge of interest in marine mineral resources.”). Given its potential for environmental harm and long-term ecosystem degradation, seabed mineral mining is coming under increased scrutiny. *Id.*

11. See, e.g., MICHAEL C. BLUMM & MARY CHRISTINA WOOD, THE PUBLIC TRUST DOCTRINE IN ENVIRONMENTAL AND NATURAL RESOURCES LAW 5 (3d ed. Supp. 2021) (describing the analysis of the role of the public trust doctrine in local government law “overdue”).

12. See Sean Lyness, *The Local Public Trust Doctrine*, 34 GEO. ENV'T L. REV. 1 (2021).

13. See generally *id.*

14. See generally *id.*

15. See, e.g., Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 458 (1892); see also PPL Mont., LLC v. Montana, 565 U.S. 576, 603 (2012) (noting that Montana asserted its public trust doctrine as “concern[ing] public access to the waters above those [river]beds for purposes of navigation, fishing, and other recreational uses.”). The principle is sometimes referred to as “the public trust” while its legal-specific manifestation is referred to as “the public trust doctrine.”

16. Though just how ancient is up for debate. See, e.g., J.B. Ruhl & Thomas A.J. McGinn, *The Roman Public Trust Doctrine: What Was It, and Does It Support an Atmospheric Trust?*, 47

tential” it holds—has seen the doctrine flourish over the past fifty years.¹⁷ Roughly coinciding with the creation of the federal environmental statutory scheme in the 1970s, the public trust doctrine has ascended as a mechanism for environmental advocacy.¹⁸ In fits and starts, the doctrine has been extended to environmental problems both old and new.¹⁹ As a result, the doctrine has captured the imagination of courts²⁰ and commentators,²¹ all of whom have been seduced by its pedigree and potential.²²

Despite its promise, however, the doctrine is showing its limits. To be fair, the cracks in the dam are the result of climate change, a prob-

ECOLOGY L.Q. 117, 126 (2020) (“There was a Roman public trust doctrine. The Romans did not call it that, and it was by no means as fully developed as the American doctrine.”).

17. WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW: AIR AND WATER § 2.20, at 155 (1986) (“It is a doctrine with both a radical potential and indifferent prospects.”); see also Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 474 (1970) (“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.”).

18. See, e.g., Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources Law: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 643 (1986) (“Since 1970 the public trust doctrine indisputably has had a major impact on litigation brought by parties on behalf of natural resource protection[.] . . . Numerous parties have relied on modern public trust theories to support their litigation objectives and in turn the courts have adopted those theories.”).

19. See, e.g., *Juliana v. United States*, 217 F. Supp. 3d 1224, 1233 (D. Or. 2016), *overruled on other grounds by* 947 F.3d 1159 (9th Cir. 2020) (children’s trust case urging application of public trust principles to the atmosphere to address climate change); see also *White Bear Lake Restoration Ass’n ex rel. State v. Minn. Dep’t of Nat. Res.*, 946 N.W.2d 373, 385–87 (Minn. 2020) (advocating unsuccessfully for application of public trust doctrine to groundwater).

20. See, e.g., *City of Montpelier v. Barnett*, 49 A.3d 120, 127 (Vt. 2012) (“State trusteeship over navigable waters has a lengthy and somewhat mythic pedigree dating back to Roman and English law.”); see also *Champlin’s Realty Assocs., L.P. v. Tilson*, 823 A.2d 1162, 1166 (R.I. 2003) (“Since ancient times, the law has recognized the unique status of tidal lands through the public trust doctrine. The Greek philosophers set the foundation for the public trust doctrine, which first was codified in the second century Institutes and Journal of Gaius.”).

21. See generally Charles F. Wilkinson, *The Headwaters of the Public Trust: Some of the Traditional Doctrine*, 19 ENV’T L. 425 (1989); Michael C. Blumm & Courtney Engel, *Proprietary and Sovereign Public Trust Obligations: From Justinian and Hale to Lamprey and Oswego Lake*, 43 VT. L. REV. 1 (2018); Hope M. Babcock, *The Public Trust Doctrine: What a Tall Tale They Tell*, 61 S.C. L. REV. 393 (2006); Robin Kundis Craig, *Adapting to Climate Change: The Potential Role of State Common Law Public Trust Doctrines*, 34 VT. L. REV. 781 (2010); Mary Christina Wood, *Advancing the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations (Part I): Ecological Realism and the Need for a Paradigm Shift*, 39 ENV’T L. 43 (2009); Peter Manus, *To a Candidate in Search of an Environmental Theme: Promote the Public Trust*, 19 STAN. ENV’T L.J. 315 (2000).

22. I count myself among the entranced. See Lyness, *supra* note 12.

lem so gargantuan and so entrenched that any legal doctrine would be stretched thin to address it.²³ But that has not stopped advocates from seeking to use the public trust doctrine to tackle the problem, most notably in a series of cases brought by Our Children's Trust on behalf of young people nationwide that attempt to use the doctrine to establish legally enforceable rights to "a healthy atmosphere and stable climate."²⁴ And while these climate cases are symbolically important and politically energizing,²⁵ they have thus far largely failed to convince the state and federal judiciary of the doctrine's applicability.²⁶ Whether because of prudential concerns, jurisdictional hurdles, or substantive defects, the climate cases have met an unfriendly judiciary.²⁷

23. See, e.g., Maxine Burkett, *Behind the Veil: Climate Migration, Regime Shift, and a New Theory of Justice*, 53 HARV. C.R.-C.L. L. REV. 445, 450 (2018) (noting that in light of climate change's massive impacts "perhaps the one certainty is that our current law and policy infrastructure is not up to the task"); see also Robin Kundis Craig, "Stationarity is Dead"—*Long Live Transformation: Five Principles for Climate Change Adaptation Law*, 34 HARV. ENV'T L. REV. 9, 17 (2010) ("[E]xisting environmental and natural resources laws are preservationist, grounded in the old stationarity framework that no longer reflects ecological realities.").

24. See generally OUR CHILDREN'S TRUST, <https://www.ourchildrenstrust.org/> [<https://perma.cc/BGD7-JPXL>] (last visited Nov. 4, 2023). These so-called "atmospheric trust" cases are distinct from the climate cases brought by state and local governments, which center on products liability claims. See, e.g., Sean Lyness, *Tangled Up in Procedure: The State and Local Climate Cases After Baltimore and Ford*, HARV. ENV'T L. REV. ONLINE (Oct. 8, 2021), <https://journals.law.harvard.edu/elr/2021/10/08/tangled-up-in-procedure-the-state-and-local-climate-cases-after-baltimore-and-ford/> [<https://perma.cc/8X2V-5CVV>].

25. See, e.g., Umair Irfan, *21 Kids Sued the Government Over Climate Change. A Federal Court Dismissed the Case*, VOX (Jan. 17, 2020) **Error! Hyperlink reference not valid.** <https://www.vox.com/2020/1/17/21070810/climate-change-lawsuit-juliana-vs-us-our-childrens-trust-9th-circuit> [<https://perma.cc/9GBF-WEYB>] (noting that "[w]hile the 9th Circuit ruling was a setback for climate activists, many are undeterred from using the courts to fight climate change and hold polluters accountable."); see also Henry Carnell, *What to Know About the Groundbreaking Climate Change Lawsuit in Montana*, MOTHER JONES (June 26, 2023) **Error! Hyperlink reference not valid.** <https://www.motherjones.com/environment/2023/06/held-montana-climate-change-lawsuit-constitution/?ref=the-wave.net> [<https://perma.cc/73LG-NRRJ>] (Interview with Michael Gerrard, "[A] successful ruling for the plaintiffs could be very energizing to young people and climate activists and lawyers around the country and indeed, around the world.").

26. See, e.g., *Juliana v. United States*, 947 F.3d 1159, 1175 (9th Cir. 2020) (finding no standing); see also *Chernaik v. Brown*, 475 P.3d 68, 84 (Or. 2020) (dismissing case); *Piper ex rel. Aji P. v. State*, 480 P.3d 438 (Wash. Ct. App. 2021) (upholding the lower court's dismissal), review denied, 497 P.3d 350 (Wash. 2021) (declining petition for certiorari, thereby upholding court of appeals dismissal of case); *but see Held v. Montana*, No. CDV-2020-307 (1st Dist. Ct. Mont., Aug. 14, 2023).

27. See, e.g., *Juliana v. United States*, 947 F.3d 1159, 1175 (9th Cir. 2020) (finding no standing); see also *Chernaik v. Brown*, 475 P.3d 68, 84 (Or. 2020) (dismissing case); *Piper ex rel. Aji P. v. State*, 497 P.3d 350 (Wash. 2021) (declining petition for certiorari, thereby upholding court of appeals dismissal of case).

Enter local governments.²⁸ Local environmental efforts have always been something of a peripheral concern: why take small actions, the conventional logic goes, when most environmental problems are decidedly not small? Indeed, many of the justifications for the federal government's role in environmental law have focused on the supposedly ineffective and inefficient role of state and local governments.²⁹

But in the past decade or so, the pendulum has begun to swing towards local action. Perhaps local governments are frustrated by the lack of federal action (statutory or administrative) on environmental issues,³⁰ disheartened by the solidifying of political lines on environmental issues,³¹ or resolved to face the existential threat of climate change by any means necessary.³² Whatever the cause, the effect is that local governments have been increasingly ambitious and proactive on environmental issues.³³

28. This Article uses the terms "local government" and "locality" to mean sub-state governing entities that have authority to enforce and regulate through ordinances, by-laws, and other measures. The terms include, but are not limited to, county governments, cities, towns, and townships – all 38,000+ of them. See Rick Su, *Democracy in Rural America*, 98 N.C. L. REV. 837, 840 (2020) ("There are nearly 39,000 local governments in the United States. But looking at the dearth of existing literature, one might come to believe that there are only a handful. Cities, particularly the nation's largest, dominate the conversation."). In so doing, I recognize that any reference to "local governments" or "localities" is a gross generalization. Such is the peril of any academic work that attempts to understand and explore local governments. See Dave Owen, *Cooperative Subfederalism*, 9 U.C. IRVINE L. REV. 177, 197 (2018) ("[L]ocal governance in the United States is diverse, and none of the generalizations made here will apply equally across the entire local government realm.").

29. See, e.g., Katherine A. Trisolini, *All Hands on Deck: Local Governments and the Potential for Bidirectional Climate Change Regulation*, 62 STAN. L. REV. 669, 674–75 (2010) (noting that "local governments are largely overlooked as relevant actors in academic discussions of environmental law.").

30. See, e.g., Lisa Friedman, *Biden 'Over-Promised and Under-Delivered' on Climate. Now, Trouble Looms in 2022*, N.Y. TIMES (Jan. 4, 2022), <https://www.nytimes.com/2022/01/04/climate/biden-climate-change.html> [on file with the journal]; see also Nadja Popovich, et al., *The Trump Administration Rolled Back More Than 100 Environmental Rules. Here's the Full List*, N.Y. TIMES (Jan. 20, 2021), <https://www.nytimes.com/interactive/2020/climate/trump-environment-rollbacks-list.html> [on file with the journal].

31. See, e.g., Sung Eun Kim & Johannes Urpelainen, *The Polarization of American Environmental Policy: A Regression Discontinuity Analysis of Senate and House Votes, 1971–2013*, 34 REV. OF POL'Y RSCH. 456 (2017).

32. See, e.g., *Morning Report: San Diego's Almost Impossible Climate Dream*, VOICE OF SAN DIEGO (Feb. 24, 2022), **Error! Hyperlink reference not valid.**<https://voiceofsandiego.org/2022/02/24/morning-report-san-diegos-almost-impossible-climate-dream/> [<https://perma.cc/NXL3-CWAQ>] ("County leaders are pushing San Diego to eliminate planet-warming gasses in less than 15 years, a full decade faster than the state.").

33. See, e.g., John R. Nolon, *In Praise of Parochialism: The Advent of Local Environmental Law*, 26 HARV. ENV'T L. REV. 365 (2002); see also Katrina M. Wyman & Danielle Spiegel-Feld, *The*

This Article is precipitated by the convergence of these two trends: the public trust doctrine's recent limitations and nascent local environmentalism. The goal is to create a framework for articulating the normative relationship between local and state governments in the public trust doctrine context. How should we accommodate local preferences in the public trust context? Do we trust local governments as trustees of the doctrine? How can state and local governments share their obligations and responsibilities under the doctrine?

In answering these questions, this Article's title is precisely chosen. I mean "localizing" in three senses: first, "localizing" in the sense that the doctrine as presently understood makes little accommodation for or consideration of the role of local governments, and thus this Article seeks to formally recognize local governments under the doctrine; second, "localizing" as opposed to "localist," as this framework does not assert a default preference for local action over state;³⁴ and third, "localizing" in the present participle tense, as a process, not simply an end goal. Localizing the public trust in this way provides a means for states and local governments to navigate their shared responsibilities under the public trust.

Such a recontextualization of the doctrine is timely, particularly in light of the growing body of scholarship investigating and empowering local government action on environmental issues.³⁵ This increased attention to local governments has included scholarship re-examining the role of local governments in a federalist system.³⁶ Localizing the public trust continues and furthers this trend.

Urban Environmental Renaissance, 108 CAL. L. REV. 305, 337-47 (2020) (detailing the various ways that cities are "using their enhanced capabilities to advance the environmental agenda," including building green infrastructure, reducing air pollution, and adapting to climate change).

34. In this clarification I am indebted to Sarah Fox who makes a similar argument with respect to environmental federalism in *Localizing Environmental Federalism*, 54 U.C. DAVIS L. REV. 133, 178-79 (2020) ("Importantly, *localized* environmental federalism does not necessarily mean *localist* environmental federalism. To localize environmental federalism means to explicitly acknowledge and account for local actors, and for the vulnerabilities in authority that they may confront. It does not put a thumb on the scale in favor of local action over choices by other levels of government, or even describe when such local action may be desirable.").

35. See, e.g., Wyman & Spiegel-Feld, *supra* note 33, at 349. See also Fox, *supra* note 34; Owen, *supra* note 28; John R. Nolon, *Calming Troubled Waters: Local Solutions*, 44 VT. L. REV. 1 (2019); Alice Kaswan, *Climate Adaptation and Land Use Governance: The Vertical Axis*, 39 COLUM. J. ENV'T. L. 390 (2014).

36. See Nestor M. Davidson, *Cooperative Localism: Federal-Local Collaboration in an Era of State Sovereignty*, 93 VA. L. REV. 959 (2007). See also Fox, *supra* note 34; Owen, *supra* note 28; Shannon M. Roesler, *Federalism and Local Environmental Regulation*, 48 U.C. DAVIS L. REV. 1111

I do not labor under the illusion that localizing the public trust doctrine is a cure for all of its ills. The public trust doctrine has roughly as many forms as states (so, approximately fifty),³⁷ and not all are identical.³⁸ Localizing the public trust doctrine does nothing to change its established delineations or alter its current forms.³⁹ I acknowledge that for some states with latent or anemic versions of the doctrine, localizing the doctrine will accomplish little.⁴⁰

For other states, however, where the public trust doctrine shapes both governmental and private actors' behaviors, there is a role in the public trust doctrine for local governments. The size and extent of that role will differ depending on the state and depending on the scope of that state's public trust doctrine. But, despite the highly

(2015); Nestor M. Davidson, *Localist Administrative Law*, 126 YALE L.J. 564 (2017); Nestor M. Davidson, *The Dilemma of Localism in an Era of Polarization*, 128 YALE L.J. 954 (2019); Sarah Fox, *Why Localizing Climate Federalism Matters (Even) During a Biden Administration*, 99 TEX. L. REV. ONLINE 122 (2021).

37. See, e.g., Hope M. Babcock, *Using the Federal Public Trust Doctrine to Fill Gaps in the Legal Systems Protecting Migrating Wildlife from the Effects of Climate Change*, 95 NEB. L. REV. 649, 688 (2017) (noting that another scholar suggests there are fifty-one public trust doctrines: "one in every state and a federal version"). The existence of a federal public trust, however, remains in dispute. See, e.g., Bennett J. Ostdiek, *Public Rights and Sovereign Power: Rethinking the Federal Public Trust Doctrine*, 51 TEX. ENV'T L.J. 215, 220 (2021) (contending that there is a federal public trust doctrine, but acknowledging that "some scholars might consider an inquiry into the nature of the federal public trust doctrine misguided."). The doctrine may also apply to tribal governments. See, e.g., Erin Ryan et al., *Environmental Rights for the 21st Century: A Comprehensive Analysis of the Public Trust Doctrine and Rights of Nature Movement*, 42 CARDOZO L. REV. 2447, 2536 (2021) ("North American tribes and First Nations have recently acted formally to codify a number of diverse and far-reaching rights of nature laws. While these newly recognized rights may represent a significant shift in the legal landscape, for many tribes, they simply codify what they have always held to be true—that nature is sacred and that people and the environment are inextricable.").

38. See, e.g., Robin Kundis Craig, *A Comparative Guide to the Eastern Public Trust Doctrines: Classifications of States, Property Rights, and State Summaries*, 16 PENN STATE ENV'T L. REV. 1, 4 (2007) ("[F]ar more often than occurs in the later-settled West, public trust use rights in the East intrude—and for practical purposes always have intruded—upon privately owned riparian and littoral property."); see also Robin Kundis Craig, *A Comparative Guide to the Western States' Public Trust Doctrines: Public Values, Private Rights, and the Evolution Toward an Ecological Public Trust*, 37 ECOLOGY L.Q. 53, 56 (2010) ("[W]estern states are more arid than eastern states, resulting in a consciousness of the importance of fresh water that pervades many of these states' public trust doctrines.").

39. For example, this Article does not (and need not) answer the question whether certain additional natural resources—groundwater, the atmosphere, etc.—are or should be part of the doctrine.

40. See Craig, *A Comparative Guide to the Eastern Public Trust Doctrines: Classification of States, Property Rights, and State Summaries*, *supra* note 38, at 24 ("Alabama has a poorly developed public trust doctrine that has never been expanded beyond the basic federal doctrine. Similarly, while recognizing log floatation, Missouri has not otherwise expanded its public trust doctrine beyond the federal test.").

particularized nature of localization, there is still a benefit to tracing its general contours. Localizing the public trust doctrine offers an opportunity to formally recognize the role of local governments in the doctrine and empower them to act. As a policy choice, localizing the public trust doctrine can enable better environmental outcomes—including, as I detail here, local action on climate adaptation—as well as align the doctrine with existing local impacts, inure the benefits of localism to the doctrine, and further environmental justice. Whether localizing the public trust occurs by judicial adoption, state regulation, or legislative enactment, this Article does not prescribe a method. But it does detail its substance and its promise.

This Article proceeds in four parts. Part II explores the framing of the modern public trust doctrine as the province of the judiciary. It argues for a public trust rooted in the lived experiences of the public. Part III articulates the benefits of a localized public trust, recognizing the roles local actors already play and identifying how localism's benefits are uniquely suited the doctrine. It further argues that localizing the public trust doctrine can be a tool to promote environmental justice and environmental federalism. Part IV proposes localizing the public trust doctrine through three principles: (1) minimum state requirements; (2) increased local autonomy; and (3) shared responsibilities between local and state governments. These principles provide a framework for the normative relationship between state and local governments in the public trust context, which intends to legitimize progressive local governmental actions and hinder regressive ones. The principles also mirror cooperative federalism and share its advantages. Finally, Part V demonstrates how localizing the public trust can work through a case study on local climate adaptation.

II. WHOSE PUBLIC TRUST?

A. The Saxonian Trust: Judicially Centered

Before envisioning a future for the public trust doctrine, it is important to understand the doctrine as it exists today. Although the public trust doctrine has ancient roots,⁴¹ its modern reinvention is

41. The doctrine is, no doubt, old. Most scholars trace the doctrine back to English antecedents with Roman roots. For a discussion of the Roman view of the public trust doctrine see Ruhl & McGinn, *supra* note 16.

credited to Joseph Sax.⁴² In a persuasive and influential 1970 article, Sax pointed to the public trust doctrine as a potential mechanism for achieving positive environmental outcomes.⁴³ While the doctrine was not new in American law, it had not been particularly active since the nineteenth century.⁴⁴ As the so-called “environmental decade”⁴⁵ dawned, Sax turned to public trust as a promising path forward.

As much a philosophy of the relationship between governments, the public, and natural resources as it is a litigation and advocacy tool, Sax’s vision of the public trust was a “legal approach to resource management problems.”⁴⁶ Sax saw the doctrine as “a tool of general application for citizens” with sufficient “breadth and substantive content” to enforce environmental quality standards against the

42. There is a cottage industry of law review articles that address Joseph Sax’s vision of the public trust doctrine, all of them crediting him as the public trust doctrine’s modern creator. *See, e.g.*, Richard Delgado, *Our Better Natures: A Revisionist View of Joseph Sax’s Public Trust Theory of Environmental Protection, and Some Dark Thoughts on the Possibility of Law Reform*, 44 VAND. L. REV. 1209 (1991); Carol M. Rose, *Joseph Sax and the Idea of the Public Trust*, 25 ECOLOGY L.Q. 351 (1998); Gerald Torres, *Joe Sax and the Public Trust*, 45 ENV’T L. 379, 380 (2015) (“Most legal observers would agree that credit for the resurrection of the modern public trust doctrine ought to be placed at the feet of one scholar: Professor Joseph Sax.”); Holly Doremus, *In Honor of Joe Sax: A Grateful Appreciation*, 39 VT. L. REV. 799, 801 (2015) (“Frequently those seeking to sum up Professor Sax’s career have described him as the architect of the modern public trust doctrine.”). After Sax’s passing in 2014, the Michigan Journal of Environmental & Administrative Law published a number of tributes. *See, e.g.*, Zygmunt Plater, *Joseph Sax, a Human Kaleidoscope*, 4 MICH. J. ENV’T & ADMIN. L. 157 (2014). I, like all other scholars of the public trust, am deeply indebted to Sax.

43. Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970). As of 2020, Sax’s article had been cited by 47 cases and over 1,100 articles. Michael C. Blumm & Zachary A. Schwartz, *The Public Trust Doctrine Fifty Years After Sax and Some Thoughts on Its Future*, 44 PUB. LAND & RES. L. REV. 1, 2 n.1 (2021).

44. *See, e.g.*, William D. Araiza, *Democracy, Distrust, and the Public Trust: Process-Based Constitutional Theory, the Public Trust Doctrine, and the Search for a Substantive Environmental Value*, 45 UCLA L. REV. 385, 386–87 (1997) (“The last twenty-five years have witnessed a remarkable renaissance of the public trust doctrine . . . The rebirth of the public trust doctrine is directly attributable to the publication of Joseph Sax’s seminal 1970 article calling attention to the doctrine[.]”).

45. *See, e.g.*, Kenneth A. Manaster, *Justice Stevens, Judicial Power, and the Varieties of Environmental Litigation*, 74 FORDHAM L. REV. 1963, 1963 (2006) (“1970 was a big year for environmental law. The first of the major federal environmental statutes, the National Environmental Policy Act (“NEPA”), went into force. The first Earth Day was observed. The federal Clean Air Act underwent revolutionary changes, and the United States Environmental Protection Agency (“EPA”) was created. Many states also passed ambitious environmental legislation and created new agencies. 1970, as is often said, began the ‘Environmental Decade,’ when the basic blueprint was drawn for the building of modern environmental law.”).

46. Sax, *supra* note 43, at 474.

government.⁴⁷ Notably, Sax intended the doctrine to apply to both “traditional” public trust assets like navigable waters and their shores as well as other natural resources that were not traditionally covered by the doctrine.⁴⁸

Sax’s version of the public trust was, however, limited to its judicial application. This was partly due to his analytical methods; his seminal article traced the ways in which judicial intervention had (and had not) safeguarded public trust assets.⁴⁹ This judicial focus was intentional: Sax stated at the outset that he was looking for “some broad legal approach which would make the opportunity to obtain effective judicial intervention more likely.”⁵⁰ Indeed, Sax viewed the doctrine as “not so much a substantive set of standards for dealing with the public domain as it is a technique by which courts may mend perceived imperfections in the legislative and administrative process.”⁵¹ Sax’s prediction for the future of his idea was accordingly centered on the courts: “the judiciary can be expected to play an increasingly important and fruitful role in safeguarding the public trust.”⁵²

This framing of the judiciary as both the vanguard and safeguard of the public trust makes sense in the context of Sax’s 1970 article. After all, the democratic process was slow to respond to growing environmental crises at the time.⁵³ Certainly, from the vantage point of

47. *Id.*

48. See Blumm & Schwartz *supra* note 43, at 16 (“The article was groundbreaking, not only for its revival of an historic, largely forgotten doctrine, but also, according to Professor Carol Rose, for ‘unhook[ing] it from its traditional moorings on and around water bodies.’”) (quoting Carol M. Rose, *supra* note 42, at 352); see also “The Public Trust: A New Charter of Environmental Rights,” in JOSEPH L. SAX, *DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION* 158, 172 (1971) (advocating for the public trust doctrine to apply to a host of environmental problems such as congestion, noise, pesticides, and radioactivity).

49. Sax *supra* note 43, at 474.

50. *Id.*

51. *Id.* at 509.

52. *Id.* at 566.

53. See, e.g., Richard J. Lazarus, *The Greening of America and the Graying of United States Environmental Law: Reflections on Environmental Law’s First Three Decades in the United States*, 20 VA. ENV’T L.J. 75, 76 (2001) (“[P]rior to 1970, environmental protection law in the United States was essentially nonexistent.”). And, even after Congress passed a raft of environmental statutes in the 1970s, there remains today an open debate whether the myriad environmental laws ever achieved their lofty goals. Compare Beth Gardiner, *This Landmark Law Saved Millions of Lives and Trillions of Dollars*, NAT’L GEOGRAPHIC (Dec. 29, 2020), <https://www.nationalgeographic.com/environment/article/clean-air-act-saved-millions-of-lives-trillions-of-dollars> [<https://perma.cc/RPP8-GLXZ>] (discussing the Clean Air Act’s impact) with Karrigan Bork, *Governing Nature: Bambi Law in a Wall-E World*, 62 B.C. L. REV. 155, 159 (2021) (“Existing environmental law literature underestimates the impacts of the Anthro-

2024, relying on the legislative process to protect natural resources in every instance sounds hopelessly naïve and inadequate.⁵⁴ After all, few think the Congress of today is capable of passing *any* major federal legislation, let alone environmental legislation.⁵⁵

Sax's concentration on the judiciary has also had real success. In a number of states, the post-1970 public trust doctrine is revitalized and potent.⁵⁶ Further, there are many examples of pioneering judges that have expanded their state's public trust doctrine, opening up public access or protecting natural resources.⁵⁷

This Saxonian vision of the public trust doctrine—one that relies on the judiciary to define and enforce the doctrine—is still the dominant version of the doctrine today. Perhaps the best illustration of Sax's influence is the Our Children's Trust climate cases, a series of cases brought by children across the United States seeking to hold the federal and state governments accountable for their failure to address climate change.⁵⁸ These cases are premised, in part, on the notion that the atmosphere is a public trust asset, one that our governmental trustees have failed to safeguard.⁵⁹ First articulated by

cene and the extent of guidance that environmental law will have to provide. Successful ecosystem management will require concrete and highly specific goals, but environmental law does not yet have a mechanism for setting these goals.”).

54. See, e.g., Richard Lazarus, *Environmental Law Without Congress*, 30 J. LAND USE & ENV'T L. 15, 15 (2014) (“[T]he political intransigence underlying Congress's abdication of its environmental lawmaking responsibilities appears to have hardened and deepened its roots.”); but see Lisa Friedman, *Democrats Designed the Climate Law to Be a Game Changer. Here's How*, N.Y. TIMES (Aug. 22, 2022), **Error! Hyperlink reference not valid.** <https://www.nytimes.com/2022/08/22/climate/epa-supreme-court-pollution.html> [https://perma.cc/G764-CH92] (discussing the Inflation Reduction Act of 2022).

55. See, e.g., Faye Shen Li Thijssen, *How Partisanship Hinders Action on Environmental Policy*, THE FULCRUM (March 22, 2022), <https://thefulcrum.us/big-picture/Leveraging-big-ideas/environmental-gridlock/> [https://perma.cc/JAS4-ZWF3] (“But the federal government has not advanced major environmental protection legislation in decades, as partisanship has brought Congress to a state of near total gridlock.”).

56. See, e.g., *Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355, 369–70 (N.J. 1984) (affirming the public's use of privately-owned dry sand areas as part of the state's public trust doctrine).

57. See, e.g., *Nat'l Audubon Soc'y v. Superior Ct.*, 658 P.2d 709, 728 (Cal. 1983) (“The state has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible.”); see also *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 985 (Pa. 2013) (finding state statute that set forth framework for oil and gas operations unconstitutional because it was “incompatible with the Commonwealth's duty as trustee of Pennsylvania's public natural resources”).

58. See generally OUR CHILDREN'S TRUST, *supra* note 24.

59. See, e.g., First Amended Complaint for Declaratory and Injunctive Relief at ¶ 308, *Juliana v. United States*, 947 F.3d 1159 (9th Cir. 2020) (No. 6:15-cv-01517-TC) (“Plaintiffs are benefi-

law professor Mary Christina Wood,⁶⁰ the atmospheric trust concept has grown from a robust academic debate⁶¹ to a countrywide litigation strategy.⁶² And, although these cases have a rather mixed record of success, even their detractors must admit that the cases have helped to elevate climate change as an issue in the public arena.⁶³

At the center of the idea of an atmospheric public trust is Sax's vision of the public trust doctrine—at least, insofar as the atmospheric public trust requires a willing judiciary to recognize and enforce it. Indeed, the notion of the atmospheric public trust was predicated on a receptive judiciary.⁶⁴ The success of the Our Children's Trust climate cases has accordingly depended on the views of judges in state and federal courthouses across the country.⁶⁵

The atmospheric trust is a particularly vivid example of the ways in which the public trust doctrine is dependent upon the judiciary for its realization, but it is not an outlier. In the 1970s, when Californians sought to use the public trust doctrine to protect Mono Lake,

ciaries of rights under the public trust doctrine[.] . . . These vital natural resources include at least the air (atmosphere), water, seas, the shores of the sea, and wildlife.”).

60. See generally Mary Christina Wood, *Atmospheric Trust Litigation*, in ADJUDICATING CLIMATE CHANGE: STATE, NATIONAL, AND INTERNATIONAL APPROACHES 99, 99 (William C. G. Burns & Hari M. Osofsky eds., 2009); Mary Christina Wood, *Atmospheric Trust Litigation Across the World*, in FIDUCIARY DUTY AND THE ATMOSPHERIC TRUST 99, 102 (Ken Coghill et al. eds., 2012).

61. Compare Mary Christina Wood & Dan Galpern, *Atmospheric Recovery Litigation: Making the Fossil Fuel Industry Pay to Restore a Viable Climate System*, 45 ENV'T L. 259 (2015), with Caroline Cress, Comment, *It's Time to Let Go: Why the Atmospheric Trust Won't Help the World Breathe Easier*, 92 N.C. L. REV. 236 (2013).

62. See, e.g., Anna Christiansen, *Up in the Air: A Fifty-State Survey of Atmospheric Trust Litigation Brought By Our Children's Trust*, 2020 UTAH L. REV. 867, 868 (2020) (“Frustrated with government inaction, individuals and organizations have begun turning to the courts in an effort to compel governments to regulate. These environmental lawsuits, known as atmospheric trust litigation (ATL), have popped up in both state and federal courtrooms across the country.”).

63. See, e.g., Nick Ehli, *Kids want to put Montana on trial for unhealthy climate policies*, CBS NEWS (July 11, 2022), <https://www.cbsnews.com/news/climate-change-lawsuit-kids-montana/> [<https://perma.cc/SM6E-JL7W>]; see also Robinson Meyer, *A Climate-Lawsuit Dissent That Changed My Mind*, ATLANTIC, (Jan. 22, 2020), <https://www.theatlantic.com/science/archive/2020/01/read-fiery-dissent-childrens-climate-case/605296/> [<https://perma.cc/GJ63-8Y52>].

64. See generally Michael C. Blumm & Mary Christina Wood, “*No Ordinary Lawsuit*”: *Climate Change, Due Process, and the Public Trust Doctrine*, 67 AM. U. L. REV. 1 (2017).

65. Cf. Piper *ex rel.* Aji P. v. State, 480 P.3d 438, 458 (Wash. Ct. App. 2021) (holding that Washington state children's climate case failed on the merits as the atmosphere is not a public trust asset) with Held v. Montana, No. CDV-2020-307 at 102 (1st Dist. Ct. Mont., Aug. 14, 2023) (finding that “Plaintiffs have a fundamental constitutional right to a clean and healthful environment, which includes climate as part of the environmental life-support system.”).

they turned to the judiciary.⁶⁶ So did Oregonians looking to do the same for Lake Oswego nearly fifty years later.⁶⁷ When some states sought to hold oil companies responsible for methyl-tertiary-butyl-ether contamination in their groundwater, they likewise asked judges to prevent the alleged impairment of their public trust assets.⁶⁸

The legal academy has followed, with most of the public trust literature focusing on how courts have used the doctrine.⁶⁹ In this I am likewise complicit, having previously looked almost exclusively at judicial reception and treatment of public trust claims.⁷⁰

In short, the Saxonian vision of the public trust is alive and well. To some extent, this may well be expected in a society that places significant power in the judiciary. Indeed, rights are dependent, at least in part, on judicial enforcement.⁷¹ This focus on judicial intervention in the public trust mirrors the tactics taken by other individual rights movements, most notably the civil rights movement.⁷² However, more than fifty years after Joseph Sax anticipated that “the judiciary can be expected to play an increasingly important and fruitful role in safeguarding the public trust[,]”⁷³ it is apparent that the

66. See Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709, 728 (Cal. 1983).

67. See Kramer v. City of Lake Oswego, 446 P.3d 1 (Or. 2019).

68. See, e.g., Rhode Island v. Atl. Richfield Co., 357 F. Supp. 3d 129, 144–45 (D.R.I. 2018) (“The State’s claim is that it can sue as trustee to protect the corpus of a public trust that includes groundwater. This claim fails: the State’s portfolio of trust assets it administers for public benefit does not, as yet, include groundwater.”); see also State v. Hess Corp., 20 A.3d 212, 217 (N.H. 2011) (“As trustee, the State must preserve the State’s waters for the trust’s beneficiaries, and the State can bring suit to protect the waters over which it is trustee from contamination.”).

69. See, e.g., Ryan Shannon, *Developments in the Public Trust*, 45 ENV'T L. 257 (2015) (noting a symposium on the public trust doctrine and how many participants focused on caselaw developments).

70. See Lyness, *supra* note 12 (assessing local government impacts on the public trust doctrine).

71. See, e.g., Erwin Chemerinsky, *The Vanishing Constitution*, 103 HARV. L. REV. 43, 97 (1989) (“Without judicial enforcement, the Constitution is little more than the parchment that sits under glass in the National Archives.”).

72. See, e.g., Roger A. Fairfax, Jr., *Wielding the Double-Edged Sword: Charles Hamilton Houston and Judicial Activism in the Age of Legal Realism*, 14 HARV. BLACKLETTER L.J. 17, 33 (1998) (describing the NAACP and Charles Hamilton Houston’s legal strategy to dismantle segregation as “a call for judicial activism”); cf. Samuel Moyn, *Counting on the Supreme Court to uphold key rights was always a mistake*, WASHINGTON POST, (June 17, 2022), <https://www.washingtonpost.com/outlook/2022/06/17/supreme-court-rights-congress-democracy/> [<https://perma.cc/2AKY-V6NH>] (“For a comparatively brief time, before President Richard Nixon began the right-wing transformation of the court, liberals controlled the institution and came to believe that judges were indispensable to the progress of rights.”).

73. Sax, *supra* note 43, at 566.

judiciary is often the *sole* focus of those seeking to safeguard the public trust.

B. A Public-Centered Trust

The public trust doctrine's nearly exclusive focus on the judiciary is not without its limitations. Not all courts have been receptive to public trust claims.⁷⁴ Even within the same state, different courts have interpreted the doctrine in diverse ways, muddying the jurisprudential waters.⁷⁵ And not every court has responded amiably to legislative tinkering with the doctrine.⁷⁶

Also, the focus on the judiciary erroneously assumes equal access to justice. The ability to defend or push the public trust doctrine in court assumes that a litigant has the resources and ability to do so.⁷⁷ Perhaps then it is no surprise that many of the most high-profile public trust disputes have occurred in wealthy communities.⁷⁸ A judicially-focused public trust thus fails to address environmental justice concerns. Further, the current doctrine ignores the role of non-

74. See, e.g., *White Bear Lake Restoration Ass'n ex rel. State v. Minn. Dep't of Nat. Res.*, 946 N.W.2d 373, 386–87 (Minn. 2020) (declining to extend the public trust doctrine to groundwater); see also *supra* notes 26, 27 and accompanying text.

75. See, e.g., Sean Lyness, *A Doctrine Untethered: "Passage Along the Shore" Under the Rhode Island Public Trust Doctrine*, 26 ROGER WILLIAMS U. L. REV. 671, 689, 693 (2021) (explaining that "[o]f th[e] six [Rhode Island Supreme Court] cases that explicitly discuss the public trust doctrine, only three even cite to the relevant constitutional provision. Not one of those three cases makes any note of the added language nor purports to interpret that language" but that a Rhode Island Superior Court "not only recognized that the 1986 amendment materially changed the scope of the public trust doctrine—something no other Rhode Island court has acknowledged—but it also took the next step of attempting to grapple with and interpret the added constitutional language.").

76. For example, Minnesota has an environmental rights statute that ostensibly codifies the state's public trust doctrine. MINN. STAT. § 116B.01–13; see also Alexandra B. Klass, *The Public Trust Doctrine in the Shadow of State Environmental Rights Laws: A Case Study*, 45 ENV'T L. 431, 435 (2015) (describing a rejected state contention that "MERA had replaced the common law public trust doctrine in Minnesota."). But the Minnesota Supreme Court has insisted that the doctrine also exists, independently, in common law form. See *White Bear Lake Restoration*, 946 N.W. 2d at 385–387.

77. See, e.g., Marcus Alexander Gadson, *Theseus in the Labyrinth: How State Constitutions Can Slay the Procedural Minotaur*, 98 WASH. L. REV. 1, 6 (2023) (describing the current crisis in access to justice: "at the same time that legal problems are widespread, access to legal services is available to only a narrow few.").

78. See, e.g., Chris Burrell, *Barriers at the Beach: People tussle over scarce access as sea levels and property values rise*, GBH NEWS (July 25, 2022), <https://www.wgbh.org/news/local/2022-07-25/barriers-at-the-beach-people-tussle-over-scarce-access-as-sea-levels-and-property-values-rise> [<https://perma.cc/725E-4C2N>] (noting that shoreline access conflicts have intensified in wealthy coastal communities).

judicial interventions like law enforcement and societal norms. For every case that makes it to litigation, there are surely countless more that are stopped before they begin—either through compliance with authorities or through chilling effect.⁷⁹ Indeed, judicial precedent does not govern every interaction between the government, the public, and the public trust.

Consider a beachgoer in New Jersey. When they wish to walk along the shoreline—an area long understood to be part of the state's public trust—do they first consult the Atlantic Reporter? Or do they look at street signage, posted instructions, and the actions of other beachgoers? If this beachgoer faces a dispute over access to their public trust lands, is their first recourse a lawsuit? Or do they discuss the matter with their fellow private citizens, local law enforcement, and perhaps even local or state representatives?

The singular focus on the judiciary's role in enforcing the public trust misses these other, equally important facets of the doctrine. The lived experience of the public is not limited to the courtroom. It is, instead, a much broader and less formal enterprise.

That vision of the public trust doctrine—one that incorporates the non-litigious elements that make up the doctrine—is the one I wish to use in this Article. To localize the public trust is to understand that the public trust doctrine exists beyond the judiciary. Of course, the judiciary has (and always will have) a role in the doctrine. But this articulation of the doctrine includes much more than judicial opinions. It includes the lived experiences of the public. In that way, it is a public-centered version of the public trust: one that focuses on how members of the public experience the doctrine.

With that framing, localizing the public trust becomes more than just achieving judicial recognition of local governments in the schema. It becomes a means of changing the public's interaction with their public trust rights. And it requires governmental actors to think beyond just the terms of the next piece of litigation.

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

III. THE BENEFITS OF LOCALIZING

This Part asserts the need for localizing the public trust. Before diving into the potential benefits of localization, I will address two common underlying premises in public trust scholarship: (1) that the current structure of the public trust is sufficiently capable of achieving the doctrine's goal of safeguarding environmental assets;⁸⁰ and (2) that the public trust doctrine is an unnecessary or undesirable tool in light of available democratic processes.⁸¹ Each is a predicate for one's view of the doctrine, and it is necessary to consider them in turn.

First, some might argue that the public trust doctrine does not need localizing as it can already be used to accomplish goals in its present form.⁸² Localizing the public trust, then, would needlessly complicate an already-working system. This view might be reduced to the adage: if it ain't broke, don't fix it.

Although the current formulation of the doctrine has indeed admirably achieved numerous environmental goals,⁸³ it is not without flaws. As explained *supra*,⁸⁴ the doctrine's reliance on judicial inter-

80. This is a notion that pervades much of the literature promoting the public trust doctrine. For a sampling, see Erin Ryan, *From Mono Lake to the Atmospheric Trust: Navigating the Public and Private Interests in Public Trust Resource Commons*, 10 GEO. WASH. J. ENERGY & ENV'T L. 39 (2019); see also Alexandra B. Klass, *Modern Public Trust Principles: Recognizing Rights and Integrating Standards*, 82 NOTRE DAME L. REV. 699 (2006); Robin Kundis Craig, *Adapting to Climate Change: The Potential Role of State Common-Law Public Trust Doctrines*, 34 VT. L. REV. 781 (2010).

81. For some of the proponents of this idea, see James L. Huffman, *Speaking of Inconvenient Truths—A History of the Public Trust Doctrine*, 18 DUKE ENV'T L. & POL'Y F. 1, 12–27 (2007); see also Lazarus, *supra* note 18 at 633 (arguing that the public trust doctrine “renders more difficult the important process of reworking natural resources law.”); Richard J. Lazarus, *Judicial Missteps, Legislative Dysfunction, and the Public Trust Doctrine: Can Two Wrongs Make It Right?*, 45 ENV'T L. 1139, 1152 (2015) (“I continue to worry that it is a serious mistake to take the public trust doctrine far beyond its historic moorings.”); but see Michael C. Blumm, *Two Wrongs? Correcting Professor Lazarus's Misunderstanding of the Public Trust Doctrine*, 46 ENV'T L. 481 (2016).

82. See, e.g., David D. Caron, *Time and the Public Trust Doctrine: Law's Knowledge of Climate Change*, 35 U. HAW. L. REV. 441, 452 (2013) (“The public trust doctrine is closely attuned to change over time. A thesis of this article is that the doctrine self adapts to change and even more looks forward to change to come.”).

83. See, e.g., Blumm and Schwartz, *supra* note 43 at 3–4 (“[T]he doctrine gave the public the right to protect the ecological and recreational value of tidelands in California; recognized public rights to recreate on ocean beaches in New Jersey; required evaluation of ecological considerations in the administration of water rights in California; gave trust protection to groundwater in Hawaii; was construed to be implicit in the federal due process clause in an atmospheric trust case; and gave implementation force to an international treaty on climate.”).

84. See *supra* Part II(B).

vention has left the doctrine muddled and often inaccessible to the public. For many members of the public, the doctrine is just another obscure, out of reach lawyer's tool, not a vital right. This is not to discount the importance of the judiciary in securing the public trust, but instead to insist that there is room for improvement.

And indeed localizing the public trust is not inconsistent with the current form of the doctrine. The idea is to add local governments to the conversation, not subtract the current players.

Second, there is an ongoing debate over the doctrine's utility in our legal system. Some have argued that the focus placed on the doctrine is to the exclusion of the democratic process.⁸⁵ Others have argued that we are pushing the doctrine far beyond its traditional moorings in tidal lands and navigable waters in a way that stretches the doctrine too thin.⁸⁶ Still others have claimed that the doctrine's reliance on courageous judicial intervention is a recipe for disappointment in light of a changing judiciary.⁸⁷

I do not disagree that the public trust doctrine has its limits. I further acknowledge that the traditional means of using the doctrine have placed too much reliance on the judiciary.

But there is still a role for the public trust doctrine to safeguard natural resources. There is, of course, the doctrine's sometimes successful track record in protecting public rights, albeit largely through judicial enforcement.⁸⁸ Rather than flatly contradicting the doctrine's critics, localizing the public trust is a means of responding to

85. See Lazarus, *Judicial Missteps*, *supra* note 81 at 1152 ("Purporting to glean from the doctrine legal obligations enforceable by the judiciary could shortcut the democratic processes for lawmaking that are central to our nation's values and system of government.").

86. See Huffman, *supra* note 81 at 6 ("But the drumbeat continues in the academy and among environmental groups, and a few courts have taken up the invitation to 'liberate' the doctrine by applying it to non-navigable waters for an expanded array of uses and to resources having little or nothing to do with navigable waters.").

87. See, e.g., Lazarus, *Judicial Missteps*, *supra* note 81 at 1145 ("Yet it did not take long for now-Justice Scalia's skepticism, if not outright disdain, for much of the legal architecture of modern environmental law to become clear and to influence the Court's rulings in ways wholly opposed to what I had perceived as positive legal trends rendering the public trust doctrine less useful.").

88. See, e.g., Craig *supra* note 21 at 797 ("While state public trust doctrines cannot remove all of these barriers [to climate change adaptation], in many states they have already successfully negotiated some of them, such as private property rights."); *but see* Joseph Regalia, *The Public Trust Doctrine and the Climate Crisis: Panacea or Platitudo?* 11 MICH. J. ENV'T. & ADMIN. L. 1, 6 (2021) ("The results are not encouraging. In most cases we reviewed, the public trust doctrine was ineffective at protecting natural water resources. Courts often mention the doctrine, complete with lofty language and promising ideals, but then fail to meaningfully apply it to tip the scales in favor of the public's interest.").

them. As envisioned *infra*,⁸⁹ localizing the public trust is a means of improving the doctrine's democratic accountability. Fully incorporating local governments into the doctrine will increase the number of voices the doctrine is responsive to. A doctrine accountable to local voices will require less resort to litigation, thus lessening the doctrine's dependence on the judiciary.

Thus, localizing the public trust doctrine does not seek to reinvent the doctrine nor supplant its current forms. Instead, my proposal seeks to improve the doctrine and make it more accountable, more responsive, and more useful. Below are explanations of what is to be gained from these improvements: (1) a doctrine that reflects the reality that local governments already impact the doctrine, even without intending to; (2) a doctrine that incorporates the benefits of localism; (3) a doctrine more responsive to environmental justice; and (4) a doctrine that comports with the existing environmental federalism structure. I conclude by addressing potential disadvantages to localizing the public trust.

A. Reflecting Reality

The current doctrine often neglects the roles local governments are already playing. Most courts and commentators place the doctrine's sole locus of control in the state sovereign.⁹⁰ But this is too narrow a view. Local governments already significantly impact the public trust doctrine. Our conception of the public trust doctrine should accord with this reality.

To be sure, some courts have recognized the roles of local governments in the doctrine. This recognition has mostly come from courts addressing local governments as co-trustees of the public trust and therefore just as responsible as the state trustee.⁹¹ And, as

89. See *infra* Part IV(B).

90. See *City of Montpelier v. Barnett*, 49 A.3d 120, 128 (Vt. 2012) (denying city's attempt to regulate access to a pond and implicitly failing to extend "trustee" status to municipalities). Also, in Colorado a proposed (but ultimately withdrawn) state constitutional amendment would have ensured that both state and local governments were equal trustees of the public trust. See *Kemper v. Leahy* (In re Title, Ballot Title), 328 P.3d 172, 175 (Colo. 2014). That such a constitutional amendment was thought needed underscores the current status of Colorado local governments with respect to the public trust doctrine.

91. See, e.g., *State v. Village of Lake Delton*, 286 N.W.2d 622, 629 (Wis. Ct. App. 1979) ("[M]any cases recognize that [the power to administer the public trust] may be delegated to other units of government, including municipalities, for purposes in furtherance of the trust."); see also *Fafard v. Conservation Comm'n of Barnstable*, 733 N.E.2d 66, 71 (Mass. 2000) ("[O]nly the Commonwealth, or an entity to which the Legislature properly has delegated au-

noted *supra*, there is the occasional legislative admission of local governments in the scheme.⁹² These, however, are exceptions, not the rule. The usual understanding of the doctrine is that it is exclusively state-based.⁹³ Many local governments accordingly do not consider themselves actors under the doctrine.⁹⁴

But there is significant evidence that local governments *do* impact the doctrine, often in consequential ways. In most states, local governments are empowered to act on so-called “local” matters through state delegations of home rule authority.⁹⁵ These delegations include the power to regulate—particularly through zoning and land use planning—as well as the power to enforce, both administratively and through local law enforcement.⁹⁶ In these spheres, local government authority is considerable. Local governments can limit or encourage development, restrict activities, exclude the public from

thority, may administer public trust rights.”); *Kelly v. 1250 Oceanside Partners*, 140 P.3d 985, 1004 (Haw. 2006) (“[T]he County has a duty, as a political subdivision of the State, to protect the waters located adjacent to the Property.”); *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 977 (Pa. 2013) (“With respect to the public trust, Article I, Section 27 of the Pennsylvania Constitution names not the General Assembly but “the Commonwealth” as trustee . . . [A]s a result, all existing branches and levels of government derive constitutional duties and obligations with respect to the people.”); *Environmental L. Found. v. State Water Res. Control Bd.*, 237 Cal. Rptr. 3d 393, 410 (Cal. Ct. App. 3rd App. Dist. 2018) (holding that “the county, as a subdivision of the state, shares responsibility for administering the public trust[.]”); *Kramer v. City of Lake Oswego*, 446 P.3d 1, 19 (Or. 2019) (“Because the state’s authority to enact restrictions on the public’s access to publicly-owned waters is limited [by the public trust doctrine], the same limitations apply to the authority of a city, to which the constitution has assigned a portion of the authority of the state.”).

92. See *supra* notes 5–9 and accompanying text.

93. See, e.g., *Iowa Citizens for Cmty. Improvement v. State*, 962 N.W.2d 780, 785 (Iowa 2021) (noting that “the State is the ‘trustee’ of the State’s navigable waters”); see also *State v. Deetz*, 224 N.W.2d 407, 411 (Wisc. 1974) (same); *State v. Exxon Mobil Corp.*, 126 A.3d 266, 288 (N.H. 2015) (same).

94. See, e.g., *Reynolds v. City of Calistoga*, A134190, A135501, 2014 WL 2986515, at *2 (Napa Cnty. Super. Ct. July 3, 2014) (“The City initially suggested it was a trustee vested with the discretion to determine the amount of bypass consistent with the public trust. However, the City now agrees, in accord with an amicus brief filed in this court by the Water Board and DFG, that it is not a trustee of the public trust resources at issue here.”).

95. See *Wyman & Spiegel-Feld, supra* note 33, at 349 (2020) (“States’ magnanimity towards municipalities has ebbed and flowed over the years as they have granted more or less generous home rule authority[.]”); see also DALE KRANE ET AL., *HOME RULE IN AMERICA: A FIFTY-STATE HANDBOOK* (2001); but see Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1062 (1980) (“Under current law, cities have no ‘natural’ or ‘inherent’ power to do anything simply because they decide to do it. Cities have only those powers delegated to them by state government, and traditionally those delegated powers have been rigorously limited by judicial interpretation.”).

96. See generally National League of Cities, *Principles of Home Rule for the 21st Century*, 100 N.C. L. REV. 1329 (2022).

particular areas, and choose when and how to enforce these rules at their discretion.⁹⁷ In other words, local governments wield a substantial amount of power over citizens.⁹⁸

It is little surprise then that this power can have effects on the public trust doctrine. I have written previously about the impacts of local governments on the public trust doctrine, cataloging their impacts into three main (but overlapping) categories: (1) local government as landowner; (2) local government as regulator; and (3) local government as enforcer.⁹⁹ Perhaps without intending to, local governments can exercise considerable influence on the public trust doctrine. They can limit access to public trust resources, prevent certain kinds of recreation on public trust assets, and even be the arbiter of where the public trust extends.¹⁰⁰

Although my previous work in this area was published recently,¹⁰¹ the evidence of local government's impact on the public trust doctrine has only continued to grow. In Oklahoma, for example, the City of Tulsa was recently rebuffed when it attempted to sell nearly nine acres of park land to a private developer.¹⁰² The State Supreme Court invalidated the park land sale, noting that "the City cannot sell Tract A of the Park to the private developer because the land is held in a public trust for the use and benefit of its citizens as a public park."¹⁰³ The fact that the City had sold the park and that it took four years of litigation to undo it only further underscores the impact local governments have on the public trust.

This theme is also present in Oregon, where a county circuit court judge recently ruled that a nearly privatized lake is a public trust asset.¹⁰⁴ There, the local government had passed an ordinance re-

97. *See id.*

98. *See, e.g.*, Richard Briffault, *Our Localism: Part I – The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 15 (1990) ("[W]hatever the technically limited status of local units and their formal subservience to the state, local governments have wielded substantial lawmaking power and undertaken important public initiatives.").

99. *See generally* Lyness, *supra* note 12.

100. *See id.*

101. *See id.*

102. *See* *Immel v. Tulsa Pub. Facilities*, 490 P.3d 135 (Okla. 2021).

103. *Id.* at 142.

104. *See* Conrad Wilson, *Judge paves way for greater public access to Oswego Lake*, OR. PUB. BROAD. (Apr. 20, 2022), <https://www.opb.org/article/2022/04/20/ruling-paves-way-for-greater-public-access-to-oswego-lake/> [<https://perma.cc/8EU2-6Z4H>]; *see also* Associated Press, *Judge to Lake Oswego: Lake Within City is a Public Resource*, U.S. NEWS & WORLD REP. (April 21, 2022), <https://www.usnews.com/news/best-states/oregon/articles/2022-04-21/judge-to-lake-oswego-lake-within-city-is-a-public-resource> [<https://perma.cc/3HZM-TEBT>].

stricting public access to the lake, installing signs and physical barriers to prevent the public from using the lake.¹⁰⁵ Members of the public challenged the ordinance, arguing that the ordinance was contrary to the public trust doctrine.¹⁰⁶ In April 2022, a state court judge agreed, holding that the entire body of water was a public trust resource.¹⁰⁷ Although the state court ruling is likely to be appealed—and it did not answer the question of whether the local government’s actions violated the public trust—this case further demonstrates the power local governments have over the public trust.¹⁰⁸

So too in New Jersey. A shoreline community recently proposed an ordinance that would limit parking near the beach to residents only.¹⁰⁹ This effort would have clearly limited the public’s right to access the shoreline, a traditional public trust asset. The local government eventually tabled the proposal after pushback from the public and concerns that enacting the ordinance would violate the public trust doctrine.¹¹⁰

These are but a few of the recent examples where local governments have influenced the public trust.¹¹¹ In short, local governments already significantly impact the public trust doctrine. Localizing the public trust, then, is a means of matching the law with reality, an opportunity to align the doctrine on the books with the doctrine on the streets (or, perhaps, shorelines). Indeed, to hold otherwise would be to ignore a considerable swath of public trust authority and impact.

105. See Wilson, *supra* note 104; see also Associated Press, *supra* note 104.

106. See Wilson, *supra* note 104; see also Associated Press, *supra* note 104.

107. See Wilson, *supra* note 104; see also Associated Press, *supra* note 104.

108. See Wilson, *supra* note 104; see also Associated Press, *supra* note 104.

109. See Wayne Parry, *Jersey shore town postpones residents-only parking near beach*, THE ASSOCIATED PRESS (May 31, 2021), **Error! Hyperlink reference not valid.**<https://apnews.com/article/nyc-state-wire-9f96211d33454e1b7c54a16a92b7e83b> [<https://perma.cc/4Y8B-9GG3>].

110. See *id.*

111. See *e.g.*, 61 Crown Street, LLC v. City of Kingston Common Council, 171 N.Y.S.3d 203, 207 (N.Y. Sup. Ct., App. Div., 3rd Dep’t 2022) (finding no public trust claim where city alienated potential park land for private use because there was no evidence that the public had accepted the land as a park); see also *In re: Petition of the Twp. of Jackson to Sell Lot 107, Wheatland Manor*, 280 A.3d 1074, 1087–88 (Pa. Commw. Ct. 2022) (upholding trial court’s denial of municipality’s petition to sell public park, noting that “[t]he public trust doctrine, which is incorporated into the Donated Property Act, requires the political subdivision to hold the property in favor of the community and not divert it from a public use or convey it to a private party.”).

One final point on the realities of the public trust. Some may contend that we could simply reorient the doctrine to avoid local government impacts. That mistakes the reasons why local governments impact the doctrine. As I argued in a previous Article, local governments have a significant impact on the doctrine because of the ways in which we have designed both the doctrine and local governments.¹¹² The public trust's amorphous legal underpinnings and intentional flexibility render the doctrine ripe for exercises of local authority.¹¹³ Within that vacuum of certainty, and without state authorities telling them otherwise, local governments have often—intentionally or not—taken steps that influence the public trust.¹¹⁴ This should be little surprise, as we have delegated decisions around land use, planning, and even enforcement of laws—all potential conflict points for public trust issues—to local governments. In other words, the local public trust is the result of the legal regime we have designed. Localizing the public trust, then, is a concession to the reality that local governments are inevitably a part of the doctrine.

B. Localism's Traditional Benefits

Localizing the public trust also instills in the doctrine the traditional benefits of localism. Localism is a well-established body of academic thought that posits that local governments occupy unique and important roles in our constitutional structure and society.¹¹⁵ Although it has its critics, localism generally contends that local governments should be given more, not less, authority to achieve a variety of goals.¹¹⁶ The reasons why are the attendant benefits of decision-making at the local level.¹¹⁷ Many of the oft-cited benefits of localism are particularly applicable in the public trust context, though not all. Of importance here are three: (1) increased demo-

112. See Sean Lyness, *supra* note 12.

113. See *id.*

114. See *id.*

115. See, e.g., Briffault *Our Localism - Part I* *supra* note 98; see also Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 395-97 (1990); Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1068 (1980); Brittan J. Bush, *A New Regionalist Perspective on Land Use and the Environment*, 56 HOW. L.J. 207, 218 (2012).

116. See generally Briffault, *Our Localism: Part II—Localism and Legal Theory*, *supra* note 115; Frug, *supra* note 115; Bush, *supra* note 115.

117. See generally Briffault, *Our Localism: Part II—Localism and Legal Theory*, *supra* note 115; Frug, *supra* note 115; Bush, *supra* note 115.

cratic participation; (2) community building; and (3) local knowledge.

First, localism brings the benefit of increased democratic participation through decentralized public decision-making.¹¹⁸ The idea is that local governments are more responsive to members of the public than more centralized governments.¹¹⁹ After all, “[d]emocratic participation is presumably more possible at the local level, where government bodies and public officials are more accessible and closer to home than they are at the state or national level.”¹²⁰ Further, participation at the local level may more readily produce tangible results.¹²¹ Indeed, local participation can lead to increased individual ability to influence public decision-making.¹²² The scope of the increased participation is important; as Professor Barry Friedman notes, “participation can and should stretch beyond electoral participation.”¹²³ In this way, unlike a letter to a congressperson or a phone call to the president, local participation may yield more responsive outcomes, which in turn can make local participation more meaningful.¹²⁴

If localities are given sufficient authority to act, they will do so in ways that are responsive to local concerns.¹²⁵ In a positive feedback loop, that increased authority will increase democratic participation in government.¹²⁶ As Professor Gerald Frug argues, “[p]ower and

118. See generally Briffault, *Our Localism: Part II—Localism and Legal Theory*, *supra* note 115; Frug, *supra* note 115; Bush, *supra* note 115.

119. See Briffault, *Our Localism: Part II—Localism and Legal Theory*, *supra* note 115 at 396 (“Local governments are crucial arenas for participation because they are small in area and population—at least when compared to the state or nation.”).

120. Richard Briffault, *Localism and Regionalism*, 48 *BUFF. L. REV.* 1, 16 (2000) (discussing importance of local autonomy).

121. See *id.* at 16 (“Where the unit is small, each individual can be heard by and potentially influence a significant portion of the polity.”).

122. See Frug *supra* note 114 at 1069 (“Individual involvement in decisionmaking is impossible except on a small scale.”).

123. Barry Friedman, *Valuing Federalism*, 82 *MINN. L. REV.* 317, 391 (1997).

124. See Briffault, *supra* note 120 at 16 (“Participation may also be more satisfying at the local level.”).

125. See Frug, *supra* note 115 at 1069–70 (“More than a reduction in the size of decisionmaking units is necessary, however, before popular participation in societal decisionmaking can be realized. There must also be a genuine transfer of power to the decentralized units.”). Though this idea is not without its critics – see Briffault, *Our Localism: Part II—Localism and Legal Theory*, *supra* note 115 at 397 (“Although the link between local government and greater participation is strong in theory, it is uncertain in fact.”).

126. See Frug, *supra* note 115 at 1070 (“Power and participation are inextricably linked: a sense of powerlessness tends to produce apathy rather than participation, while the existence of power encourages those able to participate in its exercise to do so.”); see also Friedman, *su-*

participation are inextricably linked: a sense of powerlessness tends to produce apathy rather than participation, while the existence of power encourages those able to participate in its exercise to do so.¹²⁷ Empowering local governments, then, is a means of empowering local participation in government.

To be sure, this view of localism as the harbinger of participatory democracy may be, as Professor Georgette Poindexter calls it, “a romantic view of participatory democracy.”¹²⁸ But there is surely *some* value in increasing the power of individual citizens in reaching and influencing their government. Decentralizing decision-making to the locality may not instantly create a democratic utopia, but it can certainly counter prevailing notions that voting does not matter,¹²⁹ that government is obtuse and unreachable,¹³⁰ and that public policy is rigged in favor of entrenched interests.¹³¹ Even if localism does not meet the lofty democratic aims ascribed to it, it at least is likely to help participatory democracy trend in the right direction.

Second, localism is a means of fostering a shared sense of community and reflecting that community’s values.¹³² More than simply a boundary line drawn on a map, communities are composed of individuals—some already there, some drawn to those places—who share similar sets of values and interests.¹³³ This place-based association derives from both the locality’s history and the history of the people who live within it.¹³⁴ After all, “[p]eople live in localities, raise their children there, and share many interests related to their

pra note 123, at 392 (“The simple fact is—and this has been a subject of far more study abroad than here at home—there is a ‘democracy deficit’ in our society, one that is bound to get larger.”).

127. Frug *supra* note 115, at 1070; *see also* Georgette C. Poindexter, *Collective Individualism: Deconstructing the Legal City*, 145 U. PA. L. REV. 607, 617 (1997) (“The smaller the political community, the more likely a resident will see an impact of her political voice. Furthermore, the greater impact a resident feels her voice has, the more likely she will be to use it.”).

128. *See* Poindexter, *supra* note 127, at 617.

129. *See, e.g.*, Giovanni Russonello, *Voters Fear Their Ballot Won’t Count, Poll Shows*, N.Y. TIMES (Oct. 25, 2016), <https://www.nytimes.com/2016/10/26/us/politics/voter-fraud-poll.html> [<https://perma.cc/YT7Q-SBCU>].

130. *See, e.g.*, Jake Thomas, *Most Americans, Across Party Lines, Say Government ‘Corrupt, Rigged’: Poll*, NEWSWEEK (July 1, 2022), **Error! Hyperlink reference not valid.** <https://www.newsweek.com/most-americans-across-party-lines-say-government-corrupt-rigged-poll-1721208> [<https://perma.cc/76S7-Y88J>].

131. *See id.*

132. *See* Bush, *supra* note 115, at 218.

133. *See* Richard Thompson Ford, *Beyond Borders: A Partial Response to Richard Briffault*, 48 STAN. L. REV. 1173, 1175–76 (1996).

134. *See* Briffault, *supra* note 120, at 17.

homes, families, and immediate neighborhoods.”¹³⁵ It is perhaps inevitable that common bonds will be forged and a sense of community will be created.

Localism also provides an opportunity for people to “create a place of affiliation that they can shape and control,”¹³⁶ as local autonomy can translate those local values and interests into local policy.¹³⁷ Again, this process cultivates a positive feedback loop: local autonomy allows for local values to be reflected in policy, which in turn increases a sense of community, which can then be reflected in policy. Localism can therefore help foster and nourish the collective sense of community.

Of course, this notion of community-building is not foolproof. It assumes a mobility of the populace and a sense of monoculture that can belie reality.¹³⁸ Further, we cannot ignore the ways in which certain community preferences have historically permitted racism, prejudice, and discrimination to fester unchecked.¹³⁹ Unchecked local autonomy can devolve into a race to the bottom.¹⁴⁰ But an increased sense of community can be a noble aim. And within the environmental sphere, a community centered on shared environmental values can lead to progressive outcomes. Indeed, much of the recent legislative progress on environmental issues has come from local governments that speak for communities that value environmentalism—be it through plastic bag bans,¹⁴¹ reductions in carbon foot-

135. *Id.*

136. See Ford, *supra* note 133, at 1175.

137. See Bush, *supra* note 115, at 218.

138. See, e.g., Ilya Somin, *Foot Voting, Decentralization, and Development*, 102 MINN. L. REV. 1649, 1651–52 (2018) (“Today, growing barriers to interjurisdictional mobility are a significant obstacle to economic growth in the United States, artificially depressing incomes for the poor and disadvantaged.”).

139. See Priya S. Gupta, *Governing the Single-Family House: A (Brief) Legal History*, 37 U. HAW. L. REV. 187, 194–95 (2015) (“The particular aspects of more recent exclusion highlighted (reverse red-lining, zoning, discriminatory lending, and others) can be seen as just some of the individual hardy weeds that were able to take hold in the lush environment provided by federal, state, and local government action through the decades.”).

140. See Bush, *supra* note 115, at 210 (“Because localism directly places localities within a metropolitan region in competition with one another, it incentivizes localities to implement policies that increase their economic attractiveness in a municipal race to the bottom.”).

141. See, e.g., Trevor Nace, *Here’s a List of Every City in the US to Ban Plastic Bags, Will Your City Be Next?* FORBES (Sept. 20, 2018), <https://www.forbes.com/sites/trevornace/2018/09/20/heres-a-list-of-every-city-in-the-us-to-ban-plastic-bags-will-your-city-be-next/?sh=5bc9a5d93243> [https://perma.cc/J5EA-22MN].

prints,¹⁴² or investments in renewable energy sources.¹⁴³ Allowing local communities to voice these environmental values through policy is a tangible benefit of localism.

Third, localism creates benefits from the knowledge of local officials. Local officials are, quite literally, “on the ground” in the communities they serve and work in.¹⁴⁴ As such, they bring “the nuanced knowledge and local sensibilities necessary” to make land use decisions.¹⁴⁵ Indeed, local knowledge is often pointed to as a reason why states have delegated land use decisions to local governments.¹⁴⁶

But local knowledge goes beyond land use. Scholars have pointed to local knowledge to justify localized enforcement¹⁴⁷ and localized solutions to environmental problems.¹⁴⁸ As Professor Lea VanderVelde puts it, “[t]he reward of local knowledge is invaluable insight into how the law constructs and impedes certain preferences about justice and how law is continually reconstructed as it is applied to actual situations.”¹⁴⁹ In this way, local knowledge can make broad environmental policy goals concrete and serve as a mechanism for implementation.

Importantly, all three of these benefits of localism—increased participatory democracy, a sense of community, and local knowledge—

142. See, e.g., Lizzie Wade, *Giving cities a road map to reducing their carbon footprint*, SCIENCE (Dec. 8, 2014), <https://www.science.org/content/article/giving-cities-road-map-reducing-their-carbon-footprint> [<https://perma.cc/QG2Q-7QL4>].

143. See, e.g., Alexander Dane & Katie Pastor, *3 Ways US Cities are Investing in Clean Energy for Resilience*, WORLD RES. INST. (June 16, 2020), <https://www.wri.org/insights/3-ways-us-cities-are-investing-clean-energy-resilience> [<https://perma.cc/DVX4-ZGTJ>].

144. Ashira Pelman Ostrow, *Land Law Federalism*, 61 EMORY L.J. 1397, 1442 (2012).

145. *Id.*

146. See, e.g., William W. Buzbee, *Urban Sprawl, Federalism, and the Problem of Institutional Complexity*, 68 FORDHAM L. REV. 57, 93–94 (1999) (“[T]he federal government cannot bear the burden of taking over local planning activity, but is dependent on state and local cooperation and planning due to the huge administrative responsibilities and local knowledge needed for local and state land use planning.”); see also Alejandro Esteban Camacho, *Mustering the Missing Voices: A Collaborative Model for Fostering Equality, Community Involvement and Adaptive Planning in Land Use Decisions II*, 24 STAN. ENV’T. L.J. 269, 326 (2005) (“In this sense, project-specific land use decisions are essentially and fundamentally land use mediations, the resolutions of which ultimately depend on knowledge of local conditions and interests, not technical expertise.”).

147. See Peter H. Lehner, *Act Locally: Municipal Enforcement of Environmental Law*, 12 STAN. ENV’T L.J. 50, 58 (1993) (“Because of the municipal law department’s greater knowledge of local conditions, beliefs, constraints, incentives, and personal dynamics, a local enforcement program may be more likely to achieve these goals.”).

148. See generally Frank Fischer, *CITIZENS, EXPERTS, AND THE ENVIRONMENT: THE POLITICS OF LOCAL KNOWLEDGE* (2000).

149. Lea S. VanderVelde, *Local Knowledge, Legal Knowledge, and Zoning Law*, 75 IOWA L. REV. 1057, 1057 (1990).

are particularly applicable to the public trust doctrine. As explained *supra*,¹⁵⁰ the doctrine is a creature of the judiciary, consequently suffering from a lack of participation and a sense of opacity. The doctrine does not appear to belong to the public, nor does it appear responsive to the democratic process. The precise contours of the doctrine are murky—where, exactly, is the line between the public trust and private property on the shoreline? And how can we implement broad policy goals around the doctrine?

Localism's traditional benefits are uniquely poised to address these precise concerns. By encouraging participatory democracy, localism invigorates public ownership and control over the doctrine. By fostering a sense of community, localism allows community-wide preferences to be reflected in decisions about the care and maintenance of public trust assets. And by using local knowledge, localism can make concrete where, exactly, the doctrine exists, better incorporate local sensibilities around how it should be maintained and improved, and facilitate implementation of state goals for the doctrine. Thus, localism is poised to add the very ingredients the doctrine currently lacks.

Imagine a public trust that empowers local preferences: there is now an incentive to act, to vote, and to engage with the public trust doctrine; participation in the stewardship of public trust resources is now possible and it can be done in a way that reflects that community's values and knowledge of local conditions. This, in turn, cultivates a sense of shared ownership over the public trust. In this way, localism can trigger these same positive feedback loops in the doctrine.

C. Environmental Justice

Localizing the public trust can also be a meaningful step towards orienting the public trust doctrine towards environmental justice. As the environmental movement matured from its 1970s beginnings, attention began to focus on the ways in which environmental harms were not evenly distributed throughout society.¹⁵¹ In particular, environmental harms were (and are) concentrated in communities with low-income or minority populations.¹⁵² After first achieving na-

150. See *supra* Part II(A) (describing the public trust doctrine as judicially-focused).

151. See Clifford J. Villa, *Remaking Environmental Justice*, 66 *LOY. L. REV.* 469, 482–83 (2020).

152. See *id.* at 488.

tional attention in 1982 during a grassroots protest against a toxic waste landfill in a predominantly black community in North Carolina,¹⁵³ environmental justice became a way to analyze and reconsider policy choices around environmental issues.¹⁵⁴ The issue reached new prominence in 1994 when President Clinton signed an executive order on environmental justice.¹⁵⁵

But the federal government backed off of strong commitments to environmental justice at the beginning of the twenty-first century.¹⁵⁶ It was not until after four years of the Trump administration and the national reckoning on race that occurred during the summer of 2020 that environmental justice regained national prominence.¹⁵⁷ On his first day in office, President Biden signed a new executive order on environmental justice that took aggressive steps on the issue.¹⁵⁸ The order requires “all federal agencies [to] develop programs, policies, and activities to address the disproportionately high and adverse health, environmental, economic, climate, and other cumulative impacts on communities that are marginalized, underserved, and overburdened by pollution.”¹⁵⁹ This includes the Justice40 Initiative, a program that ensures that forty percent of the benefits from climate and clean energy investments are targeted to underserved commu-

153. *See id.* at 477 (“Defining events in the origin story of environmental justice include the 1982 protest against a toxic waste landfill in a largely African-American community in Warren County, North Carolina.”).

154. Though there remains much disagreement as to what, exactly, “environmental justice” means. *See id.* at 489 (“To say that we want ‘environmental justice,’ of course, is not to say we agree what it means.”).

155. *See* Exec. Order No. 12,898, 32 C.F.R. § 651.17 (1994); *see also* Robert D. Bullard, *Introduction: Environmental Justice—Once a Footnote, Now a Headline*, 45 HARV. ENV’T L. REV. 243, 245 (2021).

156. *See* Villa, *supra* note 151, at 496 (“In 2001, consistent with its ‘all people’ definition of environmental justice, the EPA, under the Bush/Cheney administration and EPA Administrator Christine Todd Whitman, began an explicit program of de-emphasizing minority and low-income populations and emphasizing the concept of environmental justice for everyone.”) (quotation omitted).

157. *See* Bullard, *supra* note 155, at 248 (“The Environmental Justice Movement is much stronger in 2021 because of new and invigorated rallying calls for racial justice with the rise of Black Lives Matter, after the police killings of George Floyd, Breonna Taylor, and countless other Black people, and the intergenerational protests during the Summer of 2020. The protests were about justice: criminal justice, environmental justice, health justice, economic justice, energy justice, food and water justice, transportation justice—all viewed through an overarching racial justice lens. These justice issues were on the ballot in November 2020 and can be seen in the new Biden-Harris administration’s policies, priorities, and appointments.”).

158. *See* Exec. Order No. 14,008, 86 Fed. Reg. 7619 (Jan. 27, 2021).

159. *Fact Sheet: A Year Advancing Environmental Justice*, WHITE HOUSE (Jan. 26, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/01/26/fact-sheet-a-year-advancing-environmental-justice/> [https://perma.cc/43VW-GJYY].

nities; a climate and economic justice screening tool; and increased environmental enforcement in overburdened communities.¹⁶⁰ Although the Biden administration's environmental justice legacy is still being written, there is little doubt that the Biden Administration has made environmental justice a major policy goal.

In this context of steadily accumulating focus on environmental justice, the legal academy has fully embraced the issue and sought to reorient its scholarship around it.¹⁶¹ Part of this effort has involved reassessing longstanding environmental doctrines and structures, including the public trust doctrine,¹⁶² to determine whether those legal structures contribute to or hinder environmental justice. Particularly in the *Our Children's Trust* climate change cases,¹⁶³ scholars have worked to reconcile climate change litigation based on public trust principles with environmental justice.¹⁶⁴

Localizing the public trust is another step in that same direction. The public trust doctrine suffers from its own shortcomings related to environmental injustices, namely around issues of access and impairment; indeed, access to public trust resources is concentrated in certain communities that tend to be whiter and wealthier.¹⁶⁵ Many of the seminal public trust cases have stemmed from wealthy communities seeking to exclude non-residents.¹⁶⁶

Impairment of public trust resources also tends to occur in underserved communities. For example, when former President Obama announced he was building his presidential library in Jackson Park, Chicago—an area of the city that is low income and predominantly

160. *See id.*

161. *See, e.g., A Foreword From the Harvard Environmental Law Review Staff, Volume 45, 45 HARV. ENVTL. L. REV. 239, 240* (“This Environmental Justice Symposium Issue contributes to the country’s much-needed and long-overdue recommitment to EJ issues, motivated by today’s racial justice efforts and the disparities evident in the COVID-19 pandemic.”); *see also* Villa, *supra* note 151 (part of a symposium on climate justice).

162. *See generally* Marc R. Poirier, *Environmental Justice and the Beach Access Movements of the 1970s in Connecticut and New Jersey: Stories of Property and Civil Rights*, 28 CONN. L. REV. 719 (1996); Jeff Todd, *A “Sense of Equity” in Environmental Justice Litigation*, 44 HARV. ENV’T L. REV. 169 (2020).

163. *See generally* OUR CHILDREN’S TRUST, *supra* note 24.

164. *See* Todd, *supra* note 162, at 210–33.

165. *See, e.g., Confronting Racial Inequality in Beach Access*, SURFRIDER FOUND. (June 17, 2020), <https://www.surfrider.org/coastal-blog/entry/confronting-racial-inequity-in-beach-access> [<https://perma.cc/57F6-85TP>] (“Beaches have long been a marker of racial segregation in America.”).

166. *See, e.g., Borough of Neptune City v. Borough of Avon-By-The-Sea*, 294 A.2d 47, 55 (N.J. 1972) (holding that municipalities may charge fees for use of beaches but may not charge non-residents more).

minority—there was concern that the building would displace residents and impair their access to public trust parklands.¹⁶⁷ Although lawsuits seeking to block the Obama Presidential Center failed, they nonetheless illustrated the ways in which public trust asset impairment can be concentrated in environmental justice communities.¹⁶⁸

Localizing the public trust doctrine can help to counteract these tendencies. For localities that are not environmental justice communities, localizing the public trust provides clarity and consistency around that locality's obligations under the public trust. No more can a wealthy community keep out non-residents under the pretense that they did not know they had to make their public trust resources accessible. Furthermore, more than just making localities aware of their role in the doctrine, localizing the public trust places affirmative obligations on each locality to maintain—and maintain access to—public trust resources. This recognition of each locality's responsibilities under the doctrine should prevent or reduce the gate-keeping that is too often the hallmark of wealthy communities.¹⁶⁹

For environmental justice communities, localizing the public trust provides them with a formal role in the doctrine, enhancing their voice and autonomy.¹⁷⁰ Any potential impairment of public trust resources in these communities will need to answer to that local voice.

167. Taylor Moore, *The Obama Library is Coming to Chicago. Will Local Residents Be Displaced?*, *GUARDIAN* (May 24, 2021), **Error! Hyperlink reference not valid.**<https://www.theguardian.com/environment/2021/may/24/obama-library-chicago-gentrification-fears> [<https://perma.cc/TLV8-K6AZ>]; *see also* *Protect Our Parks, Inc. v. Chi. Park Dist.*, 971 F.3d 722, 738 (7th Cir. 2020) (affirming dismissal of public trust claims against Obama Presidential Center).

168. *See* *Protect Our Parks, Inc. v. Buttigieg*, No. 21-CV-2006, 2022 WL 910641 (N.D. Ill. Mar. 29, 2022). The phrase “environmental justice communities” is not federally defined, but it is commonly understood to mean minority and/or low-income communities that face disproportionate environmental harms. Some states have formally defined the phrase; *see, e.g., Environmental Justice Definitions*, NEW MEXICO DEPT OF HEALTH **Error! Hyperlink reference not valid.**<https://www.nmhealth.org/publication/view/help/309/> [<https://perma.cc/6GUW-Z6LD>] (last visited Nov. 5, 2023) (“Environmental Justice Community of Concern (EJCOC)—A neighborhood or community, composed predominantly of persons of color or a substantial proportion of persons below the poverty line, that is subjected to a disproportionate burden of environmental hazards and/or experiences a significantly reduced quality of life relative to surrounding or comparative communities.”).

169. *See supra* notes 77–79 and accompanying text.

170. *See* Fox, *supra* note 34, at 186 (“Local governments can be sites of minority empowerment.”). *See also* Heather K. Gerken, *Abandoning Bad Ideas and Disregarding Good Ones for the Right Reasons: Reflections on a Festschrift*, 48 *TULSA L. REV.* 535, 536 (2013) (“[D]ecentralization plays a crucial role in furthering the aims of the First and Fourteenth Amendment—that minority rule can be as important as minority rights for the great projects of American constitutionalism.”).

It may not prevent impairment entirely, but it at least provides an opportunity for the local community to be a part of the process.

D. Environmental Federalism

Finally, localizing the public trust can be an important part of localizing environmental federalism.¹⁷¹ Environmental law is, by its nature, a test of the country's federalist system.¹⁷² The major environmental statutes were designed to encourage state sovereigns and the federal sovereign to work together in ways that the framers hoped would be cooperative.¹⁷³ Every presidential administration brings new ideas to navigating its relationship with the states on environmental policy, some decidedly more cooperative than others.¹⁷⁴ As Professor Sarah Fox notes, “[b]ecause of the inherent complexity of environmental issues environmental federalism scholars often eschew arguments in support of regulation by a particular level of government, and instead focus on the importance of multiscalar governance mechanisms that reflect, create, and promote overlapping authority.”¹⁷⁵ However, the focus has traditionally been almost exclusively on the federal-state relationship.¹⁷⁶ This is not surprising, as most federal environmental statutes explicitly contemplate a federal-state relationship, as does the Constitution.¹⁷⁷

171. See Fox, *supra* note 34, at 156–62. Environmental federalism examines the roles—and limitations—of states and the federal government in creating and implementing environmental policy.

172. See *id.* at 159 (“[M]any of the major federal environmental law statutes involve schemes of cooperative federalism.”).

173. See *id.*

174. See, e.g., Jonathan H. Adler, *The Administrative Presidency Encounters Opportunistic Federalism*, CATO INST. (Winter 2021/2022), <https://www.cato.org/regulation/winter-2021/2022/administrative-presidency-encounters-opportunistic-federalism> [<https://perma.cc/9F92-QYJS>] (describing the Trump administration's approach to federalism, including on environmental issues, as “opportunistic,” rather than “cooperative”).

175. See Fox, *supra* note 34 at 162.

176. See Owen, *supra* note 28, at 179 (“Within that literature [on cooperative federalism], almost all of the attention focuses upon the federal government and the states.”); see also Roesler, *supra* note 36, at 1114 (“Questions of scale and allocation of governmental authority generally focus on the state-federal relationship, ignoring local governments or simply subsuming them within the state.”).

177. See, e.g., Claudia Copeland, *Clean Water Act: A Summary of the Law*, CONG. RSCH. SERV. (Oct. 18, 2016), <https://sgp.fas.org/crs/misc/RL30030.pdf> [<https://perma.cc/Z6MN-VJWH>] (“Certain responsibilities are delegated to the states, and the act embodies a philosophy of federal-state partnership in which the federal government sets the agenda and standards for pollution abatement, while states carry out day-to-day activities of implementation and enforcement.”).

In the past several years, however, scholars have begun exploring environmental federalism's local component.¹⁷⁸ What, exactly, is the role of local governments within this framework? Is there room for local autonomy? Does local power further federalism? The answers are that local governments *do* have an important role to play in furthering federalism and that they oftentimes *already are* playing that role.¹⁷⁹

Some scholars view local authority in the federalist scheme as a byproduct of federal empowerment.¹⁸⁰ Others see local autonomy as a gratuity from the state.¹⁸¹ Another emerging view combines both perspectives: "local governments are part of the interrelated web of government actors in environmental law."¹⁸² While it is not necessary here to pinpoint the precise legal foundation for local authority, it suffices to say that localizing the public trust contemplates a negotiated relationship between localities and the state, a relationship that is impossible without some federal grounding for local governments.¹⁸³

In any event, local governments *can* play distinct roles in environmental federalism. Professor Sarah Fox raises three particular benefits of a local role: (1) local governments' "greater degrees of responsiveness of local conditions"; (2) local governments' ability to experiment at a magnitude greater than states; and (3) local governments' capacity to "offer additional degrees of voice to the politi-

178. See *supra* note 36 and accompanying text.

179. Though, of course, not all scholars necessarily agree that local actors are empowered by federalism. See, e.g., Gregory Ablavsky, *Empire States: The Coming of Dual Federalism*, 128 *YALE L.J.* 1792, 1865 (2019) ("At its inception, federalism was not solely about dividing power to protect individual rights, nor was it always a method to decentralize authority and empower local communities.").

180. Davidson, *Cooperative Localism: Federal-Local Collaboration in an Era of State Sovereignty*, *supra* note 36, at 961 ("This Article proposes a new framework for conceptualizing federal empowerment of local governments that is not only consistent with the Court's contemporary view of federal structure, but in fact advances the normative and pragmatic goals the Court is seeking to achieve.").

181. See Roesler, *supra* note 36, at 1111 ("Historically, the federalism literature—both within and outside environmental law—has reflected an assumption that theories of federalism simply do not speak to questions of local authority and power separate from state authority. Rather, as political subdivisions of states, local authority is simply one incarnation of state authority for purposes of federalism.").

182. Fox, *supra* note 34, at 166.

183. See *id.* at 163 ("[A]s both a matter of practice and of common understanding, local governments are part of the federal system.").

cal process.”¹⁸⁴ These benefits might be re-framed as local expertise, local flexibility, and local voices. When properly channeled and directed, these three facets of local involvement can be immensely beneficial to supporting good environmental governance.¹⁸⁵

Importantly, recognition of local governments in environmental federalism allows for consideration of and attention to such governments’ particular vulnerabilities and limitations and means to curtail or address them. The usual concern with empowering localities is enabling parochialism and fragmentation.¹⁸⁶ Rather than fueling these fears, accepting local governments as meaningful actors in the federalist scheme can counteract these concerns. First, avoiding recognition of local governments does not necessarily avoid these concerns; local impacts exist even without recognition.¹⁸⁷ Second, acknowledging these vulnerabilities allows for incorporating local governments in ways that address them. As further explained later in this Article,¹⁸⁸ this is precisely why states should create and enforce minimum state requirements as a proactive means of empowering localities within express boundaries.

Far from just a theoretical exercise, the reality is that local governments are already playing these distinct roles. Professor Dave Owens studied examples in Oregon, Florida, and California of local governments assuming responsibility for land use and air quality in a cooperative scheme with their respective states.¹⁸⁹ Professor Sarah Fox pointed to climate policies in New York City and Phoenix that similarly illustrate local roles in environmental governance.¹⁹⁰ And Professor Shannon Roesler highlighted local action on concentrated animal feeding operations and hydraulic fracturing to do the same.¹⁹¹

Each example showcases how local governments—often ingeniously—use their existing authority to act on environmental issues.

184. *Id.* at 180. These benefits overlap with the traditionally accepted benefits of localism. *See supra* Part III(B).

185. *See Owen, supra* note 28, at 212 (“Participants in cooperative subfederalism programs generally agreed that a balance of local expertise and state oversight is a good model for governance.”).

186. I further address these and other potential disadvantages *infra* in Part III(E).

187. *See Owen, supra* note 28, at 197 (“But in the real world, often the choice is between cooperative federalism and largely unfettered local authority—or no regulation at all.”).

188. *See infra* Part IV(A).

189. *See Owen, supra* note 28, at 205–11.

190. *See Fox, supra* note 34, at 190–91.

191. *See Roesler, supra* note 36, at 1155–72.

In this way, local governments are an important element of the environmental federalism conversation, whether as a tool for advancing environmental progress or as a roadblock to it. Either way, local governments must be considered.

What is perhaps most surprising is not just that local governments are relevant environmental actors with agency, but that they are effective at exercising it. With (and sometimes even without) state permission, local governments are often successful in achieving their particular environmental goals, at least unless or until states expressly preempt them.¹⁹² Whether it be plastic bag bans, solar or other clean energy ordinances, or even climate change mitigation or adaptation measures, local governments have been extraordinarily nimble in effectuating environmental policy.¹⁹³ Part of their success, no doubt, stems from such governments' traditional autonomy over land use, an area that intersects heavily with environmental issues.¹⁹⁴ The sheer number of state preemption laws in the past several years—reactive state measures to counteract proactive local action—is a testament to the resourcefulness of local governments in this space.¹⁹⁵

In sum, local governments play a significant role in environmental federalism, one that the academy is only beginning to recognize. Local governments can bring local expertise, local flexibility, and local voices to environmental policy, a set of benefits that has already proven advantageous.¹⁹⁶ The trend is towards increased acceptance and incorporation of local governments into the scheme in ways that empower local expertise without falling prey to parochialism.

Localizing the public trust doctrine, then, would be just another example of this trend. Formally recognizing the role of local governments in the maintenance and preservation of the public trust is an important step—one that acknowledges the benefits of local expertise, local flexibility, and local voices in administering the public trust. Importantly, that recognition allows us to account for the par-

192. See Wyman & Spiegel-Feld, *supra* note 33, at 325.

193. See *supra* notes 141–143 and accompanying text.

194. See generally Nolon, *supra* note 33.

195. See Sarah Fox, *Home Rule in an Era of Local Environmental Innovation*, 44 *ECOLOGY L.Q.* 575, 578 (2017) (“There has been a growing conversation about the potential for local action on environmental issues. There has also been much discussion of preemption as it relates to local law making, and of the limitations on city authority in the face of state action.”).

196. See *id.* at 580–81 (“[C]ities have been at the forefront of environmental activism for a long time, and have long innovated with regard to local solutions to environmental problems.”) (quotation omitted).

ticular vulnerabilities and limitations that local governments bring. Further, endorsing a distinct role for local governments begins the conversation of how to manage the relationship between localities and their states given their shared responsibilities and obligations under the public trust. It is that conversation that I turn to in the next Part.

E. Potential Disadvantages of Localizing

I must account for the bitter with the sweet; while there are benefits to localizing the public trust, are there not also disadvantages? Indeed, every argument for greater local control is followed by a quick retort of criticism.¹⁹⁷ Broadly speaking, the critiques come in two varieties: fears of parochialism and concerns about fragmentation.¹⁹⁸ We might call these localism's traditional disadvantages. And while I do not discount the grave and sincere nature of these concerns, I contend that the potential disadvantages of localism are slight in the public trust context.

First, there is parochialism. Parochialism is the concern that local preferences will manifest in ways that reflect narrow-minded interests, be they discriminatory, self-interested, externality-producing, or some combination of the foregoing.¹⁹⁹ Professor Nestor Davidson aptly sums up this concern and roots it in historical debates that date back to the country's founding: "Local governments often give life to the Madisonian fear of the tyranny of local majorities: they sometimes reinforce racial, ethnic, and economic segregation; exclude outsiders; and generate significant externalities for neighboring

197. See, e.g., David D. Troutt, *Localism and Segregation*, 16 J. AFFORDABLE HOUS. & CMTY. DEV. L. 323, 325 (2007) ("[L]ocal government law has played a key structural role in fashioning a more durable system of racial and economic inequality than de jure racial discrimination could.").

198. See, e.g., *id.* at 335 ("A fourth reason for localism's succession is the role of politics in promoting racial and economic distance (fragmentation) among communities of voters whose interests might otherwise be shared. Decentralization creates a political framework for parochialism."); see also Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism*, 88 GEO. L.J. 1985, 2016–19 (2000) (developing a theory of parochialism); Alexandra B. Klass & Rebecca Wilton, *Local Power*, 75 VAND. L. REV. 93, 154–58 (2022) (discussing how to overcome parochialism in local energy projects).

199. See Cashin, *supra* note 198, at 2016–19; see also Owen, *supra* note 28, at 199–200 (detailing concerns about self-dealing).

communities.”²⁰⁰ To be sure, history is replete with examples of local autonomy being used in regressive ways.²⁰¹

Second, there is fragmentation, where local autonomy splinters public policy and decision-making into disparate fiefdoms, often outsourcing a locality’s problems to its neighbors.²⁰² The concerns raised by fragmentation take abstract forms—decreased political accountability,²⁰³ decreased ability to govern,²⁰⁴ and decreased capacity for state coordination²⁰⁵—and concrete forms, like increased racial and socio-economic disparities,²⁰⁶ increased externalities,²⁰⁷ and increased inequalities.²⁰⁸ With the sheer number of localities²⁰⁹ and the vast differences between those even within the same state,²¹⁰ it becomes easy to see how unchecked local autonomy could be disadvantageous.

The usual response to parochialism and fragmentation concerns is to shift the locus of power, at least in part, away from the locality. Be

200. Davidson, *Cooperative Localism: Federal-Local Collaboration in an Era of State Sovereignty*, *supra* note 36, at 962.

201. See Troutt, *supra* note 198, at 325 (“With respect to racial segregation and concentrated poverty, localism has been characterized in a facilitative, rather than a causal, light. It is time that localism, legal and cultural, be recognized as the primary agency behind resegregation, without which it would have been neither accommodated nor sustained.”).

202. See Bush, *supra* note 115, at 220 (“In lay-men’s terms, new localities can simply outsource their problems to other localities and segregate themselves from undesired residents and land uses. Furthermore, localist-minded economic policy produces externalities on neighboring localities as well.”).

203. See Briffault, *Our Localism: Part II—Localism and Legal Theory*, *supra* note 115, at 401–02 (“[T]raditional political scientists warned that the fragmentation and overlap of local governments that characterize most metropolitan areas posed a threat to political accountability[.]”).

204. See Frug, *supra* note 115, at 1062; see also Bush, *supra* note 115, at 221 (“Purely local democratic participation also stifles the effectiveness of policies geared towards solving problems that are inherently regional in nature as well.”).

205. See Owen, *supra* note 28, at 198 (“In all but the smallest states, there are many more local government units than there are states within the United States . . . And while the state, by retaining oversight authority, may provide checks on cross-border effects and work to ensure interjurisdictional coordination, doing so requires coordinating with many more entities than a federal agency working with just fifty states.”).

206. See Troutt, *supra* note 197, at 325.

207. See Bush, *supra* note 115, at 220.

208. See *id.* at 222 (“Finally, unbridled localism creates immense inequality among the actors inside and outside of a locality’s boundaries.”).

209. Per the Census Bureau, there are some 89,004 local governments in the United States. See U.S. CENSUS BUREAU, *Census Bureau Reports There Are 89,004 Local Governments in the United States* (2012), <https://www.census.gov/newsroom/releases/archives/governments/cb12-161.html> [<https://perma.cc/C8YE-LC8W>] (last visited Nov. 5, 2023).

210. Consider, for example, the needs and values of Austin, Texas versus the rest of the state, or those of Newport Beach, California with the rest of the state.

it regional, state-level, or even federal, the oft-cited remedy is to restrict local autonomy when and where it creates a likelihood of problematic results.²¹¹

In the public trust context, this solution is readily applicable. After all, localizing the public trust is not intended to be a wholesale transfer of power from the state to the locality. Localizing the public trust recognizes some—but not unbridled—authority for local governments. It envisions a robust role for the state in overseeing and channeling the empowerment of local governments. Should a locality act in ways that trigger parochialism—for example, by using their public trust authority to keep non-residents off the beach²¹²—the state retains authority to restrain the local government. And should localities begin to fragment in ways that produce externalities or entrench inequalities, the state can generate minimum standards below which no locality can go. In other words, the response to the very real problems of parochialism and fragmentation is not to abandon localizing altogether, but to do so in ways that retain a role for the state.

None of which is to say that parochialism and fragmentation are obviated in the public trust context. The academic literature—not to mention history's examples—persuasively counsels against undercounting localism's potential disadvantages.²¹³ But those disadvantages can be addressed, proactively, by localizing the public trust in particular, careful, ways. The next Part details how.

IV. LOCALIZING THE PUBLIC TRUST

The previous Parts of this Article have endorsed the notion of localizing the public trust, centering the doctrine around the public and cataloging the various benefits that could result from doing so. Although I have broached the edges of *what* that localizing would

211. See Bush, *supra* note 115; see also Davidson, *Cooperative Localism supra* note 37 at 962 (“Local governments often give life to the Madisonian fear of the tyranny of local majorities: they sometimes reinforce racial, ethnic, and economic segregation; exclude outsiders; and generate significant externalities for neighboring communities. In other contexts, scholars have argued for regionalist solutions to these problems of local parochialism. A regionalist perspective, I argue, can be incorporated into the jurisprudence of federal-local cooperation, tempering the scope of federal power and local autonomy to ensure that federal interests are not undermined by local parochialism.”).

212. See, e.g., *Borough of Neptune City v. Borough of Avon-By-The-Sea*, 294 A.2d 47, 55 (N.J. 1972) (holding that municipalities may charge fees for use of beaches but may not charge non-residents more).

213. See Troutt, *supra* note 197, at 325.

look like, I have yet to describe it in detail. That is what this Part endeavors to do.

I envision localizing the public trust as a process that centers on three guideposts: (1) minimum state requirements; (2) local autonomy; and (3) shared state and local responsibilities. To be sure, each guidepost appears broad and can mean different things in different contexts. But that flexibility is intentional—to articulate a set of criteria that can be adaptable enough to accommodate different state political systems, histories, and legal regimes.

Additionally, I acknowledge that these tenets are policy choices, perhaps attainable through judicial adoption or state regulations, but more likely through state legislation. Here, too, the flexibility has a purpose: to make the process of localizing the public trust more attuned to an individual state's conditions and thus easier to enact.

A. Minimum State Requirements

Localizing the public trust is not a free-for-all; the state must assert and maintain minimum standards by which all localities must abide. Local actions that impact the public trust must be consistent with these statewide requirements.

If this general setup sounds familiar, it is. There are numerous examples of states setting minimum requirements on which local governments can implement and experiment. This is perhaps nowhere more ubiquitous than in land use planning, an authority traditionally delegated to local governments.²¹⁴ There are several reasons why local governments are best positioned to make decisions around planned land uses, local knowledge and local expertise chief among them.²¹⁵ Yet many states delegate land use planning authority with strings attached.

For example, Rhode Island has a generous grant of home rule authority for local governments around land use decisions.²¹⁶ But the state has retained significant oversight authority, with a State Planning Council that operates the Division of Statewide Planning.²¹⁷

214. See *supra* notes 91–94 and accompanying text.

215. See *supra* Part III(B).

216. See Home Rule for Cities and Towns, R.I. CONST. art. XIII; but see Terrence P. Haas, Comment, *Constitutional Home Rule in Rhode Island*, 11 ROGER WILLIAMS U. L. REV. 677 (2006) (arguing that “Rhode Island’s Home Rule Amendment has spent most of its half-century existence nearly dormant”).

217. See STATE OF R.I. DIV. OF STATEWIDE PLANNING, *State Planning Council*, <https://planning.ri.gov/staff-committees/state-planning-council> [<https://perma.cc/MX2R->

Long-term planning is centralized in the State Guide Plan—approved by the State Planning Council—which sets forth broad goals, policy positions, and standards.²¹⁸ The idea is for the State Guide Plan to act as a tool to coordinate the various plans implemented by local governments.²¹⁹ Indeed, local governments must submit local comprehensive plans for state approval at least every ten years.²²⁰ More than just a procedural requirement, the local comprehensive plans must include planning on density, sustainability, green spaces, and more.²²¹ In this way, Rhode Island maintains significant substantive oversight over land use planning, while leaving the experimentation and implementation to local governments.

In other words, the model of state minimum standards that allows for local implementation is well established. It simply needs to be imported to the public trust context.

Some examples of possible minimum state requirements for local actions impacting the public trust include:

1. Cataloging Public Trust Resources

The state could require local governments to catalog and confirm the public trust resources within their jurisdiction. This could include any navigable waters, shorelines or tidelands, parklands, or other identified public trust assets. The purpose is twofold: (1) it raises awareness for local governments and their citizens of what and where the public trust assets are; and (2) it can be used to create a statewide database of the public trust resources in the state.

2. Minimum Access Requirements

The state could require minimum access requirements for members of the public to certain public trust assets. This could include restrictions on resident-only areas, including resident-only or per-

6WL8] (last visited Nov. 5, 2023); *see also* Meredith E. Brady, STATE OF R.I. DIV. OF STATEWIDE PLANNING, *The State Guide Plan: Rhode Island's Big-Picture Policy Guide for Agencies and Municipalities* (Oct. 19, 2021), <https://planning.ri.gov/sites/g/files/xkgbur826/files/documents/LU/2021/SGP--Land-Use-Commission-10-19-21.pdf> [<https://perma.cc/H6D2-H43L>].

218. *See id.*

219. *See id.*

220. *See* Rhode Island Comprehensive Planning and Land Use Regulation Act, R.I. GEN. LAWS § 45-22.2.

221. *See id.* § 45-22.2-6.

mit-only parking adjacent to public trust assets.²²² It could also include limitations on the amount a local government may charge for access to public trust resources.²²³ Or it could limit the kinds of regulations a local government may impose on use of public trust resources.²²⁴ All of these suggestions are drawn from real examples. The purpose here is to create a baseline of public access to public trust assets—and a presumption towards it—that local governments must abide by.

Minimum access requirements would go a long way to combat local attempts to restrict access to public trust resources. In so doing, it sets forth a statewide policy around public access.

3. Management Requirements

States could also delineate management requirements for local governments to preserve and maintain public trust resources. In each, local knowledge could ensure efficient and effective implementation. First, states could officially designate local governments as co-trustees of the public trust, thereby inhering in localities the affirmative obligations of the doctrine.²²⁵ This has the benefit of formally recognizing local governments under the doctrine and allows local governments to be held judicially accountable.

Second, states could outline requirements for maintenance of access points to public trust assets. There are legitimate concerns around the right to access public trust assets; what good are public trust resources if they are not accessible? Stories abound of over-

222. See *supra* notes 2–3 and accompanying text.

223. See, e.g., *Borough of Neptune City v. Borough of Avon-By-The-Sea*, 294 A.2d 47, 55 (N.J. 1972) (holding that municipalities may charge fees for use of beaches but may not charge non-residents more).

224. See, e.g., *Weden v. San Juan Cnty.*, 958 P.2d 273, 276 (Wash. 1998) (en banc) (upholding county regulation that banned all motorized personal watercraft), *abrogated on other grounds* by *Yim v. City of Seattle*, 451 P.3d 694, 702 (Wash. 2019) (en banc); see also *State v. Vill. of Lake Delton*, 286 N.W.2d 622, 642 (Wis. Ct. App. 1979) (upholding municipal regulations that zoned public lake for exclusive use of a public water ski exhibition).

225. Some state courts have already done so. See, e.g., *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 977 (Pa. 2013) (“With respect to the public trust, Article I, Section 27 of the Pennsylvania Constitution names not the General Assembly but ‘the Commonwealth’ as trustee . . . [A]s a result, all existing branches and levels of government derive constitutional duties and obligations with respect to the people.”); see also *Kramer v. City of Lake Oswego*, 446 P.3d 1, 19 (Or. 2019) (“Because the state’s authority to enact restrictions on the public’s access to publicly-owned waters is limited [by the public trust doctrine], the same limitations apply to the authority of a city, to which the constitution has assigned a portion of the authority of the state.”).

grown rights of way, left unusable.²²⁶ There are also stories of private landowners blocking public rights of way, with little local government pushback.²²⁷ Affirmative maintenance requirements for rights of way could tamp down problems of overgrowth and intrusive private property owners.

Third, states could delineate maintenance requirements for the public trust assets themselves. Here, too, regular attendance to plant overgrowth could be required. States could also mandate routine inspections of public trust resources and ensure that the built environment—picnic tables, benches, other amenities—is in good repair.

Fourth, states could go further and issue impairment standards for public trust assets. Particularly for water trust assets—rivers, lakes, shorelines—minimum standards for environmental quality could guide development, water usage, and even lawn chemicals. Essentially, states could target existing state water quality standards on public trust assets specifically.²²⁸

Fifth, states could compel local governments to assess the impacts of any development on public trust resources. Functioning something like an environmental impact statement or environmental assessment from the federal National Environmental Policy Act,²²⁹ this

226. See Brian Amaral, *In Rhode Island, Rights-of-Way Offer Another Way to Get to Beaches*, BOS. GLOBE (May 21, 2021), <https://www.bostonglobe.com/2021/05/21/metro/rhode-island-rights-of-way-offer-another-way-get-beaches/> [https://perma.cc/76VC-RRH8]; see also David Jones, *Local Men Continue Mission to Clean Up and Reopen Lincoln Beach, City Planning to Apply for Federal Grant Funding*, FOX 8 NEW ORLEANS (Feb. 21, 2022), <https://www.fox8live.com/2022/02/22/local-men-continue-mission-clean-up-reopen-lincoln-beach-city-planning-apply-federal-grant-funding/> [https://perma.cc/S9VF-KUXM].

227. See, e.g., Brian Amaral, *Finding a 50-Foot-Wide Path to the Shore in Westerly, R.I.*, BOS. GLOBE (Sept. 30, 2021), <https://www.bostonglobe.com/2021/09/30/metro/finding-50-foot-wide-path-shore-westerly/> [https://perma.cc/F9M9-JVJV]; see also David Collins, *DEEP to Allow Homeowner to Put Beach Obstructing Fence on State-Built Groin*, DAY (Nov. 23, 2021), <https://www.theday.com/article/20211123/NWS05/211129789> [https://perma.cc/K7P8-ARK5]; Lynda Clancy, *Camden Select Board Debate Highlights Tension Between Waterfront Public Access and Private Property Rights*, PENOBSCOT BAY PILOT (Mar. 8, 2022), <https://www.penbaypilot.com/article/camden-select-board-debate-highlights-tension-between-waterfront-public-access-and-pr/157626> [https://perma.cc/3XH5-5ALB]; Tony Briscoe, *Where Can You Walk on a Lake Michigan Beach? It Depends on Which State You're In*, CHI. TRIB. (Mar. 15, 2019), <https://www.chicagotribune.com/news/ct-met-lake-michigan-states-beach-access-20190312-story.html> [https://perma.cc/QXZ6-ZBBB].

228. The Clean Water Act requires states to adopt water quality standards which establish minimum protections for water bodies. See 33 U.S.C. § 1313. These water quality standards usually create limits on various chemicals and toxins. See, e.g., Julie Furr Youngman, *Water, Water, Anywhere?: Protecting Water Quantity in State Water Quality Standards*, 94 IND. L.J. 1613, 1622 (2019); see also Annie Brett, *Transboundary Waters*, 44 HARV. ENV'T L. REV. 473, 478–79 (2020).

229. 42 U.S.C. § 4321.

procedural check would force local governments to consider the impacts of development on public trust assets.

4. Planning and Zoning Requirements

Finally, states could mandate certain planning and zoning requirements for land that abuts or contains public trust assets. As noted *supra*, although many states have delegated planning and zoning requirements to local governments, they do so with certain guidelines.²³⁰ In making decisions around land use, localities already have to account for state guide plans,²³¹ state housing policies,²³² and state environmental restrictions.²³³ Adding consideration of public trust assets to all future comprehensive plans or zoning changes is in line with these other requirements. Or the state requirements could be even more granular for land that abuts or contains public trust assets: density requirements, public easements, lot size requirements, setback requirements, or nonconforming uses—all of which change the built environment around the public trust and have impacts on access.

These are just a few suggestions for how states can set forth minimum state requirements that make maintenance and preservation of public trust assets a priority for local governments. There are, undoubtedly, many more ideas out there. As explained *supra*,²³⁴ minimum state requirements can go a long way towards minimizing concerns around parochialism and fragmentation; they ensure that all local government action that impacts the public trust does so in a way that furthers state goals, be they increased access or preservation. They also have the benefit of formally recognizing of local governments under the public trust.

230. See *supra* Part IV.

231. See *supra* notes 214–221 and accompanying text.

232. See, e.g., Molly Bolan & Daniel C. Vock, *The Governors Wading Deeper Into the Housing Crisis*, ROUTE FIFTY (Jan. 20, 2023), <https://www.route-fifty.com/management/2023/01/governors-wading-deeper-housing-crisis/382048/> [<https://perma.cc/JN47-8W7E>] (“A national housing crunch is spurring governors around the country to venture into debates that typically consume local officials: regulating where new housing can go and figuring out how to entice developers to build more of it.”).

233. See, e.g., *States and Local Jurisdictions with NEPA-like Environmental Planning Requirements*, NEPA.GOV, **Error! Hyperlink reference not valid.**<https://ceq.doe.gov/laws-regulations/states.html> [<https://perma.cc/5AKL-MZX7>] (last visited Nov. 5, 2023) (noting that many states already require localities to review anticipated environmental impacts of proposed actions).

234. See *supra* Part III(D).

B. Local Autonomy

The second guidepost for localizing the public trust is local autonomy. This notion is somewhat obvious; localizing any doctrine requires decentralizing authority and empowering localities. And, because of minimum state requirements, the particular areas for local empowerment need not be spelled out as independent grants of authority. Indeed, recognizing local governments as co-trustees of the public trust is itself a broad grant of authority. Tempered by minimum state requirements, a sweeping grant of local authority can be appropriately cabined and channeled.

But it is worth considering the mechanics of *how* states can give local governments autonomy over the public trust. The traditional means of decentralizing power from states to localities has been through grants of home rule authority,²³⁵ though not all states grant such authority.²³⁶ Even within the states that have done so—legislatively or constitutionally—there are vast legal differences in what home rule authority means.²³⁷

Empowering local governments means working within these disparate home rule regimes. Some states may have strong enough home rule that granting local autonomy around the public trust will be little effort.²³⁸ For others, empowering local governments will require a wholesale shift.²³⁹

235. See, e.g., Rick Su, *Have Cities Abandoned Home Rule?*, 44 *FORDHAM URB. L.J.* 181, 190 (2017) (“Home Rule defines the basic legal standing of local governments and their relationship with the state.”); see also Lynn A. Baker & Daniel B. Rodriguez, *Constitutional Home Rule and Judicial Scrutiny*, 86 *DENV. U. L. REV.* 1337, 1338 (2009) (“Home rule doctrine reflects a far-flung effort over more than a century’s time to find meaning in the ambiguous phrases ‘local affairs’ and ‘matters of state-wide concern.’ The result of these efforts has been a highly developed, and still developing, case law, one that involves drawing lines between what is properly the domain of state government and those powers which may be exercised by municipalities free of state preemption.”).

236. See Baker *supra* note 235, at 1338 n. 10 (“Five states have no municipal home rule at all: Alabama, Hawaii, Nevada, North Carolina, and Vermont.”).

237. See Terrance Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts*, 48 *MINN. L. REV.* 643, 644 (1964) (“[T]here is perhaps no term in the literature of political science or law which is more susceptible to misconception and variety of meaning than ‘home rule.’”).

238. See, e.g., Adam Coester, *Dillon’s Rule or Not?*, 2 *NAT’L ASS’N OF CNTYS.* (2004), **Error! Hyperlink reference not valid.** <https://web.archive.org/web/20151010114031/http://celdf.org/downloads/Home%20Rule%20State%20or%20Dillons%20Rule%20State.pdf> [https://perma.cc/39T4-TBRX].

239. See *id.* (describing Wyoming, Vermont, and Virginia, among others, as “Dillon’s Rule” states where local autonomy is curtailed by the state).

Finally, local autonomy also means creating an ethos around the public trust doctrine that does not currently exist. For both state and local actors alike, the general consensus is that only the state has the power—or, indeed, the means—to impact the public trust.²⁴⁰ Granting local autonomy will require a shift in perspective. This bears emphasis because, even in other contexts, local governments have often failed to advocate for their own authority.²⁴¹ As Professor Rick Su observes, “[t]he problem is not just that cities are not raising Home Rule in their political appeals. It is also that they are not advancing a substantive vision of the city and why they should have control over their affairs.”²⁴² While localities’ reluctance to advocate for a more assertive role may be justified by political considerations,²⁴³ it can be detrimental to any localizing efforts. Local autonomy is more than a legal structure; it is a “state of mind.”²⁴⁴ Political pressures may foreclose local action even in areas where local autonomy is undisputed.²⁴⁵ Localizing the public trust thus requires a commitment to local autonomy in the face of these headwinds.

C. Shared Responsibilities

Finally, localizing the public trust envisions a process of shared responsibilities. This is not a “set it and forget it” model. Instead, the framework envisions a partnership between states and their local governments, a back-and-forth conversation about how to best preserve and maintain public trust assets. It would be easy enough, to be sure, for the state to grant some local autonomy with minimum state standards and then recede into the background. But that model nearly removes the state from the public trust; this proposal is *localizing*, not *localist*. There are surely times when course corrections and feedback from the state level will be necessary.

240. See *supra* Part II(A).

241. See Su, *supra* note 235, at 203 (“But if Home Rule depends on its ‘accept[ance] in spirit as well as in letter,’ cities are poor evangelists for its cause. They seldom raise Home Rule in their political appeals. They rarely make the case that local self-determination is meaningful in defending local legislation, or that local policy decisions should be entitled to deference.”). **Error! Hyperlink reference not valid.**

242. *Id.* at 204. **Error! Hyperlink reference not valid.**

243. See *id.* at 205 (“Cities are not necessarily unjustified in eschewing Home Rule in their political appeals, because such appeals may be a political liability.”). **Error! Hyperlink reference not valid.**

244. See *id.* at 203 (quoting Thomas Harrison Reed, *Municipal Government in the United States* 133 (Rev. ed. 1934)).

245. See *id.* at 203. **Error! Hyperlink reference not valid.**

Here, again, state and local collaborative efforts in other areas are instructive. Land use planning, for example, follows a similar collaborative model. In Rhode Island, as noted *supra*, the state planning statute sets forth certain delineated powers for local governments to implement land use planning.²⁴⁶ Crucially, the state retains a say in how local governments implement that authority.²⁴⁷ Local governments must re-submit their local plans for state approval every ten years.²⁴⁸ And the state continues building out its State Guide Plan, to which local comprehensive plans must conform.²⁴⁹ In the event of disputes between the state and local governments, a state panel may adjudicate.²⁵⁰ In this way, both the state and local governments share responsibilities for land use planning.

A similar model could work in the public trust context. After setting forth the minimum state requirements that guide the grant of local autonomy, states could continue to monitor and oversee local implementation. There could be regular intervals for state approval of local actions that impact the public trust. Or there could be periodic state policies or directives that local governments must adhere to. Finally, there could be a state dispute resolution body created to facilitate any disagreements between the state and localities on public trust-related actions.

The key here is for the state to retain a role. Both the state and local governments have responsibilities under the public trust; an additional one could be that they work to share those responsibilities in good faith.

These guideposts for the state and local relationship around the public trust mirror many of the tenets of cooperative federalism.²⁵¹ There are reasons to believe that the benefits of cooperative federalism are likely to apply similarly under this arrangement. Professor Dave Owen has detailed the benefits of cooperative *subfederalism*;²⁵² localizing the public trust could be an example of those benefits in action.

246. See *supra* notes 216–221 and accompanying text.

247. See *id.*

248. See *id.*

249. See *id.*

250. See *id.*

251. See generally Robert L. Fischman, *Cooperative Federalism and Natural Resources Law*, 14 N.Y.U. ENV'T L.J. 179 (2005).

252. See Owen *supra* note 28, at 180 (defining “cooperative subfederalism” as “[t]he possibility of recreating cooperative-federalism-like regimes between states and local governments”).

V. LOCALIZING THE PUBLIC TRUST IN ACTION: LOCAL CLIMATE ADAPTATION

The preceding Parts describe the why and how of localizing the public trust; this Part seeks to describe what it might look like in one particular context: climate adaptation.

As climate change worsens, scholars and advocates have looked for solutions in every conceivable area: litigation,²⁵³ federal legislation,²⁵⁴ state legislation,²⁵⁵ and non-governmental organizations,²⁵⁶ among others. Local governments, often contentiously, have sought to take action on a number of fronts.²⁵⁷ Though local efforts at climate mitigation exist, few believe they have sufficient impact to make a dispositive difference alone.²⁵⁸

Local climate adaptation, however, is a different story. Local governments are, in many ways, some of the most affected by climate change, presently, and in the future. Whether local governments want to or not, climate change will force adaptation at significant scale.²⁵⁹ The literature has accordingly posited a number of ways where local climate adaptation could make a meaningful difference.²⁶⁰

253. See, e.g., OUR CHILDREN'S TRUST, *supra* note 24; see also Bruce Gil, *U.S. Cities and States Are Suing Big Oil Over Climate Change. Here's What the Claims Say and Where They Stand*, FRONTLINE PBS (Aug. 1, 2022), <https://www.pbs.org/wgbh/frontline/article/us-cities-states-sue-big-oil-climate-change-lawsuits/> [https://perma.cc/4KSS-9B8K].

254. See, e.g., Tony Romm, *Senate Approves Inflation Reduction Act, Clinching Long-Delayed Health and Climate Bill*, WASH. POST (Aug. 7, 2022), <https://www.washingtonpost.com/us-policy/2022/08/07/senate-inflation-reduction-act-climate/> [https://perma.cc/8DN2-QZKZ].

255. See, e.g., Sam Ricketts, et al., *States Are Laying a Road Map for Climate Leadership*, CTR. FOR AM. PROGRESS, (Apr. 30, 2020), <https://www.americanprogress.org/article/states-laying-road-map-climate-leadership/> [https://perma.cc/NUE3-E6UU].

256. See, e.g., Chandra Lal Pandey, *Managing Climate Change: Shifting Roles for NGOs in the Climate Negotiations*, 24 ENV'T VALUES 799 (2015).

257. See, e.g., Jillian Blanchard, *Local Governments Can Use Their Power to Combat Climate Change*, BLOOMBERG L. (June 3, 2021), <https://news.bloomberglaw.com/environment-and-energy/local-governments-can-use-their-power-to-combat-climate-change-17> [https://perma.cc/RE3X-X8QB].

258. See, e.g., Jack Buckley DiSorbo, Note, *The Limitations of State and Local Climate Policies*, 57 HOUS. L. REV. 1169, 1171 (2020) ("State and local climate policies, as well as innovation within the private sector, are indispensable pieces in the national climate solution. However, physical and structural limitations cause the assumption of the national obligation to be impossible. In short, state and local actors cannot cut enough carbon emissions without the federal government.").

259. See, e.g., J.B. Ruhl & Robin Kundis Craig, 4 °C, 106 MINN. L. REV. 191 (2021).

260. See, e.g., Gremillion, *supra* note 31; see also Jenna Schweitzer, *Climate Change Legal Remedies: Hurricane Sandy and New York City Coastal Adaptation*, 16 VT. J. ENV'T L. 243 (2014); Paul Stanton Kibel, *A Salmon Eye Lens on Climate Adaptation*, 19 OCEAN & COASTAL L.J. 65 (2013); Maria L. Banda, *Climate Adaptation Law: Governing Multi-Level Public Goods Across*

This Article adds localizing the public trust doctrine as a means of effectuating local climate adaptation. In short, localizing the public trust can help set up a framework for local climate adaptation to occur. This tool functions as both a sword and a shield—localizing the public trust doctrine works for local governments wishing to take more action on climate change and it works for state governments seeking to prod their recalcitrant local governments to do something on climate change.

First, consider a local government that wishes to take action on climate adaptation in a state that is politically unmotivated on climate change. Say, Bloomington, Indiana²⁶¹ or Austin, Texas. Localizing the public trust doctrine—or at least a version of localizing the public trust that provides autonomy to the locality—is one possible means of doing so. The locality can use its obligations (and autonomy) under the public trust doctrine as a catalyst to take action. Of course, that can take many forms: adjusting local planning and zoning requirements to increase tree cover, decrease development along flood plains or coastal areas, or increase building resiliency measures;²⁶² increasing funding of so-called “hard armoring tools, such as bulkheads, levees, and dikes”;²⁶³ and using so-called “soft armoring tools like beach nourishment, dunes, and restoring wetlands[.]”²⁶⁴ The justification for local action here comes from the local autonomy that is critical to localizing the public trust doctrine.²⁶⁵

To be sure, localizing the public trust doctrine is dependent on state approval in the first instance.²⁶⁶ Moreover, localizing the public trust doctrine does not counter proactive state efforts to preempt lo-

Borders, 51 VAND. J. TRANSNAT'L L. 1027 (2018); Sarah J. Fox, *How the Biden Administration Can Empower Local Climate Action*, 51 URB. LAW. 203 (2021); Jessica Grannis, *Community-Driven Climate Solutions: How Public-Private Partnerships with Land Trusts Can Advance Climate Action*, 44 WM. & MARY ENV'T L. & POL'Y REV. 701 (2020).

261. See, e.g., *City of Bloomington Climate Action Plan*, CITY OF BLOOMINGTON (Sept. 6, 2021), <https://bloomington.in.gov/sustainability/2020-climate-action-plan> [<https://perma.cc/R5C5-G855>].

262. See, e.g., Gremillion, *supra* note 31, at 1244–47; see also Shweitzer, *supra* note 260, at 261–62.

263. Shweitzer, *supra* note 260, at 263.

264. *Id.*

265. See *supra* Part IV(B).

266. See, e.g., John R. Nolon, *Death of Dillon's Rule: Local Autonomy to Control Land Use*, 36 J. LAND USE & ENV'T L. 7, 8 (2020) (defining Dillon's Rule as a rule “that municipalities are not sovereign entities, but merely instrumentalities of states and that the legal powers delegated to them by state legislatures are to be narrowly construed”).

cal action.²⁶⁷ So, certainly, states that wish to prevent local action on climate change are ill-suited for this proposal. But localizing the public trust does allow, in some circumstances, a proactive local government to begin taking action on climate change adaptation.

Second, consider a state government that is motivated to seek climate change solutions that wishes to prompt more local government climate adaptation, particularly from local governments uninterested in doing so. Say, California and Orange County.²⁶⁸ Localizing the state's public trust doctrine provides a suite of minimum requirements that each local government must adhere to—that could include access and management requirements that take into account the impacts of climate change.²⁶⁹ Using the public trust doctrine as a focal point for those requirements can help streamline discussions and provide a base line for assessing progress. Sharing responsibilities under the doctrine thus helps keep local governments accountable.

In either case, localizing the public trust doctrine brings unique benefits to climate change adaptation solutions. The traditional localism benefits—increased democratic participation, community building, and local knowledge—are particularly impactful here. Part of the problem with climate change is the scale of the problem and the resulting malaise that results from trying to do anything about it.²⁷⁰ But localizing the public trust in the context of climate change adaptation allows for local involvement in the process, increasing citizen “buy-in” and fostering community identity.²⁷¹ These facets help create social norms around climate adaptation which can create

267. See Sarah Fox, *supra* note 34, at 135 (“Local environmental actions are almost universally vulnerable to preemption by state and federal law, and new trends in preemption have seen states removing authority from local governments to act in a variety of ways.”); see also *City of Laredo v. Laredo Merchants Ass’n*, 550 S.W.3d 586, 597–98 (Tex. 2018) (holding that local ordinance banning certain plastic and paper bags was preempted by state law).

268. See, e.g., Brooke Staggs, *Climate Grade: Orange County and All of its Cities are Failing*, ORANGE CNTY. REG. (Jan. 25, 2023), <https://www.oregister.com/2023/01/25/climate-grade-orange-county-and-all-of-its-cities-are-failing/> [<https://perma.cc/VP7Z-WWK3>].

269. See *supra* Part IV(A).

270. See, e.g., Jill Suttie, *How to Overcome ‘Apocalypse Fatigue’ Around Climate Change*, GREATER GOOD MAG. (Feb. 23, 2018), https://greatergood.berkeley.edu/article/item/how_to_overcome_apocalypse_fatigue_around_climate_change [<https://perma.cc/CJ7P-BGB2>]; see also *Eco-anxiety: How To Avoid Being Paralyzed by the Fear of Climate Change*, ENEL GREEN POWER (Dec. 12, 2022), <https://www.enelgreenpower.com/learning-hub/gigawhat/search-articles/articles/2022/12/eco-anxiety-climate-change> [<https://perma.cc/UV7C-FKEJ>].

271. See *supra* Part III.

a positive feedback loop; as your neighbors “buy in” to climate adaptation solutions, so do you.²⁷² This gives communities a sense of agency in the face of a seemingly insurmountable problem. And it does so with the benefit of local knowledge of which solutions are most feasible and how to best implement them.

Of course, this is not to suggest that localizing the public trust doctrine is a panacea for parochial ills or political stalemates. Nor is it to claim that localizing the public trust doctrine is, itself, a substantive means of climate change adaptation. But it does provide a framework for mediating state and local cooperation and a process for taking action on climate adaptation. For states and local governments looking for ways to make progress on climate change adaptation, localizing the public doctrine offers a path forward.

VI. CONCLUSION

The public trust doctrine is not a spent force. The doctrine—even centuries on—has the potential to make meaningful differences in the way we preserve, maintain, and think about natural resources. Localizing the doctrine is a means of harnessing the benefits of decentralization for a doctrine that could uniquely benefit from them. It can facilitate the ongoing relationship between states and their local governments around shared public trust obligations. It only remains, then, for states and local governments to try.

272. See Suttie, *supra* note 270 (“You’ll have a much higher impact if people perceive a climate attitude is coming from somebody who’s like them or part of their social group than if it’s coming from outside.”).