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New Zealand's Public Trust Doctrine

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Abstract

This paper presents an argument that there is a public trust doctrine which is part of New Zealand's common law. The public doctrine imposes an obligation on administrative decision-makers, with respect to decisions that impact commonly held natural resources, to act in the interests of the public. I argue the doctrine was inherited by New Zealand in 1840, as part of the English common law, and that it has been subsequently recognised in the New Zealand common law. I also argue that the doctrine has not been extinguished by the Resource Management Act 1991 or the Marine Coastal Area (Takutai Moana) Act 2011: the common law doctrine supplements these regulatory regimes. My argument concludes that the doctrine is best conceived of as a ground of judicial review, perhaps under the heading of illegality, and that there are strong normative arguments for its augmentation by common law development or legislative codification.

Word length

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Subjects and Topics

Public law, natural resource law, environmental law, judicial review.

I Introduction

This paper presents an argument that there is a doctrine in the New Zealand common law which confirms a fundamental right of New Zealanders. The arguable presence of the doctrine in New Zealand law provides a remarkable opportunity. This paper explores that opportunity and describes why, and how, it should be taken.

Known as the public trust doctrine internationally, the common law doctrine is not widely understood in New Zealand. The doctrine has been referred to, by name, in only two New Zealand judgments. It has received scant comment in New Zealand's academic literature.¹

Currently, in New Zealand, the public is responsible for ensuring its interests are taken into proper consideration by environmental decision-makers. Should the public trust doctrine be confirmed as law in New Zealand it will shift the burden of this responsibility from the public to the decision maker. Specifically, the doctrine would impose on government an obligation, much like a fiduciary duty, to ensure it administers commonly held natural resources for the benefit of the public.²

The purpose of this paper is to demonstrate that the public trust doctrine is part of New Zealand's common law. Should I succeed in this task, I argue that the doctrine should be given prominence in the law as a ground for judicial review. The fact that this part of the common law appears to currently lie dormant does not undermine its force of law. The law is an instrument of society. Elements of the common law rise in prominence, and fall away, as society evolves over time. As such, I consider there are two reasons why it is imperative to investigate the presence of the public trust doctrine in New Zealand at this point in time.

First, New Zealand's natural resources are finite and the implications of this are becoming increasingly apparent. Recent developments in New Zealand's natural resource law reflect the challenge of balancing environmental sustainability against economic development. Relevant indicators include the National Government's repeated proposals

¹ Nicola Hulley "The public trust doctrine in New Zealand" (2015) *Resource Management Journal* 31; Nicola Hulley "The public trust doctrine: An analysis of the original theory and its historical foundations" (2016) 12 *RM Theory & Practice* 82.

² Joseph Sax "The Public Trust Doctrine in Natural Resource law: Effective Judicial Intervention" (1970) 68 *Michigan Law Review* 471.

to reform the Resource Management Act 1991, and case law developments such as *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd*.³

New Zealand's dairy industry provides a useful illustration. Dairy is fundamental to New Zealand's economy. At the same time, the intensive dairy farming practices occurring in Canterbury and the Waikato are of rising concern to the public.⁴ As Canterbury's population grows, the long term externalities of unsustainable agricultural practices on commonly held freshwater ways and aquifers are becoming apparent.⁵ Intensive dairy farming means the Waikato's rivers are in a similarly dire state.⁶ The fact that this degradation of New Zealand's freshwater environment has not been prevented by environmental policy suggests change is needed. I argue that the public trust doctrine might be a suitable legal mechanism to effect this change.

The second reason it is necessary to investigate the presence of New Zealand's public trust doctrine is that the doctrine has recently been considered, and in many cases confirmed and applied, in a number of Commonwealth jurisdictions.⁷ In some the doctrine applies as common law, in others it has been entrenched in, or read into, rights or constitutional legislation. Often the doctrine has been applied by the courts in reaction to prolonged corporate friendly administrative decision-making.

Giving prominence to New Zealand's public trust doctrine is likely to be a challenging task. Due to the obligation it imposes on government, it may not gain swift political support. Its potential intersection with that confirmed by the Treaty of Waitangi is also likely to add complexity. Commentators have nevertheless urged that such complexity does not excuse delay.⁸

³ *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] 1 NZLR 593.

⁴ Parliamentary Commissioner for the Environment "Update Report Water quality in New Zealand: Land use and nutrient pollution" (June 2015) at 1.

⁵ Parliamentary Commissioner for the Environment "The state of New Zealand's environment: Commentary by the Parliamentary Commissioner for the Environment on Environment Aotearoa 2015" (June 2016) at 38.

⁶ Parliamentary Commissioner for the Environment "Water quality in New Zealand: Land use and nutrient pollution" (November 2013) at 62.

⁷ The doctrine is law in the United States, South Africa, Canada, India, Uganda, Kenya and the Philippines.

⁸ See Mary Wood "Advancing the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations (Part II): Instilling a Fiduciary Obligation in Governance" (2009) 39 *Environmental Law* 91 at 95: "The severity and pervasiveness of administrative dysfunction means that there is no simple fix to the problem. All solutions will entail fresh dilemmas, complexities and trade-offs. But that reality cannot distract from the urgent task of envisioning a different paradigm."

This analysis of New Zealand's public trust doctrine is presented in three stages. First, in Part II, I define the public trust doctrine in New Zealand. Specifically, I describe the theory which underlies the doctrine, the doctrine's three key features, and its history of operation in the common law of England and Wales (hereafter, referred to as English law, for ease of reference).

The second stage of the analysis, in Part III, starts by assessing the presence of the doctrine in New Zealand's common law. I argue that there are six judgments which suggest the doctrine, albeit in a fairly rudimentary form, is operative in New Zealand law. In order to illustrate the potential of these judgments, as seeds of the doctrine in New Zealand law, I briefly canvass the doctrine's development in the United States. I then assess whether the common law doctrine has survived the comprehensive natural resource management regimes established by the Resource Management Act 1991 and the Marine Coastal Area (Takutai Moana) Act 2011.

In Part IV of the analysis I frame up the character and form of this possible common law doctrine in New Zealand. First I test the proposition that the doctrine is best conceived of as a 'higher norm' ground of judicial review, exploring three different avenues to achieving this. Second, I traverse the future possibilities of the doctrine and outline the normative arguments in favour of its augmentation by common law development or legislative, or even constitutional, codification.

Before embarking on this analysis it is important to clarify one final point. Particularly if the doctrine is left to develop via the common law, the path to it imposing a substantive obligation on administrative decisions makers is likely to be slow and iterative. This reality is acknowledged. The arguable presence of the doctrine in New Zealand's common law should be treated as nothing other than the seeds of a remarkable opportunity: with considered cultivation and careful development it has the potential to produce very worthwhile fruits for future generations of New Zealanders.

II The Public Trust Doctrine

The public trust doctrine is a principle of common law which imposes an obligation on government to ensure commonly held natural resources are administered *for the benefit of the public*.⁹ The obligation is, in essence, sustainability oriented: it requires government to take steps to ensure that future generations have the opportunity to live in a habitable natural environment. The doctrine achieves this by placing the onus of ensuring the public's interests are properly taken into consideration, in environmental decision-making, on the administrative decision-maker rather than the public.

In order to properly assess the presence of the public trust doctrine in New Zealand's common law, the exact definition of the doctrine must first be clarified. Part II of this paper is dedicated to defining the public trust doctrine. The definition is presented in three steps. I start, in subpart A, by describing the theory which underpins the doctrine: the public trust theory. In subparts B, C and D I then draw out the three key features of the doctrine. The primary feature of the public trust doctrine is that it imposes an obligation on government. The second feature of the doctrine is that it applies flexibly and the third is that the doctrine is constitutional in nature.

A sound definition of the public trust doctrine also demands an assessment of its English common law foundations and this third step of the definition is outlined in subpart E. First, I canvass four documents which were, and are still, relevant to the doctrine: Justinian's *Institutes*, the English Magna Carta, *De Legibus et Consuetudinibus* by Henry of Bracton, and Chief Justice Hale's *De Jure Maris et Brachiorum Ejusdem*. I then assess the character and form of the doctrine in the English common law, before looking at a 2015 United Kingdom Supreme Court decision; *R (on the application of Newhaven Port and Properties Limited) v East Sussex County Council*, which provides a useful reflection on the English jurisprudence.¹⁰

A Public Trust Theory

The public trust doctrine is one of many applications of public trust theory. The relationship between public trust theory and the public trust doctrine is best characterised by conceiving the law as three dimensional, comprising: legal theory, legal doctrine and

⁹ In certain jurisdictions the public is conceived of as including members of the public not yet born. See *Juliana v United States* 217 F Supp 3d 1224 (DC Or, 10 November 2016).

¹⁰ *R (on the application of Newhaven Port and Properties Limited) v East Sussex County Council* [2015] UKSC 7.

legal practice. On this view, doctrine is the rule based ‘intermediary’ necessary to bridge the gap between legal theory and legal practice.¹¹ As a common law application of the public trust theory, the public trust doctrine is the courts articulation of a rule based on the theory.

The presence of public trust theory in New Zealand law is obviously relevant to the character of any New Zealand public trust doctrine. Its presence is not, however, essential to identifying the public trust doctrine in New Zealand’s common law. Given the limited scope of this paper I deal with the theory only briefly. Specifically, I describe what the theory entails, highlighting various hints of the theory apparent in New Zealand’s legal framework, and suggest the implications of the theory’s presence for the public trust doctrine.

Public trust theory informs the mechanics of administrative decision-making in New Zealand. The theory applies beyond the administration of natural resources. It holds that those exercising powers in the state sector do so subject to a fiduciary duty to act in the interests of the public.¹² Public trust theory is articulated in John Locke’s *Second Treatise on Civil Government* where he states that government exercises a fiduciary power to act for certain ends, so that the people retain a supreme power.¹³ Locke based his conception of this fiduciary power on the construct of a social contract and his work went on to inform De Smith’s conception of the rule of law.¹⁴

Although public trust theory is based on the concept of a fiduciary duty, owed by government to the public, its application is not predicated on satisfaction of the prerequisites of a trustee - beneficiary relationship.¹⁵ The theory is not derived from

¹¹ See Randy Barnett “Why We Need Legal Philosophy, Foreword to the Symposium to Law and Philosophy” (1985) 8 *Harvard Journal of Law & Public Policy* 1 at 9: “[l]egal doctrine is the absolutely vital intermediary step between theory and practice in the three dimension chain of legal reasoning.”

¹² See Paul Finn “A Sovereign People, A Public Trust” in *Essays on Law and Government* (Law Book Co, North Ryde NSW, 1995).

¹³ John Locke *The Second Treatise of Government (an Essay Concerning the True Original, Extent and End of Civil Government)* Richard Cox (ed) (Harlan Davidson, Illinois, 1982) at [149]; John Dunn “The concept of Trust in the Politics of John Locke” in Richard Rorty (ed) *Philosophy in History* (Cambridge University Press, Cambridge, 1984) at 279-301.

¹⁴ De Smith’s conception of the rule of law holds that the powers exercised by politicians and officials must have legitimate foundation and that the law should confirm to minimum standards of justice (both substantive and procedural). See Stanley de Smith and Rodney Brazier *Constitutional and Administrative Law* (8 ed, Penguin Books, London, 1998) at 17; Phillip Joseph *Constitutional and Administrative law in New Zealand* (4 Ed, Brookers, Wellington, 2014) at 154.

¹⁵ Mary Wood above n 8 at 128: “The trust emerges twin-born with democracy. When government derives its power from the people, the sovereign’s property interests necessarily amount to a trust. An oligarchy or dictatorship, in contracts, rejects the balance between public and private property rights,

principles of Equity.¹⁶ Rather, in line with Locke's approach, public trust theory is perhaps better conceived of as a particular version of the Evan Fox-Decent conception of the fiduciary obligations on government.¹⁷

Fox-Decent describes three conditions necessary to identify a fiduciary relationship between government and the public.¹⁸ First, the fiduciary must have administrative power over the beneficiary or certain of the beneficiary's interests. Second, the beneficiary must be incapable of controlling the fiduciary's exercise of power or be incapable, in principle, of exercising the kind of power held by the fiduciary. Third, the interests of the beneficiary need to be capable of forming the subject matter of a fiduciary obligation.

Public trust theory is reflected throughout New Zealand's legal system. For example, s 32(1)(d)(i) of the State Sector Act 1988 provides that the chief executive of a department or departmental agency is responsible to the appropriate Minister for the "stewardship" of the assets and liabilities, on behalf of the Crown, that are used by or relate to (as applicable) the department or departmental agency.¹⁹ Similarly, s 7 of the Resource Management Act 1991 prescribes *kaitiakitanga* and the "ethic of stewardship" as matters to which persons exercising functions and powers under the Act must have

instead aiming its power to serve select ruling interests at the expense of citizens." Note, in the Canadian decision *Green v Ontario* 1972 CarswellOnt 438 D L R (3d) 20 (HC) the Court declined to find a breach of the public trust doctrine on the basis that the theory only applied on the satisfaction of classic trust law principles. This approach has been described by Anna Lund as one of the reasons for the paucity of public trust doctrine jurisprudence in Canada. See Anna Lund "Canadian Approaches to America's Public Trust Doctrine: Classic Trusts, Fiduciary Duties and Substantive Review" (2012) 23 *Journal of Environmental Law & Policy* 136 at 157.

¹⁶ See Mary Wood *Nature's Trust, Environmental Law for a New Ecological Age* (Cambridge University Press, New York, 2014) at 129 where, discussing the basis for the obligation on government which arises from the public trust doctrine, she states: "A fiduciary conception of government tills the field of democracy. Arising from the government's fiduciary duty is the public trust, a limitation on the sovereign's power over natural assets. Any government deriving its authority from the people never gains delegated authority to manage resources in a way that would jeopardize present or future generations or compromise crucial public needs. To suppose otherwise imputes a gross irrationality on the part of the people." See also J Sax above n 2 at 512, where he states that public trust theory "is no more – and no less – than a name courts give to their concerns about insufficiencies of the democratic process."

¹⁷ Evan Fox-Decent *Sovereignty's Promise: The State as Fiduciary* (Oxford University Press, Oxford, 2011) at 90.

¹⁸ At 93.

¹⁹ Although the provision does not expressly provide that chief executives are responsible to the public in fulfilling this statutory requirement (they are responsible to the Minister), the concept of stewardship itself implies the exercise of powers for the benefit of the public. Stewardship is defined by the s 2 of the State Sector Act 1988 to mean active planning and management of medium and long-term interests, along with associated advice.

particular regard.²⁰ Section 14 of the Local Government Act 2002 similarly imposes requirements on local authorities which are fiduciary in nature. Fiduciary obligations in public law, on the basis of distinct events or special relationships, have also been identified by the courts of New Zealand. One example is the Crown-native relationship.²¹ Another is in the fiduciary duty local authorities owe to ratepayers.²²

Public trust theory's reflection throughout New Zealand's statute and common law means two things for the public trust doctrine in New Zealand. First, because the theory is apparent in the general operations of the administration of New Zealand, giving prominence to the public trust doctrine would not be out of step with the laws of New Zealand. Second, to the extent that New Zealand's common law public trust doctrine has been displaced by legislation, the presence of the theory means that, normatively, the doctrine could be confirmed, or even augmented, in the future (discussed in Part IV).

In the following section of the paper I outline the three key features of the public trust doctrine, continuing to clarify the relationship between the doctrine and its underlying theory.

B Feature One: Obligation on Government

The foremost feature of the public trust doctrine is that it imposes an obligation on government. The obligation, which is derived from public trust theory, requires government to take certain steps in order to administer commonly held natural resources *for the benefit of the public*. While public trust theory is premised on a fiduciary duty, the obligation that the doctrine imposes on government is perhaps (at this point in time) better conceived of as a particular version of a duty which is analogous to a fiduciary duty.

²⁰ Section 2 defines *kaitiakitanga* to mean the exercise of guardianship by the tangata whenua of an area in accordance with tikanga Maori in relation to natural and physical resources; and including the ethic of stewardship.

²¹ *Proprietors of Wakatū v Attorney-General* [2017] NZSC 17, [2017] 1 NZLR 423 (SC). Note, in an earlier decision *Paki v Attorney-General (No 2)* [2014] NZSC 118, [2015] 1 NZLR 67 (SC) the Supreme Court also made extensive obiter comments about the fiduciary duty owed by the Crown to indigenous peoples.

²² *Mackenzie District Council v Electricity Corp of New Zealand* [1992] 3 NZLR 41 (CA) in reliance on *Bromley London Borough Council v Greater London Council* [1983] AC 768. See also *Barton v Masterton District Council* [1992] 1 NZLR 232 (HC); *Telecom Auckland Ltd v Auckland City Council* HC Auckland M185/93, 28 February 1997; *Electricity Corp of New Zealand Ltd v Waimate District Council* HC Christchurch CP47/90, 27 March 1992; *Skeggs v Dunedin City Council* HC Dunedin CP105/87, 13 November 1987.

Obligations analogous to fiduciary duties can arise in a multitude of relationships and it is relatively uncontroversial that in certain circumstances such duties arise between the government and the public. Against Fox-Decent, some commentators argue that fiduciary type relationships duty cannot, in general, arise between elected officials and the public. In their view, for the duty to arise, a specific relationship, or obligation of loyalty, must be first identified.²³ However, in a recent study of fiducia in public law, Lindsay Breach commented on the longevity of the idea that government's power is fiduciary "in nature".²⁴ Paul Finn, similarly, considers that the power of government might be "properly characterised" as fiduciary.²⁵

The common law basis for the idea that government operates subject to politically founded fiduciary type obligations can be traced back to a decision of the House of Lords in 1882: *Kinloch v Secretary of State for India in Council*.²⁶ In this decision the Court first acknowledged that a 'political trust' type of relationship can arise between the Crown and the public, independent of the laws of Equity. The extent of the legal duties which flow from such relationships between the Crown and the public were clarified in *Tito v Waddell (No 2)* where the Court distinguished between Equity based trusts and public political trusts.²⁷ This distinction between the two types of trust persisted throughout the common law of the 20th century.²⁸

²³ For example, Robert Flannigan suggests: "... individual citizens cannot enforce public duties unless they have a special interest or peculiar loss not shared with the general public." See Robert Flannigan "Fiduciary Control of Political Corruption" (2002) 26 *Advocates Quarterly* 252 at 285.

²⁴ See Lindsay Breach "Fiducia in Public Law" (2017) 48 *VUWLR* 413 at 439: "The idea that the relationship between political power and the population is fiduciary in nature is traceable to enlightenment *philosophes* and the first iterations of the social contract. There is nothing revolutionary, therefore, about a modern suggestion of the same."

²⁵ See Paul Finn above n 12 at 10-11.

²⁶ *Kinloch v Secretary of State for India* (1882) 7 *App Cas* 619 at 625: "Now the words "in trust for" are quite consistent with, and indeed are the proper manner for expressing, every species of trust – a trust not only as regards those matters which are the proper subjects for an equitable jurisdiction to administer, but as respects higher matters, such as might take place between the Crown and public officers discharging, under the directions of the Crown, duties or functions belonging to the prerogative of the Crown. In the lower sense they are matters within the jurisdiction of, and to be administered by, the ordinary Courts of Equity; in the higher sense they are not."

²⁷ *Tito v Waddell (No. 2)* [1977] Ch 106 at 216 and 261, per Megarry VC: "I propose to use the word "trust" simpliciter (or for emphasis the phrase "true trust") to describe what in the conventional sense is a trust enforceable in the courts, and to use Lord Shelbourne's compound phrase "trust in the higher sense" to express the governmental obligation that he describes. ... A "higher sense" of trust inhered in the Crown's control of a phosphate-rich island colony which had an ordinance providing a commissioner would establish the formula for paying mining royalties. (But note that claimants were unsuccessful because merely imposing statutory duties on the Crown does not create fiduciary duty as a general rule. Further indicia is required.)" The *parens patriae* concept is also discussed alongside the public trust doctrine in the Canadian case *British Columbia v Canadian Forest Products Ltd* (2004) SCC 38 *CarswellBC* 1278. See also *Hawrelak v The City of Edmonton* [1976] 1 *SCR* 387 at 416 – 417 where Dickson and de Grandpré JJ stated: "Confidence in our institutions is at a low ebb. This statement is not very original but unfortunately

The public trust doctrine imposes an obligation that extends beyond any private law fiduciary duty, or duty of loyalty. This is because the doctrine operates to the benefit of the public at large rather than to a specific class of the public (which has a specific relationship with the Crown as a result of a distinct vulnerability, event, or arrangement).²⁹

C Feature Two: Flexible Application

The second feature of the public trust doctrine is that the extent of the doctrine's scope of application, in terms of the range of natural resources to which it applies, is flexible. This feature is largely attributable to the fact the doctrine is part of the common law and the common law, by nature, adjusts over time to accommodate developments in society.³⁰ The flexibility of the doctrine means that a resource which has not previously been the subject of public trust doctrine obligations may become the subject of them in the future. And vice versa.

A flexible scope of application is important to the doctrine's proper function. The doctrine is intended to ensure that the public continues to enjoy a habitable environment of commonly held natural resources in the future. As technologies change and populations shift, it is implicit that different natural resources will come under pressure. The doctrine must be able to achieve its ends notwithstanding these shifts. The flexibility of the doctrine has been expressly acknowledged by Mary Wood, commenting on how

is unchallengeable. Many factors have brought about this crisis and unconscionable conduct by public officials is only part of the story. Still, if we are to regain some of the lost ground, we have to start somewhere. To reaffirm the requirements of highest public morality in elected officials is a major step in that direction. To speak of civil liberties is very hollow indeed these liberties are not founded on the rock of absolutely impeachable conduct on the part of those who have been entrusted with the administration of the public domain.”

²⁸ Lindsay Breach above n 24 at 422.

²⁹ See *New Zealand Maori Council v Attorney-General* [2008] 1 NZLR 318 (CA) at [77] – [81]; *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

³⁰ This characteristic of the common law was most recently illustrated in *Durie & Anor v Gardiner & Anor* [2018] NZCA 278, where the Court of Appeal recognised the existence of a new public interest defence to defamation claims arising from mass publications. The non-static application of the public trust doctrine has also been expressly recognised in foreign jurisdictions such as, for example, New Jersey where the Supreme Court held: “The public trust doctrine, like all common law principles, should not be considered fixed or static, but should be molded and extended to meet changing conditions and needs of the public it was created to benefit.” See *Borough of Neptune v Borough of Avon-By-The-Sea* 61 NJ 296 (1972) 294 A2d 47 at 309.

the scope of application of the United States' public trust doctrine has broadened over time:³¹

The assets constituting the res of the public trust have been expanded by courts to meet society's changing needs. The original cases focused on submersible lands, tidelands, and wildlife as trust assets. Over time, the doctrine reached new geographic areas including water, wetlands, dry sand beaches, and non-navigable waterways.

Wood considers this augmentation necessary to protect 'modern concerns' of the public such as biodiversity, wildlife habitat, aesthetics, and recreation. Specifically, she notes that the United States "[c]ourts have justified such expansion as being well within the function of the common law to adapt to emerging social needs."³² The public trust doctrine applies flexibly in order to ensure the public's rights, to take benefit in commonly held natural resources, are appropriately protected according to society of the day. As society develops, the public trust doctrine's scope of application adjusts to reflect that development.

D Feature Three: Constitutional Character

The third feature of the public trust doctrine is that it confirms a fundamental common law right of the public.³³ The doctrine is best considered constitutional, in a rule of law sense, for two key reasons.³⁴

First, the public trust doctrine has been identified by commentators, and the judiciary, in constitutional instruments which are foundational to the Westminster system of government. In particular the doctrine has been recognised by the House of Lords as

³¹ Mary 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" (2009) 39 *Environmental Law* 43 at 80. This is based on the accommodation principle set down in *National Audubon Society v Superior Court* (1983) 33 Cal 3d 419, 189 Cal Rptr 346; 658 P2d 709.

³² Mary Wood above n 31 at 80.

³³ That these rights are 'fundamental' is confirmed by Hale. See Lord Hale *De Jure de Maris et Brachiorum Ejusdem* reprinted in Stuart Moore *History of Law of the Foreshore and Seashore* (3 ed, Sweet & Maxwell, London, 1910) at 389 – 90.

³⁴ Matthew Palmer "What is New Zealand's constitution and who interprets it? Constitutional realism and the importance of public office-holders." (2006) 17 PLR 133 at 145, where he lists the rule of law as one of six constitutional protections for citizens.

confirmed by the Magna Carta.³⁵ The English case law also characterised the public trust doctrine as confirming a fundamental common law right of the public. For example, the language used by the House of Lords in a key public trust doctrine authority (which has been relied on by New Zealand courts, as discussed in Part III), *Gann v Free Fishers of Whitstable*, expressly confirmed that the Crown's role in administering the use of natural resources could not be used in a manner to derogate from, or interfere with the "rights of the subjects of the realm".³⁶

In this respect, the constitutional character of the doctrine might be drawn out by reference to the discourse on "common law constitutionalism".³⁷ This discourse gained momentum following three particular United Kingdom administrative law judgments.³⁸ Common law constitutionalism is, according to Poole, premised on a number of key propositions including that the common law is the primary repository of the fundamental values of the political community. These values and their affiliated rights are, according to Laws, determined by way of moral philosophy: "it involves reflection on how people in society ought to live".³⁹

Jeffery Jowell, by reference to the work of John Laws, suggests that the courts have begun to explicitly endorse higher order rights of the public, which do not emanate from any implied Parliamentary intent, but from the framework within which Parliament legislates.⁴⁰ As such, based on Locke's description of the social contract foundations to the public trust doctrine, I suggest it has the potential to be conceived of as exhibiting this constitutional character.

Second, in the Commonwealth jurisdictions where the doctrine is law its constitutional character has been expressly confirmed by either the courts or Parliament (or, in some cases, both). For example, section 24 of the Constitution of the Republic of South Africa (1996) expressly codifies the public trust doctrine. In promulgating this entrenched

³⁵ See *Malcomson v O'Dea* (1863) 10 HLC 593, 11 ER 1155. See also Bradley Freeman, Emily Shirley "England and the public trust doctrine" (2014) 8 Journal of Planning and Environment Law 839 at 841.

³⁶ *Gann v Free Fishers of Whitstable* (1865) 11 HL Cas192, 11 ER 1305.

³⁷ See Thomas Poole "Questioning Common Law Constitutionalism" (2005) 25 Legal Stud 142.

³⁸ *Thoburn v Sunderland City Council* [2003] QB 151; *R v Secretary of State for the Home Department, Ex parte Simms* [2000] 2 AC 115 (HL); *R v Secretary of State for the Home Department, Ex parte Pierson* [1998] AC 539 (HL).

³⁹ Thomas Poole "Back to the Future? Unearthing the Theory of Common Law Constitutionalism" (2003) 23 OJLS 435 at 440.

⁴⁰ Jeffery Jowell "Beyond the Rule of Law: Towards Constitutional Judicial Review" (2000) PL 671 at 675, citing John Laws "Law and Democracy" (1995) PL 72 at 79.

legislation the South African Parliament has consciously confirmed the constitutional character of the doctrine in its jurisdiction. The courts of these jurisdictions have, at the same time, recognised the constitutional character of the doctrine by reading it into the constitutionally confirmed right to life. The Kenyan High Court decision *Waweru v Republic* is illustrative. The case concerned discharge of raw sewage into a public water source and in making its judgment the High Court determined to read the doctrine into the right to life confirmed by art 71 of the Constitution of Kenya (1969).⁴¹

The constitutional character of the doctrine is also reflected in the language employed by the courts of these jurisdictions. In the preeminent public trust doctrine decision of the United States, *Illinois Central Railroad v People of the State of Illinois*, for example, Field J states:⁴²

The sovereign power, itself ... cannot consistently with the principles of the law of nature and the constitution of a well ordered society, make a direct and absolute grant of the waters of the state, divesting all citizens of their rights.

Field J's reference to the "principles of the law of nature and the constitution of a well ordered society" signals of the constitutional nature of the public trust doctrine. Further, in the 2016 decision *Juliana v United States* (a case recently noted by the New Zealand High Court) the constitutional character of the doctrine was considered in depth.⁴³ Aiken J held that she could not imagine that the United States' coastal sea waters could possibly be privatized without implicating principles that reflect core values of its Constitution and the very essence of the purpose of the United States government.

Resting within this constitutional feature of the doctrine is the role it generates for the judiciary.⁴⁴ As discussed in Part IV, I argue that because the doctrine is rooted in the balance of powers characteristic of Westminster government oversight of the public trust

⁴¹ *Waweru v Republic* (2006) 1 Kenya Law Reports 677. Article 71 of the Constitution of Kenya (1969) provided: "No person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal offence under the law of Kenya of which he has been convicted." Note, this is now confirmed by art 26 of the Constitution of Kenya 2010.

⁴² *Illinois Central Railroad v People of the State of Illinois* (1892) 146 US 387 at 456.

⁴³ *Juliana* above n 9 at 1276. Noted by Mallon J in *Thomson v Minister for Climate Change Issues* [2018] 2 NZLR 160 (HC) at [112].

⁴⁴ Phillip Joseph, above n 14 at 160.

doctrine would be the jurisdiction of the courts.⁴⁵ In particular, I suggest the doctrine would fall within the court’s jurisdiction to rule on the legality of public acts.⁴⁶

This analysis now proceeds to the final step of defining the public trust doctrine in New Zealand, by outlining the foundations of the doctrine in English law, described as “the most visible aspect of public trust over centuries – guaranteeing access to shorelines, navigable waters and fishing.”⁴⁷

E English Public Trust Doctrine

The English public trust doctrine is relatively undeveloped compared to the versions of the doctrine formulated in the other Commonwealth jurisdictions where it is law. As the discussion below reveals, the doctrine’s development in English law was stifled early on due to unwarranted judicial deference to certain obiter comments made by Holroyd J in the 1821 decision *Blundell v Catterall*.⁴⁸ The United Kingdom Supreme Court has since commented on the surprising impact of these obiter comments.⁴⁹ I argue that the Supreme Court’s recent comment gives fresh vigour to the authority of the English common law public trust doctrine.

At the outset, it must be emphasised that a proper understanding of the English doctrine demands consideration of four documents: Justinian’s *Institutes*, the English Magna Carta, *De Legibus et Consuetudinibus* by Henry of Bracton, and Chief Justice Hale’s *De Jure Maris et Brachiorum Ejusdem*. Each of these documents informed the English courts’ application of the public trust doctrine. They have also subsequently informed the New Zealand judiciary’s approach to the doctrine.⁵⁰ I canvass each briefly below.

⁴⁵ In Part IV I address the potential of the public trust doctrine as a ground for judicial review.

⁴⁶ *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 473 (HL) at 410.

⁴⁷ Sarah Jackson, Oliver Brandes and Randy Christensen “Lessons from an Ancient Concept: How the public trust doctrine will meet obligations to protect the environment and the public interest in Canadian water management and governance in the 21st century” (2012) 23 *Journal of Environmental Law and Practice* 176 Appendix A at 180.

⁴⁸ *Blundell v Catterall* (1821) 5 B & Ald 268.

⁴⁹ *Newhaven* above n 10.

⁵⁰ For a New Zealand example, see *Mueller v Taupiri Coal-Mines (Limited)* (1900) 20 NZLR 89 (CA) at 117, where reference is made to Lord Hale’s *De Jure Maris*.

1 *Justinian's Institutes*

The archetype of the public trust doctrine is in the *Corpus Juris Civilis*: a code of law commissioned by Justinian in a bid to consolidate and systemise the Roman law.⁵¹ In AD 529 a section of the *Institutes* was amended to insert the following text:⁵²

1. Now **the things which are, by natural law, common to all are these: the air, running water, the sea and therefore the seashores. Thus, no one is barred access to the seashore**, provided he refrain from entry into houses, monuments and buildings; for they are not subject to the laws of nations as also the sea.
2. Rivers, on the other hand, and ports are public; hence the right to fish is open to all in ports and rivers.
3. Now, the seashore is as far as the winter tide reaches its furthest extent
[emphasis added]

The bold extract (from here on denoted *Institutes* 2.1.1) encapsulates an early formulation of the public trust doctrine.⁵³ The doctrine held that certain resources were common to all, by natural law, and that no person could be barred access to those resources. According to the *Institutes* the resources to which the doctrine applied, as at 529, were the air, running water, the sea and seashores.

⁵¹ *Corpus Juris Civilis* was compiled under the authority of Tribonian and promulgated between 529 and 534. *Corpus Juris Civilis* comprises four sections. The first, *Codex Justinianus* contains a compilation of selected enactments. The second, *Digesta* (or *Pandectae*) comprises a summary of key extracts from the writings of preeminent Roman jurists. The third, *Institutiones* is a commentary or guide which introduces the code of law (it is in this section that the public trust doctrine was inserted). The fourth, *Novellae Constitutiones* contains new laws, passed after 529, which were added to the code after it had been originally published. See Paul du Plessis *Borkowski's Textbook on Roman Law* (4 ed, Oxford University Press, New York, 2010) at 60. Although the *Institutiones* (more commonly known as the *Institutes*) may have originally been intended only as a commentary to the code of law, it was promulgated on the same day as the *Digesta* and received the force of law. See P Van Warmelo "The Institutes of Justinian as a Student's Manual" in Peter Stein and A. D. E. Lewis (eds) *Studies in Justinian's Institutes in memory of J A C Thomas* (Sweet & Maxwell, London, 1983) at 164 – 180. The *Institutes* were relied on by a number of preeminent English common law jurists including Lord Hale and Henry of Bracton. The *Institutes* have also been expressly referred to by the New Zealand Supreme Court; see *Motor Mart Limited v Webb* [1958] NZLR 773 (SC).

⁵² Joseph Thomas *The Institutes of Justinian* (North-Holland Publishing Company, Amsterdam, Oxford, 1975) at 65. The Latin text provided: "1. Et quidem naturali iure communia sunt omnium haec : aer et aqua profluens et mare et pe hoc litora maris. Nemo igitur ad litus maris accedere prohibetur, dum tamen villis et monumentis et aedificiis absteineat, quia non sunt iurus gentium, sicut et mare. 2. Flumina autem omnia et portus publica sunt: ideoque ius piscandi omnibus commune est in portibus fluminibusque. 3. Est autem litus maris, quatenus hibernus fluctus maximus excurrit".

⁵³ *Blundell v Catterall* above n 48 at 280-4; *Newhaven* above n 10 at 34, 106 -13.

Patrick Deveney and others have produced a thorough investigation of the meaning of this extract of the *Institutes* in the context of the broader function and concepts of Roman law at the time.⁵⁴ I proceed in this analysis on the basis that this particular extract of the *Institutes* is an early formulation of the public trust doctrine.⁵⁵

2 *Magna Carta*

In the 1862 public trust doctrine decision *Malcomson v O'Dea* the English House of Lords held that the English Magna Carta confirmed a prima facie public right of fishery (an accepted form of the English public trust doctrine).⁵⁶ It has since been acknowledged by Deveney that the “Magna Carta is the original source of the public’s rights in the coastal area, both because of its demonstration of the principle that the king was subject in some ways to the people, and because of several specific limitations on his powers.” However, Deveney enters a caveat by noting that the public trust doctrine formulations identified in the Magna Carta were, in his view, of little practical significance to the law of England at the time.⁵⁷

No version of the Magna Carta contains express reference to public trust theory or to the doctrine.⁵⁸ Rather, the Magna Carta is considered to reflect the doctrine via two specific

⁵⁴ See Patrick Deveney “Title, Jus Publicum and the Public Trust: An Historical Analysis” (1976) 1 Sea Grant Law Journal 13 at 21 – 36 for a thorough investigation. Thomas has produced a similarly comprehensive analysis, as has Lee. See Joseph Thomas above n 52 at 75 and Robert W Lee *The Elements of Roman Law* (Legal Publications Limited, Wellington, 1956) at 35. The parameters of this tenet of law are far from clear cut and interpreting ancient legal texts is always fraught with the risk of misapprehension. As identified by Paul du Plessis, the Roman law distinction between the categories of public things was not always clear. His assessment is, for example, that the seashore certainly lacked clear legal identity. In the event that the seashore is categorised as a public thing, he does nevertheless state that according to Roman law: “Those things which are subject to human right are either public or private. Public things are considered to be nobody’s property for they belong corporately to the whole community. (D 1.8.1 pr).” See Paul du Plessis above n 51 at 86 and 153.

⁵⁵ See *Blundell v Catterall* above n 48; *Arnold v Mundy* above n 50.

⁵⁶ *Malcomson v O'Dea* above n 35. The Court’s reliance on the Magna Carta in the case has, however, been described as a mistake which has nonetheless become settled law (by virtue of this case itself). See Thomas Appleby, “The public right to fish: Is it fit for purpose?” (2005) 16 (6) Journal of Water Law 201 at 202.

⁵⁷ See Patrick Deveney above n 54 at 41.

⁵⁸ Holt has produced an extensive examination of the Magna Carta and its implications for the development of English law. See James Holt *Magna Carta and Medieval Government* (Hambleton Press, London, 1985) at 123.

rules relating to weirs and riverbeds.⁵⁹ The relevant rules are prescribed by Chapters 16 and 23 of the Magna Carta. Chapter 16 provides:⁶⁰

No riverbanks shall be placed in defense from henceforth except such as were placed in the time of King Henry, our grandfather, by the same places and the same bounds as they were wont to be in his time.

Chapter 23 provides:⁶¹

All weirs for the future shall be utterly put down on the Thames and Medway and throughout all England, except upon the seashore.

It is not immediately apparent that these excerpts of the Magna Carta were applications of the public trust doctrine. As such, Deveney has dismissed the notion that the Magna Carta confirmed the public trust doctrine as one which came about through a “process of creative judicial misunderstanding in favor of the public’s rights”.⁶² Likewise, acknowledging the uncertainty associated with the interpretation of Chapters 16 and 23, James Huffman describes them as “very thin reeds upon which to rest an expansive public trust doctrine”.⁶³

Despite the views of Huffman and Deveney, the constitutional significance of the Magna Carta means any semblance of the public trust doctrine identifiable in its provisions must bear great weight.⁶⁴ The Magna Carta is an acknowledgement of the ancient rights and

⁵⁹ The 1225 version of the Magna Carta is the version that is, today, recognised as the Magna Carta. The 1215 version was officially annulled by the (then) Pope, on the request of King John’s successor; King Henry III. See Phillip Joseph above n 14 at 164.

⁶⁰ Magna Carta Chapter 16, art 20 (Eng 1225). The quoted text is from the 1225 version, derived from Chapter 47 of the 1215 version which provided: “all forests that have been made such in our time shall forthwith be disafforrested; and a similar course shall be followed with regard to river banks that have been placed ‘in defense’ by us in our time.”

⁶¹ Magna Carta Chapter 23. The quoted text is from the 1225 version, derived from Chapter 33 of the 1215 version which provided: “All kydells for the future shall be removed altogether from Thames and Medway, and throughout all England, except upon the seashore.”

⁶² Patrick Deveney above 54 at 39.

⁶³ James Huffman “Speaking of Inconvenient Truths – A History of the Public Trust Doctrine” (2007) 18 Duke Environmental Law and Policy Forum 1 at 21.

⁶⁴ Lord Chatham described the Magna Carta as a charter which, along with the Petition of Right 1627 and the Bill of Rights 1688, constitutes an element of the “Bible of the English Constitution”. In the same vein, the Magna Carta has been described by Holdsworth as having “influenced profoundly the development of constitutional law”. See William Pitt *The Speeches of the Right Honourable the Earl of Chatham in the Houses of Lords and Commons: With a Biographical Memoir and Introductions and*

liberties of the people.⁶⁵ It would also not be the first time a somewhat slim reference in the Magna Carta has been held out to confirm a fundamental right of the public today.⁶⁶ James Huffman acknowledges this, stating that the “Magna Carta has been relied on repeatedly in modern times for claims of broad public rights, notwithstanding its origins in the struggle between the king and his barons.”⁶⁷ Whether Chapters 16 and 23 were originally intended to reflect the public trust doctrine or not, *Malcomson v O’Dea* means that, ultimately, the Magna Carta did influence the public trust doctrine’s development in the English law.

3 *De Legibus et Consuetudinibus Angliae*

Bracton’s work, *De Legibus et Consuetudinibus Angliae*, England’s first general treatise on law, was heavily influenced by Roman law and the treatise, in turn, heavily influenced the early development of English common law.⁶⁸ Importantly, Bracton’s discourse regarding the treatment of ‘things in common’ recites the *Institutes* 2.1.1:⁶⁹

Some things are common.

By natural law these are common to all: running water, air, the sea, and the shores of the sea, as though accessories of the sea. No one therefore is forbidden access to the seashore, provided he keeps away from houses and buildings [built there], for by the jus gentium shores are not common to all in the sense that the sea is, but buildings built there, whether in the sea or on the shore, belong by the jus gentium to those

Explanatory Notes to the Speeches (Aylott & Jones, London, 1848) at 98; William Holdsworth *Sources and Literature of English Law* (Oxford Clarendon Press, Great Britain, 1925) at 2.

⁶⁵ See Thomas Taswell-Langmead, *English Constitutional History* (11 ed, Sweet & Maxell, London, 1960) at 65 where he described the Magna Carta as “a treaty of peace between the king and his people in arms, yet their ancient rights and liberties, the acknowledgement of which had been extorted from the King, were expressed to flow from this charter, which was not only a ‘grant’, but also a ‘confirmation’.”

⁶⁶ For example, clause 29 of the 1297 version of the Magna Carta still confirms New Zealander’s right to a fair trial.

⁶⁷ James Huffman above n 63 at 23.

⁶⁸ See Henry Bracton “De Legibus et Consuetudinibus Angliae” in Samuel Thorne *Bracton on the Laws and Customs of England, attributed to Henry of Bratton c. 1210-1268, Translated with revisions and Notes* (Harvard University Press Cambridge, Massachusetts, and London, 1977). *De Legibus et Consuetudinibus Angliae* is considered to have been published between 1250 and 1256: see Theodore Plucknett *A Concise History of the Common Law* (5 ed, Little Brown and Company, Boston, 1956) at 259.

⁶⁹ Samuel Thorne above n 68 at 39 - 40. See Henry Bracton *De Legibus et Consuetudinibus Angliae* George Woodbine (ed) (Yale University Press, London 1915 – 1942) for the original text: “Quædam res sunt communes. Naturali vero iure communia sunt omnium hæc: aqua profluens, aer et mare et litora maris, quasi mari accessoria. Nemo igitur ad litus maris accedere prohibetur, dum tamen villis et ædificiis absteineat, quia litora non sunt iure gentium communia sicut et mare. Immo ædificia, si in mari sive in litore posita fuerint, ædificantium sunt de iure gentium, et ita in hoc casu solum cedit ædificio, licet alibi contrarium, quod ædificium cedit solo.”

who build them. Thus in this case the soil cedes to the building, though elsewhere the contrary is true, the building cedes to the soil.

Bracton's replication of *Institutes* 2.1.1 in *De Legibus* was relied on by the English judiciary in subsequent public trust doctrine decisions.⁷⁰ As is outlined below, however, Bracton's incorporation of this civil law concept into the English law was not accepted without question.

4 *De Jure Maris et Brachiorum Ejusdem*

Published in 1670, and authored by Chief Justice Hale, *De Jure Maris* also contributed to the development of the English common law public trust doctrine. The text provides a comprehensive description of the English laws relevant, at the time, to the seas, navigable waters and tidal lands.⁷¹ In contrast to Bracton's treatise, *De Jure Maris* does not quote *Institutes* 2.1.1. Rather, Hale is considered to have endorsed the public trust doctrine through incorporation by reference to the *jus publicum* of Roman law:⁷²

⁷⁰ See *Blundell v Catterall* above n 48.

⁷¹ Lord Hale *De Jure de Maris et Brachiorum Ejusdem* reprinted in Stuart Moore, *History of Law of the Foreshore and Seashore* (3 ed, Sweet & Maxwell, London, 1910) Chapter 15, at 389. With respect to the authority of *De Jure Maris*, see James Jerwood, *A dissertation on the Rights to the Sea Shores and to the Soil and Bed of Tidal Harbours and Navigable Rivers* (Butterworths, London, 1850) at 31: "From the time of its publication up to the present... [Hale's] work has been regarded as standard authority upon the subject indicated by the title, and as such it has been referred to by judges on the bench and quoted by text writers generally, without any apparent qualification or doubt as to its authenticity or soundness."

⁷² See Stuart Moore above n 33 at 389. Two additional excerpts of Hale's treatise are considered to reflect the public trust doctrine: "But though the king is the owner of this great wast, and as a consequent of his propriety hath the primary right of fishing in the sea and creeks and arms thereof; yet the common people of England have regularly a liberty of fishing in the sea or creeks or arms thereof, as a publick common of piscary, and may not without injury to their right be restrained of it, unless in such places or creeks or navigable rivers, where either the king or some particular subject hath gained a propriety exclusive of that common liberty" and "[t]hat the people have a publick interest, a *jus publicum*, of passage and repassage with their goods by water, and must not be obstructed by nuisances or impeached by exactions, as shall be shewn when we come to consider of ports. For the *jus privatum* of the owner or proprietor is charged with and subject to that *jus publicum* which belongs to the kings subjects; as the soil of a highway is, which though in point of property it may be a private man's freehold, yet it is charged with a publick interest of the people, which may not be prejudiced or damnified." According to Huffman, Hale established three categories of coastal property. First, the *jus privatum* which is held by individuals, or by the Crown (where the Crown's private interests were no different to the holdings of individuals). Second, the *jus regium* which is a royal right which requires that the state provides "for the safety and preservation of our realm..." And third the *jus publicum*; the rights of the public. This has been the cause of consternation for some academics: See James Huffman above n 63 at 27 where he expresses much concern about developments occurring through 'lawmaking by personal reputation' quoting Glenn McGrady, "The Navigability Concept in the Civil and Common Law, Historical Developments, Current Importance, and Some Doctrines that Don't Hold Water (1975) 3 Florida State University Law Review 513 at 567.

The *jus privatum* that is acquired to the subject, either by patent or prescription, must not prejudice the *jus publicum*, wherewith public rivers and arms of the sea are affected to public use.

The *jus publicum* comprises the general rights of the public which are fundamental, inalienable and inextinguishable, including the public trust doctrine.⁷³ The *jus privatum*, in contrast, comprises a private right, or title, to any resource – a right that can be transferred, bought or sold.⁷⁴ As is described below, the *jus publicum* concept went on to inform the English courts' approach to the public trust doctrine.⁷⁵

This analysis now addresses the early English cases which, referring to these four documents, involve early applications of the public trust doctrine in English law.

5 Early English Common Law

The English common law contains a fairly rudimentary version of the public trust doctrine: it afforded the public fundamental rights to access the foreshore for the purposes of fishing and navigation only. Notwithstanding this, the English common law has seeded the development of the public trust doctrine in a number of Commonwealth jurisdictions.

The earliest identified English common law application of the public trust doctrine is in the 1611 decision *The Royal Fishery of the River Banne*.⁷⁶ The case involved a dispute regarding foreshore fishing rights and the Kings Bench held there was a common right in navigable rivers and the sea:⁷⁷

⁷³ See Stuart Moore above n 33 at 389 – 90 where he states: "[T]his interest or right in the subject must be so used as it may not occasion a common annoyance to passage of ships or boats; for that is prohibited by the common law, and these several statutes before mentioned, viz. erecting new weares, inhancing hold, fixing of pikes or stakes, and the like in order to fishing: for the *jus privatum* that is acquired to the subject by patent or prescription, must not prejudice the *jus publicum*, wherewith public rivers or arms of the sea are affected for public use."

⁷⁴ The rights which comprise the *jus privatum* are threefold. More specifically, Lee states that the *jus privatum* is derived from natural precepts, or from the precepts of universal law, and that it comprises the *jus natural*, *jus gentium* and *jus civile*. See Robert Lee above n 54 at 35.

⁷⁵ See *Blundell v Catterall* above n 48. The emphasis on the *jus publicum* / *jus privatum* distinction appears to have largely arisen as a result of the writing of Hale, which heavily informed the development of the public trust doctrine in the United States. See Patrick Deveney above n 54 at 45, where he states "Hale introduces this term into the common law in its technical sense". The *jus publicum* concept has also been referred to by the New Zealand Court of Appeal; see *Mueller* above n 50.

⁷⁶ *The Royal Fishery of the River Banne* (1611) Sir John Davies Reports (KB) reprinted in (1611) 80 ER 540 (KB).

⁷⁷ *The Royal Fishery of the River Banne* above n 76 at 149.

That there are two kinds of rivers, navigable and not navigable; that every navigable river, so high as the sea ebbs and flows in it, is a royal river, and belongs to the King, by virtue of his prerogative; but in every other river, and in the fishery of such other river, the tenants on each side have an interest of common right; the reason for which is, that so high as the sea ebbs and flows, it participates in the nature of the sea, and is said to be a branch of the sea so far as it flows.

The Royal Fishery of the River Banne established the public trust doctrine in the English common law, as confirmed by the 1768 Kings Bench decision *Carter v Murcot*.⁷⁸ *Carter v Murcot* also concerned foreshore fishing rights and the judgment of the Kings Bench held that the fishery is common and public:⁷⁹

In rivers not navigable, the proprietors of the land have the right of fishery on their respective sides; and it generally extends ad filum medium aquæ. But in navigable rivers, the proprietors of the land on each side have it not; the fishery is common: it is primâ facie, in the King, and is public.

In 1811 the public trust doctrine was applied in another foreshore rights case *Attorney-General v Parmenter*. Here the court held that the public's right in soil under salt water cannot be disposed of, even if that land is the subject of a grant by the Crown.⁸⁰

All the soil under the salt water between high water mark and low water mark is the property of the Crown. Such property has certainly been (as it may be) communicated in great many instances to the subject, but that is always subservient to the public right of the King's subjects generally....The private right of the Crown may be disposed of, but the public right of the subject cannot, even if it be within this grant.

Shortly after, in 1821, came a split decision of the King's Bench: *Blundell v Catterall*.⁸¹ The case is of particular significance not only due to the majority decision of the Court, but also because the judgment addresses the Magna Carta, *De Jure Maris* and *De Legibus et Consuetudinibus Angliæ* (which replicates the *Institutes* 2.1.1). The case concerned a

⁷⁸ *Carter v Murcot* (1768) 98 ER 2162.

⁷⁹ At 2162.

⁸⁰ *Attorney-General v Parmenter* (1811) 147 E R 345 at 352.

⁸¹ *Blundell v Catterall* above n 48 at 287.

dispute regarding the public's common law right to bathe in the sea. In particular, it was argued that hotel guests were not free to utilise bathing machines located on the beach because those running the machines were inadvertently interfering with the Lord of the Manor's exclusive fishing rights.

Justice Holroyd, for the majority, found in favour of the Lord of the Manor and stated in obiter that there was no English common law right of the public to bathe in the sea. Holroyd J considered that any such right would have had to have been established by historic usage and custom. Bathing was only an emerging trend in England, at the time. Significantly, in reaching his judgment, but also by way of obiter comment, Holroyd J dismissed the public trust doctrine arguments presented based on Bracton's commentary and *Institutes* 2.1.1.⁸² These obiter comments would stifle the doctrine's development in English law. In dissent, Best J explicitly noted the relevance of the public trust doctrine concept confirmed in *De Legibus* to the dispute at hand:⁸³

From the general nature of this property, it could never be used for exclusive occupation. It was holden by the King, like the sea and the highways, for all his subjects. The soil could only be transferred subject to this public trust; and general usage shews that the public right has been excepted out of grant of the soil...

Initially *Blundell* was considered a decision of limited authority: one that was relevant only to the emerging public practice of using bathing machines.⁸⁴ For example, in 1862 the House of Lords considered the case of *Malcomson v O' Dea* and applied the public trust doctrine, by express reference to the Magna Carta.⁸⁵ Specifically, the Lords confirmed that the public had a prima facie right of fishery. Then, in 1865, the House of Lords considered the public's rights of access for the purposes of fishing in *Gann v Free Fishers of Whitstable*. Again, the public trust doctrine was applied: the House of Lords held that the Crown's ownership of certain resources could not be used to derogate from or interfere with the navigation rights of the public:⁸⁶

⁸² At 292.

⁸³ *Blundell v Catterall* above n 48 at 287, this same extract is cited in *Newhaven* above n 10 at [126].

⁸⁴ For example, 40 years later, in the decision *Mace v Philcox*, Erle CJ clearly demonstrated a lack of enthusiasm for restricting any usage or right of the public to the seashore to that necessary for mere bathing purposes. See *Mace v Philcox* (1864) 15 CB (NS) 600.

⁸⁵ *Malcomson v O' Dea* above n 35. The Court's reliance on the Magna Carta in this case has, however, been described by Thomas Appleby as a mistake which has nonetheless become settled law (by virtue of this case itself). Thomas Appleby above n 56 at 202.

⁸⁶ *Gann v Free Fishers of Whitstable* above n 36.

The bed of all navigable rivers where the tide flows and reflows, and of all estuaries or arms of the sea, is by law vested in the Crown. But this ownership of the Crown is for the benefit of the subject, and cannot be used in any manner so as to derogate from, or interfere with the right of navigation, which belongs by law to the subjects of the realm.

Despite these decisions Holroyd J's obiter comments in *Blundell v Catterall* hindered the development of the English common law public trust doctrine. This primarily played out in the 1904 case *Brinckman v Matley*.⁸⁷ The dispute which had arisen regarded the public's right to access the seashore for the purposes of bathing and Williams LJ held that because Holroyd J's obiter comments regarding the public trust doctrine had not been invalidated in the 80 years that had been passed since that judgment, his court ought not to upset the law thus settled, as it had "been recognised ever since by the whole profession as an accurate and binding statement of the law".⁸⁸

Williams LJ's unnecessary deference to Holroyd J's obiter comments appears to have muddied the authority of the public trust doctrine in English law, such that the doctrine received little judicial application or comment in the decades which followed. The authority of *Blundell* was, however, considered by the United Kingdom Supreme Court in a 2015 case involving disputed rights of access to the seashore for the purposes of recreation.⁸⁹ The judgment of the Court provides useful clarification of some of the uncertainty generated by Holroyd J and Williams LJ.

The case, *R (on the application of Newhaven Port and Properties Limited) v East Sussex County Council*, required the Court to assess three alternative approaches to ascertaining whether the public used the beach for bathing "as of right" or "by right".⁹⁰ The majority judgment, delivered by Lord Neuberger and Lord Hodge, concluded that although the issue of public rights to access the seashore was an issue of wide-ranging importance, the facts of the case at hand meant that it was not necessary to issue a definitive decision on

⁸⁷ *Brinckman v Matley* [1904] 2 Ch 313.

⁸⁸ At 325.

⁸⁹ *Newhaven* above n 10.

⁹⁰ The first of the three options required the Court to be satisfied that the individuals who make up the public of the United Kingdom have, as a matter of general common law, and irrespective of the wishes of the owner of the foreshore, the right to use the foreshore for the purpose of bathing. The second of the options was based on an argument that any owner of the foreshore is presumed to implicitly permit the individuals that make up the public of the United Kingdom to use the foreshore for the purpose of bathing, unless and until the owner explicitly communicates a revocation of this implied permission. Third, and finally, the Supreme Court considered the option that the public of the United Kingdom have no rights to use the foreshore, and therefore can only access the beaches for bathing purposes as trespassers.

the English common law public trust doctrine. Despite this, the judgment is important to the English doctrine for a few reasons.

First, a substantial portion of the judgment is dedicated to reviewing the history of common law foreshore access rights (including mention of New Zealand case law).⁹¹ In undertaking this task, the Supreme Court indicated that it expected the issue of the rights of the public to the seashore to be raised in the future. Second, the majority confirmed that it remained reluctant to overturn *Blundell v Catterall* in respect of the public's right to bathe.⁹² Third, the judgment of Carnwath LJ, while agreeing with the approach of majority, included extensive comment on the English common law public trust doctrine. Carnwath LJ expressed a clear lack of enthusiasm for the judgment of Holroyd J in *Blundell*, and for the deference to it exhibited by the English judiciary over the decades that followed:⁹³

... I confess that I do not find the enthusiasm of the Court of Appeal for the judgment of Holroyd J altogether easy to share. Its erudite analysis of extracts from Justinian, Bracton, and Hale, and of obscure exchanges between the court and counsel in some early English cases, makes rather heavy reading to modern eyes.

Carnwath LJ also expressed difficulty in understanding why Holroyd J's obiter comments were upheld by Williams LJ:⁹⁴

It is also difficult to find the basis of the assertion by Vaughan Williams LJ that the majority judgments in the earlier case had been "recognised ever since by the whole of the profession as an accurate and binding assertion of the law".

⁹¹ The Court noted *Crawford v Lecren* (1868) 1 NZCA 117 (CA).

⁹² *Newhaven* above n 10 at [49]. The reluctance of the majority to step away from *Blundell* appears to have been primarily based on two issues. First, the Court considered that overturning or overruling the approach set out in the judgment would result in a 'rather odd' dichotomy whereby the seashore is treated differently to the upper part of many beaches. The dichotomy would arise from the fact that the public would be presumed permitted to use the seashore, but not any other land (where the law of trespass applies). Second, the Supreme Court was concerned about interfering with any longstanding precedent. In the judgment it is specifically noted that overturning *Blundell* would risk upsetting numerous decisions and actions which had been based on the, not unreasonable, assumption that the view of the majority in *Blundell* represented the law. In expressing this view the majority nonetheless describes the dissenting judgment of Best J, which recognised the public trust doctrine, as not without force.

⁹³ *Newhaven* above n 10 at [107].

⁹⁴ At [108].

He observed that, over time, recreational use of the foreshore and the associated beaches had become an even more wide-spread and popular activity for the English public and pointed out that “[t]here is no record of anyone relying on the judgment in *Blundell v Catterall* to restrict such use”.⁹⁵

Carnwath LJ went on to outline the limits he saw to *Blundell* being treated as good authority. First, he highlighted that the facts of the case did not turn on whether there is a general right of the public to bathe on the foreshore. Rather, it concerned the right of the public to bring onto the beach bathing machines for that purpose (in an area where it conflicted with private fishing rights). Second Carnwath LJ pointed out that *Blundell* concerned conflicting rights of commercial exploitation of a beach rather than any right of the public to access the beach for recreational purposes. Third, Carnwath LJ noted that he interpreted the dissenting judgment of Best J to confirm that, as required by Holroyd J, it *was* customary for the public to cross the area in question on foot for the purpose of bathing – and that the custom was not questioned in the case.

Carnwath LJ concluded by noting the continuing uncertainty in many jurisdictions as to the legal basis for any rights of the public to access the foreshore for recreational purposes and the wide variety of statutory and judicial mechanisms employed to deal with the matter.⁹⁶ He expressed surprise at the extent of this variety given that the systems of law in many of those jurisdictions were based on the English common law and suggested that some of the confusion in the common law world was due to the *Blundell* decision.

While Holroyd J’s obiter comments in *Blundell* may have introduced some historic uncertainty with respect to the character and form of the English public trust doctrine, the *Newhaven* judgment makes it clear that, on the basis of the English law cases outlined above, the common law doctrine continued to operate with regard to the rights of the public to access the foreshore for the purposes of fishing and navigation.

In conclusion, application of the doctrine by the English judiciary was informed by four documents and it was relied to ensure the Crown did not make decisions which derogated from the public’s right to access the foreshore for the purposes of fishing and navigation. The remainder of this analysis is restricted to a focus on the fishing and navigation formulations of the English public trust doctrine (any right to bathe is excluded).

⁹⁵ At [108].

⁹⁶ *Newhaven* above n 10 at [130].

III Locating New Zealand's Public Trust Doctrine

In this Part of the paper I seek to locate the public trust doctrine in New Zealand law. There are four cases which I consider confirm that the English common law public trust doctrine became part of the New Zealand common law. They are: *Crawford v Lecren*; *Mueller v Taupiri Coal-Mines (Limited)*; *Ngati Apa & Anor v Attorney-General & Ors* and *Paki v Attorney-General*. In subpart A I discuss each case, with the objective of demonstrating that although these decisions do not make express reference to the 'public trust doctrine', they do nonetheless demonstrate judicial recognition of the doctrine in New Zealand law. I also discuss two more recent New Zealand decisions which expressly refer to the public trust doctrine: *Thomson v Minister for Climate Change Issues* and *Waitakere City Council v Lovelock*.⁹⁷ These express references, I argue, suggest judicial acceptance of the cogency of the doctrine.

In subpart B, I briefly canvass how the English public trust doctrine case law has been relied on in the United States to develop, what is today, an expansive doctrine. Finally, in subpart C, I address whether the common law doctrine has survived the natural resource management schemes established by the Resource Management Act 1991 and Marine Coastal Area (Takutai Moana) Act 2011.

A New Zealand's Public Trust Doctrine

The English public trust doctrine authorities outlined in Part II became the law of New Zealand via s 1 of the English Laws Act 1858. This legislation confirmed that the law of England as at 14 January 1840, so far as applicable to the circumstances of the colony of New Zealand, was deemed and taken to have been in force therein from that day, and that it continued to apply in the administration of justice in New Zealand accordingly.⁹⁸ Today, the inheritance mechanism is confirmed by s 5 of the Imperial Laws Application

⁹⁷ *Waitakere City Council v Lovelock* [1997] 2 NZLR 385 (CA); *Thomson v Minister for Climate Change Issues* [2018] 2 NZLR 160 (HC).

⁹⁸ The Act applied to England's laws as of 14 January 1840 meaning the inheritance of England's laws was given statutory recognition before the Treaty was signed on 6 February 1840. As such, no New Zealand court has attempted to apply Maori law beyond recognising customary rights and usage, including aboriginal rights to fishing and land. The implication of this is that the English common law public trust doctrine became New Zealand's law before the Treaty was signed. See Phillip Joseph above n 14 at 47 where *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680 (HC) and *R v Symonds* (1847) NZPCC 387(SC) are discussed as authorities for aboriginal rights to fishing and land.

Act 1988.⁹⁹ These statutory provisions mean that, technically, the English precedent outlined in Part II has the potential to be applied as New Zealand law.¹⁰⁰

My argument that the public trust doctrine forms part of the law of New Zealand is, however, based on evidence of judicial application of the English doctrine in New Zealand's case law. Evidence of the doctrine's application in New Zealand cases demonstrates satisfaction of the 'so far as applicable' prerequisite specified in the English Laws Act 1858. I suggest that there are four New Zealand cases which provide such evidence and each is discussed below.

1 *Crawford v Lecren*

Crawford v Lecren is the first New Zealand case to refer to the English public trust doctrine.¹⁰¹ The 1868 case involved a dispute regarding whether there is, in New Zealand, a right of the public to load and unload goods on the foreshore. The Court of Appeal determined that there was no right to load and unload goods on the foreshore. Despite this finding, the judgment remains authority for the public trust doctrine principle that, prima facie, all navigable tidal waters are subject to a public right of navigation.¹⁰² In confirming this position the Court of Appeal made express reference to *Blundell v Catterall* and the *jus publicum*.¹⁰³

I argue that *Crawford v Lecren* demonstrates early judicial acknowledgement of the public trust doctrine in New Zealand.¹⁰⁴ Although the reference is only slim, it nonetheless suggests the doctrine had become a recognised part of New Zealand law. Specifically, by confirming the New Zealand public's right to navigate the foreshore, by reference to *Blundell*, the Court of Appeal appears to have recognised the doctrine's

⁹⁹ Section 5 of the Imperial Laws Application Act 1988 provides: "Application of common law of England: After the commencement of this Act, the common law of England (including the principles and rules of equity), so far as it was part of the laws of New Zealand immediately before the commencement of this Act, shall continue to be part of the laws of New Zealand." Note, the principle of inheritance was confirmed by the New Zealand courts in the decision *Fuller v Macleod* [1981] 1 NZLR 390 (CA) at 415.

¹⁰⁰ See FM Brookfield "Communal ownership of (non-Maori) sea land" [2006] NZLJ 253 at 253.

¹⁰¹ *Crawford v Lecren* above n 91.

¹⁰² At 127, as referred to in FM Brookfield *Laws of New Zealand Water* at [246].

¹⁰³ *Mueller* above n 50 at 118; the Court discusses a particular passage of the *Blundell* judgment issued by Holroyd J and confirms its own interpretation of Holroyd J's guidance. Specifically the Court states that its interpretation is that where Holroyd refers to 'navigable' rivers he is referring to rivers in their legal sense – "that is, rivers in which the tide ebbs and flows". The Court goes on to say that it reached this interpretation because Holroyd J put the common law right of navigation on the same footing as the common-law right of fishery. This aligns with the dicta in *Newhaven* above n 10.

¹⁰⁴ The New Zealand Court of Appeal's reference to *Blundell* above n 81 in *Crawford v Lecren* was specifically acknowledged by the English Supreme Court in *Newhaven* above n 10.

application to the circumstances of New Zealand (in satisfaction of the legislative requirement specified by s 1 of the English Laws Act 1858).

2 *Mueller v Taupiri Coal-Mines (Limited)*

Mueller v Taupiri Coal-Mines (Limited) is the second case which demonstrates that the public trust doctrine had become New Zealand law. I argue it provides further evidence of the New Zealand courts' application of the public trust doctrine.

The 1900 Court of Appeal decision involved a dispute regarding the application of the common law presumption that if a river is described as a boundary to a property, and not merely adjoining, the soil of the riverbed passes *ad medium filum aquae*.¹⁰⁵ In *Mueller* the Court recognised that, whether the common law presumption applied or not, provided that the river is navigable, “the public have an easement therein, or a right of passage, subject to the *jus publicum* as a public highway”.¹⁰⁶ In confirming this position, the Court referred to the key English public trust doctrine authority *Blundell v Catterall*.¹⁰⁷

The *Mueller* judgment contains a useful discussion of New Zealand's common law public trust doctrine more broadly. There are three points worth noting. First, Stout CJ's judgment (in dissent) and the judgments of Williams and Edwards JJ all cite Hales' *De Jure Maris*.¹⁰⁸ This indicates a general recognition of the authority of this text in New Zealand law.¹⁰⁹ Second, Williams J, for the majority, expressly asserted that “in [New Zealand], the Crown is in effect a trustee for the public of lands vested in the Crown”.¹¹⁰ Williams J made this statement without reverting to the laws of Equity in order to substantiate the Crown's responsibility as trustee. I consider that this statement confirms fairly clear judicial recognition of the public trust doctrine in New Zealand law. Finally, the *Mueller* judgment referred to the Irish decision *Murphy v Ryan*.¹¹¹ This is another

¹⁰⁵ *Ad medium filum aquae* means the owner of the property owns the riverbed to half way across the river.

¹⁰⁶ *Mueller* above n 50 at 95.

¹⁰⁷ *Blundell v Catterall* above n 48.

¹⁰⁸ *Mueller* above n 50 at 94, 109 and 117.

¹⁰⁹ This proposition is supported by the fact that *De Jure Maris* has more recently been cited by the Supreme Court in *Paki v Attorney-General* [2012] 3 NZLR 277(SC) and also in *Adams v Bay of Islands County* [1916] NZLR 65 (SC).

¹¹⁰ *Mueller* above n 50 at 106.

¹¹¹ *Murphy v Ryan* (1868) Ir R 2 CL 143 at 118 where it is stated: “But, whilst the rights of fishing in fresh water rivers, in which the soil belongs to the riparian owners, is thus exclusive, the right of fishing in the sea, and in its arms and estuaries, and in its tidal waters, wherever it ebbs and flows, is held by the common law to be public juris, and to belong to all the subjects of the crown — the soil of the sea and its arms and estuaries and tidal waters being vested in the sovereign as a trustee for the public. The exclusive

early common law public trust doctrine decision in which the fundamental rights of the public, held in trust by the Crown, are confirmed.

Although the public trust doctrine was not central to the issue in *Mueller*, the judgment is important: it confirms judicial recognition of the English doctrine in New Zealand. This is particularly due to Williams J's description of the Crown as being in effect trustee of public land.

3 *Ngati Apa & Anor v Attorney-General & Ors*

The third New Zealand decision which demonstrates recognition of the English public trust doctrine in New Zealand law is *Ngati Apa & Anor v Attorney-General & Ors*, a 2003 case before the Court of Appeal. The relevant dispute arose regarding the extent of the Maori Land Court's jurisdiction under the Te Ture Whenua Maori Act 1993 to determine the status of foreshore or seabed and related waters.¹¹²

In this decision the Court of Appeal refers to the New Zealand public's fundamental right to navigation, citing *Gann*.¹¹³ Specifically, the Court expressly acknowledged the "early established" common law right to navigation as one which could not be prejudiced by the Crown in granting private rights to the soil below the watermark. The Court of Appeal's reference to *Gann* in this decision suggests that the English common law public trust doctrine continued to form part of New Zealand's common law in 2003. I reach this conclusion on the following basis. First, *Gann* is a clear English common law authority for the public's right to access the foreshore for the purposes of navigation – an accepted application of the English public trust doctrine. Second, that particular application of the public trust doctrine was expressly upheld by the Court of Appeal of New Zealand, by direct reliance on *Gann*, in 2003 (after the RMA had come into force; see subpart C).

4 *Paki v Attorney-General*

The most recent New Zealand decision which suggests the English public trust doctrine is part of New Zealand law is *Paki v Attorney-General*, a 2012 decision of the Supreme

right of fishing in the one case and the public right of fishing in the other depend upon the existence of a proprietorship in the soil of the private river by the private owner, and by the sovereign in the public river respectively."

¹¹² *Ngati Apa & Anor v Attorney-General & Ors* [2003] 3 NZLR 643 (CA) at [133] – [135].

¹¹³ At [133]. The idea that, despite any transfer in the private interests in the river, there remains an untrammable right of the public in the resource, resonates with the *jus publicum* referred to in *Blundell* and *Crawford v Lecren*.

Court.¹¹⁴ *Paki* involved a dispute regarding ownership of the riverbed of the Waikato River. The appellants argued, among other things, that the Crown held the Waikato River in constructive trust for the descendants of the original owners. In reaching its determination the Supreme Court relied on the English decisions *Gann v Freefishers of Whitstable* and *Malcomson v O’Dea* for the position that:¹¹⁵

In English common law the presumption of Crown ownership of the bed of “navigable rivers” required both that such lands be within the tidal reaches and that they be beneath waters navigable in fact. The presumption was therefore inevitably concerned with part only of the river bed: it was excluded from those parts beyond the tidal reach; and it applied only to those tidal parts of the river that were navigable in fact.

The facts of *Paki* meant that the Court was required to consider the issue of constructive trusteeship and fiduciary duties of the Crown. These issues were, however, considered exclusively in the context of Maori custom: the Supreme Court did not refer to *Gann* or *Malcomson* as authorities for the fiduciary obligations on the Crown.¹¹⁶ Nevertheless, the Court’s citation of these two English decisions suggests that they remain authoritative today.

In summary, on the basis of the reference to, and recognition of, the English common law public trust doctrine authorities in the four New Zealand cases outlined above I argue the English common law public trust doctrine is part of New Zealand’s common law. If this proposition is accepted, New Zealand’s common law doctrine would confirm that the public have prima facie rights to access the foreshore for the purposes of fishing and navigation, and that the government holds the foreshore as a trustee for the public.

¹¹⁴ *Paki v Attorney-General* [2012] NZSC50, [2012] 3 NZLR 277 (SC).

¹¹⁵ *Paki* at [60]. *Gann v Freefishers of Whitstable* above n 36; *Malcomson v O’Dea* above n 85.

¹¹⁶ In discussing the public right of navigation in tidal waters, by reference to *Gann*, FM Brookfield describes a fundamental right which aligns directly with the English common law public trust doctrine: “The public right of navigation in tidal waters is a right given by the common law that extends to over the whole space over which the tide flows, and the right is not suspended when the tide is too low for vessels to float. The public right of navigation is not a right of property, but it is a right to come and go or pass and repass, and is analogous to public rights on the highway. The right is paramount to any rights of the Crown or subjects of the waters in question. Therefore every grant by the Crown in relation to tidal waters, for example a grant of the foreshore, must be construed as subject to the public right of navigation and the owner of the foreshore may do nothing that interferes with the right.” (citation omitted) see FM Brookfield *Laws of New Zealand Water* at [247].

The public trust doctrine has also been referred to by name in two relatively recent New Zealand judgments: *Thomson v Minister for Climate Change Issues* and *Waitakere City Council v Lovelock*.¹¹⁷ Neither judgment makes this reference in the context of discussing the English common law public trust doctrine authorities outlined in Part II. However, I argue that these references, both described below, suggest judicial acceptance of the cogency of the doctrine today.

5 *Thomson v Minister for Climate Change Issues*

Thomson v Minister for Climate Change Issues is a 2018 decision of the High Court which involved judicial review of the New Zealand government's response to climate change.¹¹⁸ In her judgment Mallon J referred to *Juliana v United States*, a decision of the Oregon District Court, which involved a challenge in respect of the alleged failure of various United States government agencies to curtail carbon dioxide emissions despite their knowing of the effect of those emissions on climate change. Mallon J expressly referred to *Juliana* and to the United States' public trust doctrine:¹¹⁹

... a constitutional challenge (an infringement of life and liberty) and for violation of a **public trust doctrine** (by denying future generations of [sic] essential natural resources) [emphasis added].

Mallon J noted that the doctrine was argued in *Juliana* on the basis of various government officials having knowledge, for decades, that "CO2 pollution has been causing catastrophic climate change".¹²⁰ As such, the High Court's consideration of the doctrine in *Thomson* was coloured by the climate change context in which it was raised: it treated the doctrine with caution due to the political and international relations implications of the doctrine in that particular context. Notwithstanding this caution, the High Court observed that the constitutional challenge presented in *Juliana* was found to be within the jurisdiction of the Court:¹²¹

The Court concluded the case did not involve a non-justiciable political question. It did not need to "step outside the core role of the judiciary to decide [the] case". As a

¹¹⁷ *Waitakere City Council* and *Thomson* above n 97.

¹¹⁸ *Thomson* above n 97.

¹¹⁹ *Thomson* at [112], discussing *Juliana v United States* No 6:15-CV-1517-TC (DC Or, 8 April 2016), upheld on review in *Juliana* above n 9.

¹²⁰ *Thomson* at [112] – [115].

¹²¹ At [115].

constitutional challenge this case was squarely within the role of the Court. However the Court recognised that, if the plaintiffs prevailed on the merits, “great care” would be required in crafting a remedy. The separation of powers doctrine might permit the Court to direct the defendants to ameliorate the plaintiffs’ injuries, but limit its ability to specify precisely how to do so. In its concluding comments, the Court emphasised the role of the courts given the importance of the issues at stake.

This excerpt of the judgment gives an indication of the political complexities which can characterise cases where the public trust doctrine is argued. I deal with these complexities, as they may arise in New Zealand, in Part IV. I do not, however, suggest that the public trust doctrine of New Zealand is useful to addressing the implications of climate change in New Zealand (at this point in time).¹²² *Thomson* is mentioned here because I consider the High Court’s reference to the United States’ doctrine should be taken as an indicators of the doctrine’s cogence. The reference is bare, and the doctrine is in no way central to the decision of the Court. Nevertheless, had the Court considered the doctrine irrelevant or to be lacking cogence no reference would have been made.

6 *Waitakere City Council v Lovelock*

The second case which I argue indicates judicial recognition of the cogency of the public trust doctrine is *Waitakere City Council v Lovelock*.¹²³ The case involved judicial review proceedings brought by a group of residents in respect of the Waitakere City Council’s 1995 rating decisions. The High Court had found in favour of the residents, concluding that the Council’s method of fixing the rates was unreasonable.¹²⁴ The Council appealed and although the residents opposed the appeal only the Council appeared before the Court of Appeal.¹²⁵

By a majority the Court of Appeal overturned the High Court’s decision. Thomas J agreed with the majority’s finding (Richardson and Blanchard JJ) that the Council had not acted unreasonably, however, most of the judgment is dedicated to obiter discussion of the law on unreasonableness in New Zealand. Thomas J discussed the nature of the

¹²² In the event that the New Zealand doctrine is, over time, augmented as I suggest it might be in Part IV it may have the potential to be relevant to climate change policy in the future.

¹²³ *Waitakere City Council* above n 97.

¹²⁴ *Lovelock v Waitakere City Council* [1996] 3 NZLR 310.

¹²⁵ The Court was advised by the Council that a settlement had been reached with the residents. In order to have the decision of the High Court reversed the Council unilaterally argued the appeal.

relationship between local councils and ratepayers, making express reference to the public trust doctrine and discussing public trust theory extensively:¹²⁶

The notion of an underlying trust cannot be dismissed as an historical anachronism. The perception of a trust persists in modern democratic theory today and has been extended to central government. It has been invoked in support of a **public trust doctrine** imposing a trustee or trustee-like obligation on elected representatives who derive their power from the people they serve. (See, e.g., R A Epstein, “The Public Trust Doctrine” (1987) 7 *Cato Journal* 411; and P Finn, “Public Trust and Public Accountability” (1994) 3 *Griffin LR* 224). The constitutional basis for the notion is not untenable. It rests on the sovereignty of the people. Under a democracy, Parliament is “supreme” in the sense that term is used in the phrase “parliamentary supremacy”, but the people remain sovereign and enjoy the ultimate power which that sovereignty confers. Of necessity, they delegate the machinery of government to their elected representatives together with such powers as are necessary to carry it out. But as sovereignty remains with the people the elected government remains answerable to them in the exercise of their delegated power [emphasis added].

Importantly, Thomas J made obiter suggestion to the effect that elected representatives who make up local authorities are charged with a fiduciary obligation in the performance of statutory tasks. He went on to assert that a failure to fulfil this obligation would mean an authority had acted unreasonably. Thomas J made this assertion by reference to a series of public trust theory authorities which acknowledge the fiduciary duty on local authorities when making decisions in respect spending ratepayers funds.¹²⁷ Although the facts of *Waitakere* did not involve natural resources policy, I consider Thomas J’s obiter comments demonstrate judicial support for the doctrine, particularly as it would apply to local government.¹²⁸

The theory, is, perhaps, even more apt in respect of local government, which exercises powers devolved from central government and which is therefore

¹²⁶ *Waitakere City Council* above n 97 at 410.

¹²⁷ At 408 – 411 citing *Bromley London Borough Council v Greater London Council* above n 22; *R v Roberts* [1924] 2 KB 695; *Roberts v Hopwood* [1925] AC 578. This fiduciary duty has been confirmed by the New Zealand courts; see *Mackenzie District Council* above n 22.

¹²⁸ *Waitakere* above n 97 at 410. Thomas J’s comments align very closely with Mary Wood’s description of the underlying basis for the public trust doctrine. See Mary Wood above n 8 at 129: “Legislators and agencies acting in repudiation of trust principles do so illegitimately outside the sphere of authority granted to them. That government officials now do so regularly demonstrates how far modern bureaucracy has strayed from its purpose – and how far citizens have wandered from their vigil over democracy”.

untrammelled by apprehensions of legislative supremacy. Local government can be perceived as the agent or fiduciary of the people performing a task and exercising the powers of government which have been devolved to it on trust for the people it represents.

The suggestion made here is particularly appropriate to the public trust doctrine in that, in New Zealand, it is local authorities, rather than central government, which perform the bulk of natural resource decision-making. As concluded with respect to *Thomson*, Thomas J's obiter comments should not be taken as anything more than a modern day indication of the cogency of the doctrine which otherwise appears to have been accepted by the courts of New Zealand in a fairly rudimentary form.

To summarise, I argue New Zealand's common law contains a public trust doctrine, which was inherited via the English Laws Act 1858. The presence of the doctrine is confirmed by judicial application of the English common law public trust doctrine authorities *Gann v The Freefishers of Whitstable* and *Blundell v Caterall* in the New Zealand decisions described above. In addition, the statement of Williams J in *Mueller v Taupiri Coal-Mines (Limited)* that "in [New Zealand], the Crown is in effect a trustee for the public of lands vested in the Crown" indicates the doctrine had become New Zealand law.¹²⁹ More recent references to the doctrine made by the New Zealand courts in *Thomson v Minister for Climate Change Issues* and *Waitakere City Council v Lovelock* also evidence a modern day judicial acceptance of the cogency of the doctrine.

I argue that these six cases provide fertile ground to assert that the doctrine became, and remains, part of the common law in New Zealand. The potential of these seeds of the doctrine can be illustrated by reference to the comparative experience of the United States. The United States' doctrine is, today, expansive. It is also based on the same English common law authorities which New Zealand inherited in 1840. New Zealand's public trust doctrine would share the common law roots of the United States doctrine.

Analysing the United States judiciary's interpretation of the English common law, and its subsequent development, enables an enhanced understanding of what the common law doctrine in New Zealand might entail. This is helpful not only in order to clarify the character of the doctrine, it also provides an indication of how it may be applied, and developed in New Zealand over time. While the United States judiciary's appetite for the

¹²⁹ *Mueller* above n 50 at 106.

doctrine will not necessarily be replicated by the New Zealand courts, the shared common law roots suggests that, in suitable conditions, there is at least potential for a similar doctrine to develop in New Zealand.

B United States Case Study

The English common law public trust doctrine came to form part of the law of the United States law following its declaration of independence.¹³⁰ There is, today, a wealth of public trust doctrine jurisprudence available in United States case law. It is in the United States that the doctrine has been most vigorously developed and although the doctrine started out in case law, certain States have explicitly incorporated the doctrine into their constitutions, entrenching it as fundamental rights law.¹³¹

The first United States decision to refer to the public trust doctrine was *Arnold v Mundy*.¹³² Like *Mueller* (the second New Zealand case discussed above) the judgment refers to two English common law decisions, *De Jure Maris* and the Magna Carta.¹³³ The case involved alleged trespassing over an oyster bed and the defendant pleaded a public right to fish in navigable waters. Based on his assessment of the English law inherited by the State of New Jersey, in the Supreme Court, Kirkpatrick CJ held that navigable rivers and the coasts of the sea (including land under water) were common to all people and that they were vested in the sovereign, not for its own use, but for the use of the citizen.¹³⁴

Deveney describes Kirkpatrick's dicta as having laid the ground for the case of *Illinois Central Railroad v Illinois*, widely considered to be the case which cemented the public

¹³⁰ Shortly after this event each new State enacted a 'reception statute' which imported the body of English common law, as at 1776, to the extent that it was consistent with enacted United States legislation and its constitution.

¹³¹ In particular, the public trust doctrine is confirmed in the constitutions of Rhode Island, Louisiana, Vermont, Illinois and Hawaii. See Robin Craig "Adapting to Climate Change: The Potential Role of State Common-Law Public Trust Doctrines" (2010) 34 Vermont Law Review 781 at 831 and Keala Ede, "*He Kānāwai Pono no ka Wai* (A Just Law for Water): The Application and Implications of the Public Trust Doctrine in *In e Water Use Permit Applications* (2002) 29 Ecology Law Quarterly 283. The public trust doctrine did encounter a number of unfavourable judgments. For example, in *People v New York 46 Staten Island Ferry Co* (1877) 68 NY 71 at 77-78 the court explicitly warns that the legislative arm of government should not be undermined by the public trust doctrine: "It will not be presumed that the legislature intended to destroy or abridge the public right for private benefit, and words of doubtful or equivocal import will not work this consequence... The state, in place of the Crown, holds the title, as trustee of a public trust, but the legislature may, as the representative of the people, grant the soil, or confer an exclusive privilege in tide waters, or authorize a use inconsistent with the public right...".

¹³² *Arnold v Mundy* above n 50.

¹³³ In particular, the common law cases *The Royal Fishery of the River Banne* above n 76 and *Carter v Murcot* above n 76 are referred too.

¹³⁴ *Arnold v Mundy* above n 50 at 11-12.

trust doctrine in United States jurisprudence.¹³⁵ *Illinois Central Railroad v Illinois* was decided in 1982, by the United States Supreme Court.¹³⁶ In his judgment Field J determined that, on basis of the public trust doctrine, the State of Illinois lacked the necessary authority to transfer title to land submerged by navigable waters.¹³⁷ In reaching this decision, Field J expressly referred to Kirkpatrick CJ's dicta in *Arnold v Mundy* with respect to the limits on the power of the state in dealing with public trust resources:¹³⁸

The sovereign power, itself, therefore, cannot consistently with the principles of the law of nature and the constitution of a well ordered society, make a direct and absolute grant of the waters of the State divesting all the citizens of their common right. It would be a grievance which never could be long borne by a free people.

Following *Illinois Central Railroad*, the doctrine was recognised by the courts in several additional States. For example, the 1918 decision *Aquino v Riegelman* where the Supreme Court asserted that its judgment turned “solely and squarely” on the doctrine, and that to fail to recognise the doctrine would “deprive the public of its right”.¹³⁹ In particular, Benedict J expressly denied that the legislature had the power, either by direct

¹³⁵ Patrick Deveney above n 54 at 56. In between *Arnold v Mundy* and *Illinois Central Railroad v Illinois* a few cases were decided which are relevant to the public trust doctrine however none added to the jurisprudence on the doctrine in a remarkable way. See *Lansing v Smith* (1829) 4 Wend 9 21 (SC) (New York) where, by direct reference to English law, the Court held that the Legislature, as a representative of the public, may regulate or restrict the exercise of public rights to public resources. However, the Court went on to clarify that the Legislature may only do so for the benefit of the public at large, and on the proviso that it does not interfere with the vested rights of individuals: “There can be no doubt of the right of Parliament in England, or the legislature of this state, to make such grants, when they do not interfere with the vested rights of particular individuals. The right to navigate the public waters of the state, and to fish therein, and the right to use the public highways, are all public rights belonging to the people at large. They are not the private unalienable rights of each individual.” See also *Martin v Waddell's Lessee* (1842) 41 US (16 Pet.) 367 at 40, a case which concerned the ownership of the seabed below navigable waters. In reaching its final determination, the Court held: “In the judgment of the court, the lands under the navigable waters passed to the grantee as one of the royalties incident to the powers of government, and were to be held by him in the same manner and for the same purposes that the navigable waters of England, and the soils under them are held by the Crown.”

¹³⁶ *Illinois Central Railroad* above n 42.

¹³⁷ At [435]. Note the judgment itself contains no reference to the “public trust doctrine”. In a subsequent opinion on the decision United States public trust academic Joseph Sax coined the term. Sax is largely responsible for the United States’ public trust doctrine dialogue. In 1971 he wrote: “Long ago there developed in the law of the Roman Empire a legal theory known as the “doctrine of the public trust”. It was founded upon the very sensible idea that certain common properties, such as rivers, the seashore, and the air were held by the government in trusteeship for the free and unimpeded use of the general public. Our contemporary concerns about the “environment” bear a very close conceptual relationship to this venerable legal doctrine.” See Joseph Sax “Defending the Environment: A Strategy for Citizen Action” (1971) 47 (2) *Indiana Law Journal* 175, at 163 – 164.

¹³⁸ *Illinois Central Railroad* above n 42 at [456], quoting *Arnold v Mundy* above n 50 at 78.

¹³⁹ *Aquino v Riegelman* (1918) 104 Misc. 28, 171 N. Y. S 716 (SC) (Kings Country).

action or otherwise, to give or grant to any person rights which are the property of all the citizens of the Commonwealth, and which the legislature held in trust for the common use. He went on to describe citizens right of passage across lands over which the tides ebb and flow as inalienable.¹⁴⁰

From these slim origins, the United States' doctrine has developed significantly. The courts have now settled a nuanced methodology to balancing the public and private interests often at stake in public trust doctrine cases.¹⁴¹ The approach, known as the 'feasible accommodation principle', had its genesis in the Californian Supreme Court decision *National Audubon Society v Superior Court* (otherwise known as the *Mono Lake* decision).¹⁴² *Mono Lake* involved a dispute regarding environmental damage caused to the lake as a result of declining water levels, due to diversions permitted by the Department of Water and Power. The feasible accommodation principle set down by the Court involves two key elements.

First, the Court determined that state authorities have an ongoing duty to supervise the use of natural resources: the duty requires the authority to continually review its administrative decisions in this respect.¹⁴³ Even if the authority satisfies the doctrine in making an initial administrative decision about a particular resource, it may subsequently breach its duty if it does not take steps to continually assess the appropriateness of that

¹⁴⁰ At 231-33.

¹⁴¹ The approach is also well set out in the decision *Marks v Whitney* where the court considered a dispute that had arisen in relation to ownership of tidal lands. The court held that the tidal lands were subject to the public trust. See *Marks v Whitney* (1971) 491 P2d 374, 381- 82 (Cal), as cited in *National Audubon Society*, above n 31 at 4: "The buyer of land under these statutes receives the title to the soil, the *jus privatum*, subject to the public right of navigation, and in subordination to the right of the state to take possession and use and improve it for that purpose, as it may deem necessary. In this way, the private right of the purchaser will be given as full effect as the public interest will permit." In respect of the *jus publicum* interests of the public in the tidal land, the court clarified, at 6: "The public uses to which the tide lands are subject are sufficiently flexible to encompass changing public needs. In administering the trust, the state is not burdened with an outmoded classification favouring one mode of utilization over another."

¹⁴² See *National Audubon Society* above n 31. For a comprehensive analysis of this decision and its implications for the United States, see Erin Ryan, "The Public Trust Doctrine, Private Water Allocation, and Mono Lake: The Historic Saga of National Audubon Society v. Superior Ct." (2015) 45 Environmental Law 561.

¹⁴³ *National Audubon Society* above n 31 at 446. "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. Just as the history of this state shows that appropriation may be necessary for efficient use of water despite unavoidable harm to public trust values, it demonstrates that an appropriative water rights system administered without consideration of the public trust may cause unnecessary and unjustified harm to trust interests. As a matter of practical necessity the state may have to approve appropriations despite foreseeable harm to public trust uses. In so doing, however, the state must bear in mind its duty as trustee to consider the effect of the taking on the public trust, and to preserve, so far as consistent with the public interest, the uses protected by the trust."

initial decision. The court held that the duty imposed by the doctrine cannot be satisfied by a single decision, it is an enduring obligation which requires the relevant authority to regularly reassess its decision.

The second element of the feasible accommodation principle outlined by the Court held that no vested private rights could impede the application of the public trust doctrine. At the time, this was a major step for the United States public trust doctrine: it confirmed the English common law position that the public trust doctrine rights of the public imposed real limits on the rights of private individuals / developers.¹⁴⁴

The *Mono Lake* decision was significant not only because of the feasible accommodation principle; the decision also involved significant extension of the doctrine's application, in terms of the types of natural resources to which the doctrine applied. The Supreme Court held that the United States doctrine was not confined to protecting only that which was confirmed by the English doctrine: the public's rights to navigation and fishing. Rather, the doctrine was held to apply to any administrative decision made regarding the ecological or recreational use of a commonly held natural resource. Specifically, the Court held that the doctrine also imposed a duty in respect of California's common heritage of streams, lakes, marshlands, and tidelands.

From *Arnold v Mundy* to *Mono Lake*, the rapid ascension of the United States public trust doctrine is apparent. *Mono Lake* involved a fundamental reinterpretation of the English common law: emphasising the normative basis for the doctrine, the Court developed its own expansive version for application in the United States. Indeed, as described above, most recently the public trust doctrine has been invoked in the United States to attempt to hold administrative decision makers to account for climate change.

Whether the New Zealand courts would favour similar developments in New Zealand's common law remains to be seen. At the very least, a number of political and legal hurdles would need to be navigated on the way. The most important of those hurdles is that the common law can be modified by express legislation. In the next section of this paper I assess whether New Zealand's public trust doctrine has been displaced by legislation enacted since the doctrine was first recognised by the courts of New Zealand.

¹⁴⁴ See Michael Blumm, "The Public Trust Doctrine and Private Property: The Accommodation Principle" (2010) 27 Pace Environmental Law Review 649 at 759.

C Public Trust Doctrine and New Zealand's Statute Law

The New Zealand statute book contains no express reference to the public trust doctrine or to public trust theory. It is therefore necessary to investigate whether the essential concept is reflected in, or has been displaced by, statute.

I assess the authority of the doctrine in the context of New Zealand's statute law as follows. First, I briefly outline the general rules of interpretation established with respect to the displacement of common law rights by statute. Second, I assess whether, in principle, two pieces of New Zealand legislation are likely to have displaced the doctrine: the Resource Management Act 1991 (RMA) and the Marine Coastal Area (Takutai Moana) Act 2011 (MCAA). Given that New Zealand's doctrine preserves the public's right to access the foreshore, for the purposes of fishing and navigation, these two Acts are of key importance.¹⁴⁵ If New Zealand's common law public trust doctrine has not been displaced by the RMA or MCAA it may supplement the statutory scheme established by each. In the analysis below I consider this possible coexistence.

1 Rules of Interpretation

The New Zealand courts are clear that the common law will be presumed to persist in the absence of express statutory language to extinguish it (including by necessary implication).¹⁴⁶ This approach, known as the principle of non-derogation, applies with particular force where common law rights are at issue.¹⁴⁷

The principle of non-derogation holds that a common law right will prevail unless legislation indicates otherwise, taking into careful consideration the nature of the common law right argued, and the specific statutory language at issue. As stated by

¹⁴⁵ This assessment of the relevant legislation is by no means comprehensive: the legislation pertinent to any case argued on the basis of New Zealand's common law public trust doctrine will depend on the specific facts at hand.

¹⁴⁶ See, for example, *Hume v Auckland Regional Council* [2002] 3 NZLR 363 (CA) at 371 where the Court of Appeal held that, in the absence of express provision to the contrary, Parliament must not have intended to exclude the public from accessing a marine area in which a private jetty had been erected pursuant to a coastal permit.

¹⁴⁷ *R v Secretary of the State for the Home Department, ex p Pierson* [1997] UKHL 37, [1997] 3 All ER 577 [1998] AC 539 per Lord Browne Wilkinson at pp 573 – 574. See Phillip Joseph above n 14 at 792 – 794. The approach was confirmed by Lord Hoffmann in *R v Secretary of State for the Home Department ex parte Simms* [2000] 2 AC 115 (HL) where he stated: “Fundamental rights cannot be overridden by general or ambiguous words”. The approach was also confirmed by the New Zealand High Court in *Aoraki Water Trust v Meridian Energy Limited* [2005] 2 NZLR 268 (HC) at [25] where Chisholm and Harrison JJ acknowledged that “[c]ommon law principles apply to the express provisions of a statute unless Parliament has clearly indicated a contrary intention”.

Tipping J, “the conventional common law approach ... considers that Parliament does not legislate in a way that impinges on common law rights without that intention being made clear”.¹⁴⁸ If the public trust doctrine does entail a fundamental right of the New Zealand public then the courts will require clear statutory language in order to find that the common law doctrine has been ousted.

With respect to extinguishment by necessary implication, the bar is also set high in that the courts require the implication to be one which logically follows from the express provisions of the statute construed in their context: mere “sensible” interpretation is insufficient to modify the common law.¹⁴⁹ In the case *Cropp v Judicial Committee* the Supreme Court made it clear, however, that in suitable circumstances even delegated legislation, created pursuant to a general rule making power, can oust a general common law right.¹⁵⁰ The case concerned the Judicial Committee’s power to create a rule to require randomised drug testing of jockeys and the Supreme Court upheld the rule, which was alleged to breach basic common law rights, on the basis that the rule making power was directed towards ensuring the safety of racing. As is detailed in the RMA centric analysis below, it appears that the courts will be unpersuaded that a common law right persists where the legislation which cuts across the right is intended to address or mitigate a serious harm.¹⁵¹

2 *Resource Management Act 1991*

The stated purpose of the RMA is to promote the sustainable management of natural and physical resources. Rather than constituting a licensing or economic regulatory regime, the legislation is intended to ensure that successive generations manage the available resources carefully, and pass them on to the next generation in no lesser state than was made available to them.¹⁵²

The RMA does not expressly extinguish the common law.¹⁵³ The legislation does, however, establish an integrated and holistic regime of environmental management which

¹⁴⁸ *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [212].

¹⁴⁹ *B v Auckland District Law Society* [2004] 1 NZLR 326 (PC); *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2002] 2 WLR 1299 at [45].

¹⁵⁰ *Cropp v Judicial Committee* [2008] 3 NZLR 774 (SC).

¹⁵¹ At [32].

¹⁵² *Te Aroha Air Quality Protection Appeal Group v Waikato Regional Council* (No 2) (1993) 2 NZRMA 574 at 585; *Marlborough District Council v Southern Ocean Seafoods Ltd* [1995] NZRMA 220 at 227; *Imrie Family Trust v Whangarei District Council* [1994] NZRMA 453 at 462.

¹⁵³ *Springs Promotions Ltd* above n 155 per Randerson J at [60] and [62]. This decision followed *Ports of Auckland Limited v Auckland City Council* [1991] NZLR 601 where Baragwanath stated: “Counsel

may make certain aspects of the common law redundant.¹⁵⁴ The RMA prescribes default rules of public foreshore access. As such the legislation may displace, or even give effect to, the public trust doctrine in New Zealand's common law.

Displacement of common law rights by the RMA was considered in the High Court case *Springs Promotions Ltd v Springs Stadium Residents Association Inc.*¹⁵⁵ The case involved allegations of excessive noise caused by the Western Springs speedway and the court was required to determine whether the RMA was a 'complete code'. Randerson J confirmed that, in relation to certain topics, the RMA was not a code of law and that the legislation could not implicitly oust the common law. He considered that although the RMA prescribed a comprehensive regime, it would be going too far to claim that the statute was exhaustive.¹⁵⁶

Although it is fair to describe the Act as comprehensive, it is going too far, with respect, to describe it as a code if that is intended to mean that it excludes the application of the common law in the area and replaces it with a set of statutory rules that are the exhaustive and exclusive source of the law.

Randerson J went on to suggest certain factors that should be taken into consideration in order to assess whether the relevant statute should be treated as a code of law.¹⁵⁷

Key elements in determining whether the Act provides a complete code on a specific topic are the extent of detail in the relevant provisions; whether the provisions expressly or impliedly leave open the possibility of the application of law from other sources; whether other statutory provisions or rules of common law on equity bear on the issue; and whether there are any other indicators of statutory intention. In the end, it is a matter of statutory construction against the background of the general law.

have in the past tended to treat the common law and statutory planning law as independent of one another, despite the obvious relevance of parliamentary policy expressed in statute to the development of the common law. ... The time should be long past when statute law and common law were seen as occupying different planes. Decision makers, including planning authorities and the Court on judicial review, must consider what construction of the legislation and what development of the common law will avoid anomaly and provide a sensible result." Compare *McGuire v Hastings District Council* [2002] 2 NZLR 577 at [20]. See the discussion in David Grinlinton "The Continuing Relevance of Common Law Property Rights and Remedies in Addressing Environmental Challenges" (2017) 62 McGill Law Journal 633 at 647.

¹⁵⁴ *Faulkner v Gisborne District Council* [1995] 3 NZLR 622 (HC) at 631.

¹⁵⁵ *Springs Promotions Ltd v Springs Stadium Residents Association Inc* [2006] 1 NZLR 846 (HC).

¹⁵⁶ At [60].

¹⁵⁷ At [62].

In reaching this position, Randerson J noted that s 23(1) of the RMA expressly provides that compliance with the Act does not remove the need to comply with all other applicable Acts, regulations, bylaws and rules of law. The final category: ‘rules of law’ includes the common law, which the public trust doctrine may be a part of.

Preceding this case, a similar question was considered by the courts on at least two other occasions. I briefly describe the decision reached in each as it demonstrates the nuances of determining whether the RMA has displaced the common law. In a 1995 decision *Faulkner v Gisborne District Council*, concerning the maintenance of a sea wall, Barker J held that s 23 of the RMA did not preserve a right or rule of law which, on the proper construction of the RMA, had been impliedly restricted or abolished.¹⁵⁸ Specifically, Barker J took the view that it was a necessary implication of the RMA regime that common law property rights pertaining to maintenance of sea walls were subject to the legislative regime. As such, where common law rights are considered inconsistent with the RMA’s purpose or scheme it appears more likely that they will be determined to have been ousted by the legislation.

This is to be compared with the 2000 decision *Varnier v Vector Energy Limited* where Salmon J held, consistent with the approach in *Springs Promotions*, that s 23 of the RMA preserved the common law claims to, for example, nuisance, trespass and negligence.¹⁵⁹ Salmon J stated that it was not within a planning authority’s statutory power to authorise a common law nuisance, on the basis that in his view it was clear from s 23 that consent under the RMA was not intended to remove the common law rights against nuisance.

Faulkner and *Varnier* can be reconciled by reference to the nature of the specific common law right at issue. Where the relevant common law runs counter to the scheme established by the RMA it appears less likely that the court will consider the right to survive. Where the right addresses a mischief that is not contrary to the purposes of the RMA, and for which there are strong public policy considerations, it is more likely that the common law will be held to supplement the RMA’s framework.

In light of these decisions I submit that the public trust doctrine would, in principle, be considered by a court to survive the RMA. I make this submission by reference to the

¹⁵⁸ *Falkner v Gisborne District Council* [1995] 3 NZLR 622 (HC) at 632.

¹⁵⁹ *Varnier v Vector Energy Limited* [2004] NZRMA 193 (HC) at [28].

decision *West Coast ENT Inc v Buller Coal Ltd* where it was held by the majority that the RMA should be given a limited interpretation, based on necessary implication, even where a broader reading is consistent with the scheme of the Act.¹⁶⁰ Taking into consideration the factors outlined by Randerson J in *Springs Promotions* I note that the public trust doctrine does not run counter to the purposes of the RMA. Rather the doctrine runs in direct support of the RMA. This suggests, in principle, that the doctrine could be conceived of as supplementing the RMA. In addition, as outlined above, the public trust doctrine addresses a mischief for which there are strong public policy considerations: that is ensuring natural resource decision-makers reach sound decisions by acting in the interests of the public. Notwithstanding this, there are at least two particular provisions of the RMA which, prima facie, appear to emulate New Zealand's public trust doctrine.

The first is s 6 of the Act. Sitting within Part 2, this provision prescribes a list of matters of national importance, and requires that each be recognised and provided for by all persons exercising powers and functions pursuant to the RMA.¹⁶¹ Where a matter of national importance is determined to be relevant to a particular decision, the courts have held that a presumption arises in favour of achieving the matter.¹⁶² Weighing against this presumption will be any other relevant factors that might outweigh the matter of national importance. Subsection (6)(d) specifically requires consent authorities to recognise and provide for the “maintenance and enhancement of public access to and along the coastal marine area, lakes and rivers” in exercising their powers and authority.¹⁶³ This requirement appears to emulate the public trust doctrine, which also confirms a fundamental right of the public to access the foreshore (for certain purposes).

The second is s 12 of the RMA. Section 12 sets out the more specific rules which regulate use of ‘coastal marine areas’. Subsection (1) prescribes particular activities which cannot be undertaken in the marine coastal area. These range from reclamation and construction to damage or disturbance of the area. Subsection (1) also appears to emulate the doctrine. If every New Zealander was prevented from undertaking all of the activities specified in

¹⁶⁰ *West Coast ENT Inc v Buller Coal Ltd* [2014] NZLR 32 (SC) at [173] as discussed in Ross Carter *Burrows and Carter Statute law in New Zealand* (5 ed Lexis Nexis NZ Limited, Wellington, 2015) at 324.

¹⁶¹ Persons includes Ministers, local authorities that are preparing policies and plans, and consent authorities that are carrying out adjudication functions. See *Quarantine Waste (NZ) Ltd v Waste Resources Ltd* [1994] NZRMA 529 (HC).

¹⁶² *New Zealand Rail Ltd v Marlborough District Council* (1993) 2 NZRMA 449, affirmed [1994] NZRMA 70 (HC).

¹⁶³ See s 2 of the Resource Management Act 1991: “consent authority means a regional council, a territorial authority, or a local authority that is both a regional council and a territorial authority, whose permission is required to carry out an activity for which a resource consent is required under this Act”.

subsection (1), there would little room for the commonly held marine coastal area to be used in such a way that access to the foreshore would not be preserved for future generations of the public.¹⁶⁴

It is, however, critical to emphasise that the rules specified by ss 6 and 12 (1) are not absolute. In particular, s 12 (2) and (3) specifically contemplate exceptions being made to these rules via national environmental standards, regional coastal plans and resource consents. This is significant and I argue it means there is room for the common law doctrine to supplement the RMA: the common law doctrine would apply to decisions which entail an exception to the default position prescribed by s 12.¹⁶⁵

National environmental standards are determined by central government and promulgated in regulations by Order in Council.¹⁶⁶ Regional coastal plans are prepared by local authorities, in consultation with the Minister of Conservation, iwi authorities of the region and any customary marine groups in the region.¹⁶⁷ Resource consents are approved by regional councils, territorial authorities or local authorities. I suggest that the public trust doctrine would supplement the statutory framework established by the RMA by regulating the decision-making of the consent authorities where the relevant decision would impact the public's access to the foreshore, for the purposes of navigation and fishing. Where a consent authority determines, for example, a regional coastal plan

¹⁶⁴ In conjunction with ss 6(d) and 12, ss 229 and 122(5) set a fairly comprehensive suite of rules which ensure that the New Zealand public can access marine coastal areas. Section 229 prescribes specific purposes for designated areas defined as 'esplanade reserves' and 'esplanade strips'. The first prescribed purpose is enabling public access to, or along, any sea, river, or lake. The second prescribed purpose is enabling public recreational use of esplanade reserves and esplanade strips, and any adjacent sea, river, or lake, provided the use is compatible with conservation values. Section 122(5) of the Act prescribes specific rules regarding 'coastal permits'. These rules presume public access by providing that any such permit is not to be interpreted as granting the owner rights of exclusive occupation unless it is either expressly stated in the permit or reasonably necessary for the purpose of the permit. That is not to say that this rule has operated smoothly, indeed one commentator has remarked that "[t]he breadth of exclusive occupation and its relation to the presumption of public access under s 6(d) of the RMA is an issue that has been hotly contested in the courts." See Robert Makgill 'Public property and private use rights: Exclusive occupation of the coastal marine area of New Zealand' in Klaus Bosselmann and Vernon Tava (eds) *Water and Sustainability: New Zealand Centre for Environmental Law Monograph Series: Volume 3* (NZCEL, Auckland, 2011) 77-110 at 94.

¹⁶⁵ Part 4 of the Conservation Act 1987 also provides for public access to waterways by providing for the reserve of marginal strips from any sale or disposition of Crown land. This legislation codifies the historic concept of the Queen's Chain, originally set down in Royal Instructions to Governor Hobson in 1840. For more on this concept and its history see John Baldwin, "Explaining the Queen's Chain Myth: the Evolution of Laws for Marginal Strips" (1999) 289 *New Zealand Surveyor* at 28, and Katherine Sanders, "Public Access and Private Property: The Queen's Chain and the Custom of Recreational Access [2012] 2 *NZLRev* at 273 – 319.

¹⁶⁶ Section 43 Resource Management Act 1991.

¹⁶⁷ Schedule 1 of the Resource Management Act 1991.

which inhibits the public's access to the foreshore, the common law doctrine could apply to that decision and impose an obligation on the authority, much like a fiduciary duty, to take certain steps to determine, and take into account, the interests of the New Zealand public in determining that regional coastal plan (I suggest what these steps involve in Part IV).

As noted in Part II, the RMA does already specify overarching obligations on authorities which determine regional coastal plans, national environmental standards and resource consents.¹⁶⁸ Section 7 (a) and (aa) of the RMA require persons exercising functions and powers under the Act to have particular regard to *kaitiakitanga* and the 'ethic of stewardship'. Further, the requirement for consent authorities to have particular regard to the matters specified in s 7 has been held by the court to impose a duty on the authority to consider specifically the matters which may be relevant, and to deal with them in an affirmative manner.¹⁶⁹ The duty referred to by the courts is a duty owed to the public: ie, those that the relevant authority is acting on behalf of and the phrase "have particular regard to" has been held by the Planning Tribunal to impose on authorities more than a positive "duty to be on inquiry":¹⁷⁰

To have particular regard to something in our view is an injunction to take the matter into account, recognising it as something important to the particular decision and therefore to be considered and carefully weighed in coming to a conclusion.

The obligation imposed on government by the public trust doctrine runs close to the duty which has been read into s 7 of the RMA. The key difference between the two lies in the matter consent authorities are required to properly consider under s 7 compared to under the public trust doctrine. Section 7 does not explicitly require authorities to have particular regard to the interests of the public. Although, the matters specified in (a) through (j), read as a whole, may cover what are the interests of the public, the provision encapsulates a more static conception of those interests than the doctrine does. The RMA may go a large portion of the way to giving effect to the doctrine (in its current form) in New Zealand law. The RMA does not, however, go so far as to displace the doctrine.

¹⁶⁸ Section 14 of the Local Government Act 2002 specifies certain principles which local authorities must act in accordance with, however these do not apply to all decision-makers under the RMA.

¹⁶⁹ Kenneth Palmer *Laws of New Zealand* Resource Management at [25] by reference to *Donnithorne v Christchurch City Council* [1994] NZRMA 97 at 103.

¹⁷⁰ *Marlborough District Council v Southern Ocean Seafoods Ltd* [1995] NZRMA 220 at 229, referring to *Gill v Rotorua District Council* (1993) 2 NZRMA 604 at 617.

The doctrine imposes a more fundamental obligation on environmental decision-makers than the RMA. Specifically, the doctrine shifts the onus of ensuring the public's interests are properly taken into consideration, from the public to the decision-maker. In light of the levels of public concern regarding environmental degradation outlined in Part I, I argue that the provisions of the RMA cannot be considered to achieve what the obligation imposed by the public trust doctrine would.

In conclusion I argue that the common law public trust doctrine would, in principle, supplement the RMA (acknowledging that it is difficult to determine this in the abstract). I base this conclusion on the following observations; first, s 23 expressly preserves the common law; second, the common law doctrine does not run counter to the purposes of the RMA; and third, although ss 6, 7 and 12 specify default rules which, prima facie, emulate the doctrine, the statutory regime specifically contemplates exceptions to those rules. I argue that the doctrine would apply to decision-makers which determine such exceptions. The doctrine is capable of supplementing the RMA by imposing a common law obligation on consent authorities which goes beyond the duty which has been read into s 7 of the RMA. Specifically, the doctrine would require authorities that make decisions which would inhibit the public's access to the foreshore to, in addition to having particular regard to the matters specified in s 7, take steps to fulfil an obligation, much like a fiduciary duty, to ensure such exceptions are determined in the interests of the public.

I now consider whether the public trust doctrine has been displaced by the Marine Coastal Area (Takutai Moana) Act 2011.

3 *Marine Coastal Area (Takutai Moana) Act 2011*

One of the prescribed purposes of the Marine Coastal Area (Takutai Moana) Act 2011 is to establish a durable scheme to ensure the protection of the legitimate interests of all New Zealanders in the marine and coastal area of New Zealand.¹⁷¹ As such, certain of its provisions may also displace or emulate to the public trust doctrine.

The MCAA was enacted following the Court of Appeal decision *Attorney-General v Ngati Apa* and it repealed and replaced the Foreshore and Seabed Act 2004.¹⁷² The

¹⁷¹ Section 4 (1)(a) Marine Coastal Area (Takutai Moana) Act 2011.

¹⁷² Note the Foreshore and Seabed Act 2004 may have temporarily extinguished the public trust doctrine. The Explanatory Note to the Foreshore and Seabed Bill states that the legislation was enacted because, following the Court of Appeal's decision in *Attorney-General v Ngati Apa* above n 112, the

MCAA expressly confirms that any customary interests in the marine coastal area which were extinguished by the Foreshore and Seabed Act 2004 are restored and given legal expression in accordance with the Act.¹⁷³ On the commencement of the MCAA, s 11 (1) mandated that the Crown and every local authority was divested of every title in the common marine and coastal area. Pursuant to subsection (2), today neither the Crown nor any other person owns or is capable of owning the common marine and coastal area. Generally speaking, these provisions reflect the public trust doctrine in that they confirm that the government does not own the marine coastal area; it is responsible only for the administration of the area.

The MCAA does not include a provision which replicates s 23(1) of the RMA. Despite that s 4(2)(d) provides that the legislation recognises and protects the exercise of existing lawful rights in the marine and coastal area. As such, it is possible that the common law public trust doctrine would be confirmed by the MCAA. At the same time, however, ss 26, 27 and 28 of the MCAA provide for the public's rights of access to the marine coastal area, including for navigation and fishing. These default rights are similar to the rights conferred by the doctrine.

The default access rights are, however, as is the case for the default rights prescribed by the RMA, expressly subject to restrictions determined by way of bylaw, regional plan and district plans. The decision-makers who are empowered to make such determinations are required to act in accordance with the purposes of the MCAA. The MCAA does not, however, impose a statutory requirement, or obligation, on decision-makers to act in the interests of the public in determining the use of marine coastal areas.¹⁷⁴

As a result I argue that rather than having been displaced by the MCAA, the common law public trust doctrine would be confirmed by, and therefore supplement, the MCAA. The practical effect of its supplementation would be that it imposes an obligation on decision-

Government considered it necessary to clarify the general status of the foreshore and seabed, and the full range of interests that may exist in these areas. Sections 7, 8 and 9 of the Foreshore and Seabed Act 2004 codified customary rights of access to the foreshore and seabed, rights of navigation within the foreshore and seabed, and fishing rights. All other customary rights were extinguished.

¹⁷³ Section 6(1) of the Marine Coastal Area (Takutai Moana) Act 2011. This means that if it had been extinguished the doctrine would now remain law in New Zealand. Subsection (2) provides: "Any application under this Act for the recognition of customary interests must be considered and determined as if the Foreshore and Seabed Act 2004 had not been enacted."

¹⁷⁴ One of the four purposes prescribed by s 4 of the Act is to establish a durable scheme to ensure the protection of the legitimate interests of all New Zealanders in the marine and coastal area of New Zealand. With respect to the decision-making requirements see, for example, ss 94 and 119 of the Marine Coastal Area (Takutai Moana) Act 2011.

makers which intend to create an exception to the default position prescribed by ss 26, 27 and 28, by way of bylaw, regional plan or district plan, to limit or circumscribe the public's rights to access the foreshore. As noted above with regard to the RMA, the doctrine would impose an additional obligation on MCAA decision-makers by shifting the burden of ensuring the public's interests are properly taken into consideration, from the public to the decision-maker.

To conclude this Part of the paper, I argue that there is case law which confirms the judicial application of the public trust doctrine in New Zealand. Specifically, a fairly rudimentary form of the English common law public trust doctrine appears to form part of New Zealand's common law. The doctrine confirms a right of the public to access the foreshore for the purposes of fishing and navigation, and imposes an obligation, a version of fiduciary duty, on administrative decision-makers to ensure that any natural resource decisions which impact on this right are made for the benefit of the public of New Zealand.

As to whether the doctrine has survived the RMA and / or the MCAA I argue that, rather than having been displaced by, the common law doctrine supplements these legislative regimes. The doctrine does not run contrary to the purposes of the RMA or the MCAA: the object of the doctrine directly supports the purposes of each statute.¹⁷⁵ Both Acts include provisions which could be interpreted as having displaced the rights confirmed by the doctrine. Notwithstanding this, I argue that the express permission granted to authorities to determine exceptions to the default statutory access rights means that the legislation is unlikely to be read as having ousted the duty imposed by the common law doctrine. Based on this conclusion, I now assess the most appropriate way to conceive of the doctrine's operation in New Zealand law.

¹⁷⁵ *Minotaur Custodians Ltd v Wellington City Council* [2016] NZHC 238, [2016] 3 NZLR 92 at [48], per Mallon J: "The common law may supplement statutory provisions unless by necessary implication the statute must be regarded as providing a comprehensive procedural code."

IV The Form of New Zealand's Public Trust Doctrine

Part IV explores the most appropriate operationalisation of New Zealand's public trust doctrine, should it currently lie dormant in the common law. In subpart A, I assess the possibility of conceiving the doctrine as a ground of judicial review. In subpart B explore the doctrine's future development possibilities and outline the normative arguments in favour of its augmentation.

A Judicial Review and the Public Trust Doctrine

As described in the preceding analysis the public trust doctrine entails a constraint on government's administrative decision-making in respect of natural resources. Taking into account the way the doctrine has developed in the United States, I propose that the doctrine should be operationalised in New Zealand as a ground of judicial review law. In the section which follows I sketch out this possibility. First, however, I outline two observations which offer support to my proposal.

The public trust doctrine is based on public trust theory and the theory holds that those acting in the service of the public do so subject to a fiduciary duty to act in the best interests of the public. The obligation imposed by the public trust doctrine is, therefore, in essence directed towards ensuring sound government administration. Ensuring sound administrative decision making is also the function of judicial review. The close alignment of the doctrine with the purposes of judicial review is the first observation which supports my proposal.

Illustrating this alignment, Thomas J's obiter remarks regarding public trust theory and the doctrine, in *Waitakere City Council v Lovelock*, were made in the context of the court exercising its judicial review function.¹⁷⁶ The same is true for Mallon J's reference to the United States' public trust doctrine in *Thomson v Minister for Climate Change Issues*.¹⁷⁷ Furthermore, given the existing judicial review jurisprudence regarding the fiduciary duties on government and local authorities in New Zealand, locating the public trust doctrine within this same administrative law frame work seems appropriate.¹⁷⁸

¹⁷⁶ *Waitakere City Council* above n 97.

¹⁷⁷ *Thomson* above n 97. Note, there is also Canadian jurisprudence which urges the doctrine to be treated as a tool to evaluate the decision-making process of Government, rather than the substance of those decisions. See Anna Lund, above n 15 at 153. This is based on the view of Joseph Sax above n 2 at 513.

¹⁷⁸ *Mackenzie District Council* above n 22.

The second observation is based on Matthew Palmer's description of the way that administrative law "enables the court to 'read in' or imply requirements on government decision-making, which are not explicit in statute."¹⁷⁹ In this respect, he notes that on occasion, in certain contexts, the Treaty of Waitangi will be a source of obligations in the decision-making process of government. In light of Palmer's analysis I suggest that because the public trust doctrine could similarly be conceived of as a 'higher norm' non-statutory requirement it is best operationalised in the law in the same way that the Treaty is.

Tying back to the constitutional feature of the public trust doctrine outlined in Part II, the doctrine could therefore be considered to fit best within the judicial review framework by reference to common law constitutionalism. Thomas Poole has stated that judicial review is the absolutely vital site of political deliberation, bearing primary responsibility for ensuring that the fundamental rights of individuals are not infringed.¹⁸⁰ If the doctrine is accepted to exhibit this constitutional character, then this also suggests there is merit in exploring its operationalisation as a ground of judicial review.

1 *Jurisdiction and Justiciability*

Judicial review is based on the rule of law. The primary role of the court in exercising its review function is to uphold the fundamental and enduring values that constitute the rule of law.¹⁸¹ The court's supervisory jurisdiction is derived from the premise that statutory powers can only be exercised within limits.

In New Zealand all administrative decisions are amenable to judicial review subject to satisfactory jurisdiction and justiciability. Justiciability is not susceptible to neat rules and the courts have, at times, blurred the distinction between jurisdiction and justiciability.¹⁸² Typically, in determining whether to intervene, the courts will take into consideration factors such as the gravity of the issue at hand, the nature of the interests affected, the subject-matter of the impugned decision and the constitutional role of the decision-

¹⁷⁹ Matthew Palmer *The Treaty of Waitangi in New Zealand's Law and Constitution* (Victoria University Press, Wellington, 2008) at 207.

¹⁸⁰ Thomas Poole "Questioning Common Law Constitutionalism" (2005) 25 *Legal Stud* 142 at 154.

¹⁸¹ *Peters v Davison* [1999] 2 NZLR 164 (CA).

¹⁸² Jenny Cassie and Dean Knight, "The Scope of Judicial Review: Who and What May be Reviewed" (Paper presented to the New Zealand Law Society Administrative Law Intensive Conference, August 2008) at 63.

maker.¹⁸³ The context to the relevant decision will also have a major bearing on how the courts approach jurisdiction and justiciability.¹⁸⁴ The limit to the court's review jurisdiction is based on recognition of the fact that:¹⁸⁵

... the larger the policy content and the more the decision maker is within the customary sphere of elected representatives the less well equipped the Courts are to weigh the considerations involved and the less inclined they must be to intervene.

The concept of justiciability, in comparison, comes down to a distinction between the appeal and review functions of courts in ruling on the legality of public acts. In considering the legality of a decision, the question addressed by the court is whether it was reached in accordance with law, fairly and reasonably.¹⁸⁶ A reviewing court must determine whether the administrative decision-making has been sound. Appeal, in contrast, entails adjudication on the merits of the relevant decision.

In the natural resource context the delineation between substantive / merits based issues and matters relating to the legality of a decision can be unclear.¹⁸⁷ This is, primarily, because natural resources legislation prescribes substantive environmental objectives which inform the process by which decision-makers must reach decisions.¹⁸⁸ As a result an unease can colour judicial review proceedings on natural resource matters, where the decision-making process necessarily involves striking a balance between competing interests in those resources. This same unease may characterise judicial review proceedings based on the public trust doctrine. As outlined in subpart 3 below, the requirements imposed by the doctrine are essentially process oriented; however the requirement to satisfy these requirements will be informed by the substance of the natural resources decision being made.

¹⁸³ *Bradley v Attorney-General* [1988] 2 NZLR 454 (HC) at 465 and *Royal Australian College of Surgeons v Phipps* [1999] 3 NZLR 1 (CA) at 11 per Henry, Keith, McGechan JJ.

¹⁸⁴ Compare, for example, *Ririnui v Landcorp Farming Ltd* [2016] NZSC 62 (SC), [2016] 1 NZLR 1056 and *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd* [1994] 2 NZLR 385 (PC). See also Caleb O'Fee "A New Perspective on the Public – Private Divide? Justiciability of Government Contracting Decisions Following Ririnui and Problem Gambling" (2018) 49 VUWLR 133.

¹⁸⁵ See Matthew Smith, *The New Zealand Judicial Review Handbook* (Thomson Reuters, New Zealand, 2011) at 109 in particular the commentary regarding *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA), per Richardson J, at 197 – 198.

¹⁸⁶ Phillip Joseph above n 14 at 863.

¹⁸⁷ Ceri Warnock, Associate Professor Otago University, "Environment and the Law: The normative force of context" (RMLA Salmon Lecture 2018, Auckland, 26 July 2018).

¹⁸⁸ *Discount Brands Ltd v Westfield (NZ) Ltd* [2005] NZSC 17, [2005] 2 NZLR 597 (SC); *Bayley v Manukau City Council* [1999] 1 NZLR 568 at 576 (CA).

If the public trust doctrine is considered to best ‘fit’ within New Zealand’s judicial framework, it is necessary to articulate how the doctrine might be argued as a ground for review. Generally speaking, there are three headings to judicial review: illegality, irrationality and procedural unfairness.¹⁸⁹ The courts have, however, cautioned that these three headings are not mutually exclusive or exhaustive and that new heads may evolve on a case by case basis.¹⁹⁰

2 *Grounds for Review*

There are a number of possible ways to conceive of the public trust doctrine as a ground for judicial review. While it is not necessary to identify with certainty which heading is most receptive to the doctrine, in the analysis below I test three possible avenues.

One option would be to argue that the obligation imposed by the doctrine should be treated as a ‘relevant factor’ which would be taken into consideration by a reasonable administrative decision-maker.¹⁹¹ This argument could be made by analogy to the judicial review decisions where the Treaty of Waitangi has been determined by the courts – depending on the nature of the decision, the decision-maker, and those affected – as a matter which decision-makers, acting reasonably, are under a duty to consider.¹⁹²

It has been confirmed by the Court of Appeal that although the Treaty is not itself the basis for action in the New Zealand courts, the Treaty can be indirectly enforced through administrative law and statutory interpretation.¹⁹³ In light of this jurisprudence, an argument could be made that, although the obligation imposed by the doctrine does not

¹⁸⁹ As identified by Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL) at 410.

¹⁹⁰ *R v Panel on Take-overs and Mergers, ex parte Guinness* [1990] 1 QB 146 at 160 (CA). Lord Cooke of Thorndon has remarked that the three grounds for review can be reduced to a simple fact and that is that a “decision maker must act in accordance with law, fairly and reasonably.” See Robin Cooke “Third Thoughts on Administrative Law [1979] NZ Recent Law 218 at 225. Lord Donaldson has similarly described judicial review as an inarticulate premise, holding that it essentially involves basic question of “whether something [has] gone wrong of a nature and degree which required the intervention of the court and, if so, what form that intervention should take.”

¹⁹¹ *Environmental Defence Society Inc v South Pacific Aluminium Ltd (No 4)* [1981] 1 NZLR 530 at 535, per Woodhouse J: “Parliament cannot have contemplated that an applicant under the National Development Act could avoid awkward or significant environmental issues by ignoring them in his own report. And lest they were then to be overlooked we are satisfied that the intention is that they must be mentioned.”

¹⁹² *Attorney-General v New Zealand Maori Council* [1991] 2 NZLR 129 at 139, see also Matthew Palmer, above n 179 at 201.

¹⁹³ *New Zealand Maori Council v Attorney-General* [2008] 1 NZLR 318 at [72], citing *Barton-Prescott v Director-General of Social Welfare* [1997] 3 NZLR 179.

itself bind the New Zealand government, the obligation is nonetheless a consideration that must be factored into government decision-making, in relation to the administration of natural resources.

In a rather separate context, involving bylaws regarding residential brothels, Heath J held that a “local authority proposing to regulate in relation to a public right must take into account the general law on the same subject’ and that “[a] bylaw must not destroy the public right”.¹⁹⁴ This decision provides an additional basis on which to assert that the common law public trust doctrine should be treated as a matter which should be taken into account by administrative decision-makers, as a part of the general law.

An argument that the doctrine is a relevant consideration would entail the doctrine being asserted as one which secures the fundamental common law rights of the public: based on the principle of legality, decision-makers would be required to interpret statutes consistently with the doctrine. In affirming the principle of legality, Baragwanath J has stated, for example, that in interpreting statutes, long standing principles of constitutional law are assumed to have been taken for granted.¹⁹⁵

[I]nlegislators and drafters assume the Courts will continue to act in accordance with well recognised rules... Long standing principles of constitutional and administrative law are likewise taken for granted, or assumed by the Courts to have been taken for granted, by Parliament.

On the basis of the principle of legality an argument might be made that doctrine supplements the RMA and MCAA, because to find otherwise would be inconsistent with the fundamental rights of New Zealanders.¹⁹⁶ In this respect Glazebrook J confirmed in *Agnew v Pardington* that the court could interpret a statute to avoid “inconsistency with important and fundamental values of our legal system”.¹⁹⁷ Because the doctrine fits

¹⁹⁴ *JB International Ltd v Auckland City Council* [2006] NZRMA 401 (HC) at [57].

¹⁹⁵ *Refugee Council of New Zealand Inc v Attorney-General* [2002] NZAR 717 (HC) at [57].

¹⁹⁶ For example, in Australia the public trust doctrine has been applied by the courts by reference to a duty on public officers to exercise their functions in order to achieve the express objects of legislation. *Willoughby City Council v Minister for Administering the National Parks and Wildlife Act* (1992) 78 LGERA 19. Further, the Australian courts have identified public trust duties in pollution control legislation, where a licence holder’s breach of the legislative scheme is considered to constitute a breach of public trust. See, for example, *Environment Protection Authority v Port Kembla Copper Pty Ltd* [2001] NSWLEC 174, 115 LGERA 391. For a more general discussion on the Australian public trust doctrine see Jedidiah Brewer and Gary Libecap, “Property rights and the public trust doctrine in environmental protection and natural resource conservation” (2009) 53 (1) *Australian Journal of Agricultural and Resource Economics* 1.

¹⁹⁷ *Agnew v Pardington* [2006] 2 NZLR 520 (CA) at [32].

closely with the statutory purposes of the RMA and MCAA, it is unlikely that the obligation it imposes would need to be set aside because it could ‘frustrate’ or be ‘in conflict’ with the statutory scheme established by Parliament.¹⁹⁸

Alternatively, the doctrine might be argued as grounds for review based on the presumption of consistency. Currently the presumption operates only in a limited sphere: it holds that so far as its wording allows, legislation should be read in a way that is consistent with New Zealand’s international obligations.¹⁹⁹ A public trust doctrine argument based on the presumption of consistency would start by likening the doctrine to New Zealand’s international legal obligations, drawing out the ‘higher norm’ similarities between the two sources of obligation. The argument would then need to be made that because the doctrine is analogous to the international laws which inform certain administrative decisions in New Zealand it must, implicitly, be taken into consideration in a similar way by environmental decision-makers.²⁰⁰

Both the principle of legality approach and the presumption of consistency approach, in essence, involve the doctrine being argued as a common law higher norm, which decision-makers must be cognoscente of in reaching natural resource decisions. This ties back to the common law constitutionality discourse outlined briefly in Part II. It is also significant to the appropriate intensity of review. By reference to the principle of legality, Dean Knight describes the conditions under which maximum intensity of review can be deployed, (noting that conditions described are not, however, definitive).²⁰¹ Knight states that first a conflict with a ‘fundamental human right’ must be identified, and that “the set of recognised rights is pliable”. Knight’s use of the term ‘pliable’ indicates there is room for the public trust doctrine to be included in the set of fundamental rights.

Second, Knight suggests that it must be established that it was not the expressed or implied intent of Parliament to mandate restrictions on the relevant common law right. Based on the conclusions I draw in respect of the RMA and MCAA in Part III, this condition also appears to be satisfied by the public trust doctrine. As such, I argue that Knight’s two conditions suggest a higher intensity of review would be suitable for cases

¹⁹⁸ Compare *Brannigan v Davidson* [1996] 2 NZLR 278(CA) at 286 and *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [150].

¹⁹⁹ *New Zealand Air Line Pilots' Association Inc v Attorney-General* [1997] 3 NZLR 269 (CA) at 289.

²⁰⁰ *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA) and *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104 (SC).

²⁰¹ Dean Knight *Vigilance and Restraint in the Common Law of Judicial Review* (Cambridge University Press, Cambridge, 2018) at 88.

where the doctrine is relied on as a ground for review. This leads to another possible heads of review where vigilant scrutiny is required of the courts: constitutional review.

Described as a new method of review currently being developed by the New Zealand courts, constitutional review is a ground which invites the courts to consult openly on the full range of public law values that inform public decision-making.²⁰² As outlined in Part II, I argue that one of the three features of the public trust doctrine is that it is constitutional in nature. As such, the doctrine could also conceivably sit comfortably within this developing ground for review.

A constitutional review argument would be premised on the obligation imposed by the doctrine on government authorities, which requires them to take steps to ensure they fulfil their fundamental responsibilities to the public. The Court of Appeal has confirmed that “to deny the public (or a particular member of the public) a right to be heard, without giving them any opportunity to influence [the] decision” requires a court to be “vigilant”.²⁰³ In addition, as outlined by Mahon J in *Meadowbank Stud Farm Ltd v Stratford County Council*, “the lives of citizens in a democratic State are controlled in many respects by regulatory agencies equipped with a formidable armoury of discretionary powers”, as such “there must be public confidence in the administration”.²⁰⁴ By asserting that the doctrine imposes a fundamental obligation on decision-makers it may be possible to argue its application under the constitutional review heading.²⁰⁵

Reflecting on the different options outlined above, I proceed in this analysis on the basis that the doctrine might be best conceived as a ground for review under the heading of the principle of legality. This is not to discount the alternative options. Rather, it is to enable this paper to proceed to next stage of analysis: I explore the possible practical implications of the doctrine for natural resource decision-makers in New Zealand.

3 *Public Trust Doctrine in Action*

Conceived of as a ground of judicial review, New Zealand’s public trust doctrine would require the courts to assess not the substance of any determination made by an authority to limit the public’s rights to access the foreshore, for the purposes of fishing or

²⁰² See Phillip Joseph above n 14 at 873, citing Lord Cooke of Thorndon “The Road Ahead for the Common Law” (2004) ICLQ 273 at 282.

²⁰³ *Videback v Auckland City Council* [2002] 3 NZLR 842 (HC) at [35].

²⁰⁴ *Meadowbank Stud Farm Ltd Stratford County Council* [1979] 1 NZLR 342 (SC) at 348.

²⁰⁵ *Diagnostic Medlab Ltd v Auckland District Health Board* [2007] 2 NZLR 832 (HC) at [124], [208] and [357].

navigation, but rather whether, in making that determination, the authority had fulfilled its obligations as, in effect, trustee of the natural resources held by the Crown.²⁰⁶ It would mean that where an administrative decision-maker exercises a power, or reaches a determination, which fails to take into proper consideration the obligation imposed by the doctrine the courts would have jurisdiction to review the decision.²⁰⁷

In order to clarify how a decision-maker might satisfy the obligation imposed by the doctrine I describe here how it would operate, in practice, by reference to a specific fact scenario: Wellington Airport's proposed runway extension. This proposed project was the subject of resource consent applications determined by the Greater Wellington Regional Council Environment Committee.²⁰⁸ It has also already been the subject of judicial review proceedings, although (obviously) no challenge was asserted on the basis of the public trust doctrine.²⁰⁹ The runway extension will, however, result in significant restrictions to the public's ability to access part of the Wellington foreshore, including for the purposes of navigation and fishing.

I argue that the doctrine would impose an obligation on the Council to ensure it builds a particular step into its decision-making process. That step will, first, see the authority assess what the public interest is in the area of the Wellington foreshore which will be affected by the extension. This might be achieved by way of public consultation, as is often required in RMA processes. However, public consultation in of itself may not be adequate to discharge the obligation. It will be incumbent on the authority to determine the proper way to assess what the public interest is in the case at hand, whether it be by engaging with the public, scientists or economic experts.

Once the authority has assessed, and is comfortable that it properly understands, what the long term interests of the public are in the relevant piece of foreshore, it will then need to satisfy itself that it has taken those interests into proper consideration in the process of reaching its final decision. This will mean that, as part of the balancing exercise the authority performs in respect of the competing interests in that section of the foreshore, it must be comfortable that the final decision made is ultimately in the interests of the public.

²⁰⁶ Williams J refer to the Crown being "in effect a trustee for the public of lands vested in the Crown" in *Mueller* above n 50 at 117, a case which also cited *Blundell v Catterall* above n 48.

²⁰⁷ See pt 30 of the High Court Rules 2016.

²⁰⁸ Anticipated Resource Consent Process for WIAL's Runway Extension Project, under s 87D Resource Management Act 1991 (28 April 2016), available at <http://www.connectwellington.co.nz>.

²⁰⁹ *Wellington International Airport v New Zealand Air Line Pilots' Assoc Inc* [2018] 1 NZLR 780.

This two-step process is analogous to that which must be undertaken by any person subject to fiduciary duties. It is also the same as that which the courts have confirmed a local authority must perform in determining how to spend the rates it collects from the public. Therefore, the question posed to any court reviewing the decisions made in the runway extension fact scenario would centre on whether the Greater Wellington Regional Council Environment Committee had followed a suitable decision-making process in order to discharge its obligation to act in the interests of the public in determining to grant the consent application. The doctrine would mean that the onus of ensuring the public's interests are properly taken into consideration is shifted from the public to the decision-maker.²¹⁰

B Public Trust Doctrine in the Future

In this last section of the paper I outline the future prospects of the public trust doctrine in New Zealand. First I describe two normative arguments in favour of an augmented form of the doctrine being developed in the common law, as has occurred in the United States. I then test the possibility of achieving this augmentation by statutory codification.

1 Normative Arguments in Favour of an Augmented Doctrine

Parts II and III of this paper described a common law doctrine which I argue could be used to hold administrative decision-makers to account for failing to properly determine resource consents or policies, which impact public access to the foreshore for the purposes of fishing or navigation, in the interests of the public. The doctrine, should it be recognised in its current common law form, would not apply to natural resources beyond the foreshore of New Zealand. I argue there are two normative reasons to augment the doctrine in New Zealand's common law, as occurred in the United States *Mono Lake* decision.²¹¹

²¹⁰ Alternatively, consider for example a decision of a board of inquiry for the Environmental Protection Authority (EPA), in respect of a nationally significant project which impacts the foreshore of New Zealand. A failure to satisfy the public trust doctrine obligation may involve the EPA performing an inadequate assessment of the New Zealand public's interests in the foreshore, or failing to properly take into consideration those interests in the process of reaching its final decision regarding the nationally significant project.

²¹¹ Rafe Sagarin and Mary Turnipseed "The public trust doctrine: where ecology meets natural resources management" (2012) 37 Annual Review of Environmental Resources 473 at 483: "we need to understand what the public trust doctrine is now, rather than what it was not then."

First, as described in Part I there are instances in New Zealand of administrative decisions being made which appear to permit, or even encourage, the degradation of New Zealand's natural resources other than foreshore, to the detriment of the public. Consent authorities make determinations regarding the use of such natural resources in consultation with the public and the corporate entities which will be affected by, or benefit from, the decision. At the moment, the onus is on the public to ensure its interests are communicated to, and understood by, the relevant decision-maker.

The problematic aspect of the current system lies in the fact that, compared to those with corporate interests in the relevant resource, the public are less well-resourced and organised. This inhibits the extent to which decision-makers are properly taking into consideration the public's interests. The doctrine would address this by shifting the onus of ensuring the public interests are properly taken into consideration, from the public to the decision-maker. And, an augmented form of the doctrine would focus authorities' attention on the interests of the public for a range of resources beyond just the foreshore of New Zealand.²¹²

The importance of ensuring that public authorities properly consider the interests of the public in *all* environmental decision-making is already evident in New Zealand's natural resources law. For example; the decision in *Mueller*, which describes the Crown as "in effect a trustee for the public" with regard to natural resources; and similarly, the Planning Tribunal decisions which hold that consent authorities are under a positive duty to have 'particular regard' to the matters specified in s 7 of the RMA.²¹³ It has also been recognised by the courts in cases involving the spending of rates expenditure.²¹⁴

²¹² Note: there is not one international example of the doctrine applying to minerals. In New Zealand, all minerals are owned by the Crown, pursuant to s 11 of the Crown Minerals Act 1991. It would need to be determined whether this ownership was outright or subject to the duties imposed by the public trust doctrine.

²¹³ *Mueller* above n 50 and *Marlborough District Council* above n 152 at 229, referring to *Gill v Rotorua District Council* (1993) 2 NZRMA 604 at 617.

²¹⁴ See *Mackenzie District Council v Electricity Corp of New Zealand* above n 22 at [47] where the Court of Appeal dispensed with any qualifications and articulated the unvarnished principle that a "local authority has a fiduciary duty to the ratepayers to have regard to their interests". In this decision it was confirmed that the Council had a fiduciary duty to the ratepayers to have regard to their interests, seeking to balance fairly those of the different categories of ratepayers and not casting an inordinate burden on any one group. In exercising that duty the local authority is not obliged to adopt a narrow user pays approach but it must give some consideration to the relationship between the prospective incidence of rates on each category of ratepayer and the benefits that those ratepayers may be expected to derive as members of the community. *Bromley London Borough Council* above n 22 was applied by the Court of Appeal.

In the case of rates expenditure, the relationship between a decision of the local authority and the natural environment of the public is slightly abstracted. However the expenditure of public money does ultimately determine, for example, the quality of the public's drinking water, and the nature of their sewage and rubbish collection services. Each of these undeniably contributes to the environment of ratepayers. An augmented form of the public trust doctrine could, therefore, be viewed as nothing other than an extension of this existing common law fiduciary duty on local authorities.

As to the grounds for the extension of the existing duty, Lindsay Breach has acknowledged that increasing judicial recognition of fiduciary concepts in the public law realm may occur in response to social pressure on the judiciary to hold political actors to account.²¹⁵ In this respect, the social pressure building, as a result of the degradation of New Zealand's rivers due to intensive dairy farming, for example, may be adequate to encourage the judiciary to take a step in this direction. If this was the case, the policy objectives expressed in the provisions of the RMA and MCAA (which are arguably not currently being met) could read by the courts as support by Parliament for augmentation of the doctrine in the common law.²¹⁶

The second reason I argue New Zealand's public trust doctrine needs to be applied in an augmented form is that it would reflect a trend in the Commonwealth to adopt an expansive form of the public trust doctrine. It would also fall in line with the current international discourse regarding human rights to the environment, and the long term implications of unregulated economic development.²¹⁷

New Zealand has no entrenched bill of rights or constitution which confirms a fundamental environmental right of New Zealanders. The New Zealand Parliament has the power to promulgate legislation which limits the rights and freedoms of New

²¹⁵ Lindsay Breach above n 24 at 423.

²¹⁶ *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [6]; *Ports of Auckland Ltd v Auckland City Council* [1999] 1 NZLR 601 (HC) at 609.

²¹⁷ See Justice Susan Glazebrook "Human Rights and the Environment" (2009) 40 VUWLR 293 for a more detailed analysis of whether there is an existing right to the environment based on international instruments such as the Universal Declaration of Human Rights (1948). In particular, at 318 – 319 she comments that "... the right to a quality environment cannot be seen as an individual right. It must also be a right enjoyed by communities and peoples". She goes on to state that provided any right to the environment is properly constituted the interests of communities and the individuals that make it up should coincide and that the preambles of the International Covenant on Civil and Political Rights (1976) and the International Covenant on Economic, Social and Cultural Rights (1976), and art 29 of the Universal Declaration of Human Rights (1948) recognise the notion of duties being owed to the collective. These sentiments also indicate the suitability of the public trust doctrine, which establishes a right of the public in general, to address rights to the environment at a domestic level.

Zealanders contained in the common law, the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993.²¹⁸ Because New Zealand has an uncodified constitution, the fundamental rights of the New Zealand public are located in a collection of (un-entrenched) legal instruments including in the common law.²¹⁹ This not only means the fundamental rights of New Zealanders can be easily extinguished, but also that new constitutional rights might be more easily identified.²²⁰ As a result, arguably, there is greater scope for the doctrine to be treated as a constitutional right in New Zealand than is the case for jurisdictions which have an entrenched constitution.

Although New Zealanders have no right to the environment, section 8 of the New Zealand Bill of Rights Act 1990 does confirm that no person will be deprived of life except on such grounds as are established by law and are consistent with the principles of fundamental justice.²²¹ In addition, s 29 of the Magna Carta 1297 provides that no freeman shall be disseised of his freehold, or liberties, or free customs, but by lawful judgment of his peers, or by the law of the land and that no person will be denied or deferred either justice or right (including common law rights).²²²

In order for the judiciary to make a finding that s 8 or s 29 embodies the doctrine in New Zealand, or that an augmented form of the doctrine in of itself confirms a constitutional common law right of the public, it would need to be presented with a case of fairly strong facts. New Zealanders have yet to encounter a scenario where degradation to the environment has threatened their health and wellbeing. There are however salient

²¹⁸ The courts will, however, give preference to an interpretation of the provision which is consistent with the rights and freedoms contained in the Bill of Rights. See s 6 of the New Zealand Bill of Rights Act 1990. Any judicial review proceedings brought in this respect: are likely to be struck out by the court, see 7.43 of the High Court Rules 2016.

²¹⁹ Geoffrey Palmer and Andrew Butler describe the collection as "... a hodgepodge of rules, some legally binding, others not. It is formed by a jumble of statutes, some New Zealand ones and some very old English ones; a plethora of obscure conventions, letters patent and manuals; and a raft of decisions of the courts." See Geoffrey Palmer and Andrew Butler, *A constitution for Aotearoa New Zealand* (Victoria University Press, Wellington, 2016) at 9 and 13. For example, *Barnett and Grant v Campbell* (1902) 21 NZLR 484 (CA) establishes in New Zealand that the right to search and seize evidence of crime was consequent upon the facts of arrest, not merely authority to arrest; See Phillip Joseph above n 14 at 31.

²²⁰ See Lord Cooke's comment that "...some common law rights presumably lie so deep that even Parliament could not override them" in *Taylor v New Zealand Poultry Board* [1984] NZLR 398 (CA) at 398.

²²¹ In New Zealand the right to life specified by s 8 is not absolute. With respect to the exception prescribed, the phrase 'fundamental justice' would also need to be considered by the court. Specifically, the court would need to address what 'fundamental' adds to 'justice'? This may suggest a definition of justice which is broader than justice in terms of civil and criminal proceedings in court. "Fundamental justice" could be interpreted as reference to the just operation of the Westminster system of government. See *Auckland Area Health Board v Attorney General* [1993] 1 NZLR 235 at 244.

²²² *Siemer v New Zealand Court of Appeal* [2013] NZHC 3344.

international examples of public policy generating such degraded environmental conditions that public health has suffered as a result. One example arose in respect of Coca Cola's re-application for a licence to use groundwater in Kerala, India.²²³ The dispute came about as a result of the local authority's decision to decline to re-grant the licence and the High Court upheld the local authority's decision, stating:

... it can be safely concluded that the underground water belongs to the public. The State and its instrumentalities should act as trustees of this great wealth. The State has got a duty to protect ground water against excessive exploitation and the inaction of the State in this regard will be tantamount to infringement of the right to life of the people guaranteed under Article 21 of the Constitution of India.

This decision illustrates a Commonwealth court resorting to the common law, indeed an augmented form of the public trust doctrine, in order to ensure an appropriate balance is struck between corporate and public interests in a particular natural resource. The Indian public trust doctrine originated from the same English common law authorities which form a part of New Zealand's law.²²⁴ Notwithstanding the limited form of the English public trust doctrine, as occurred in *Mono Lake*, the Indian High Court determined to rely on an augmented form of the doctrine in order to ensure the public could continue to enjoy the groundwater.

As described in Part I it is becoming less difficult to envisage such circumstances eventuating in New Zealand. As a result of the resource management decisions being made regarding intensive dairy farming, for example, certain rivers are already no longer suitable for the public to swim in, let alone drink. As such, I consider an augmented form of the doctrine is already necessary in New Zealand. If augmentation of the public trust doctrine does not occur via common law developments it could nonetheless be given force by Parliament. In this last section of the paper I consider how legislative

²²³ See *Perumatty Grama Panachayat v State of Kerala* 2004 (1) KLT 731.

²²⁴ India's first public trust doctrine decision, *M.C. Mehta v Kamal Nath* was made by broad reference to the English common law. See *MC Mehta v Kamal Nath* (1997) 1 SCC 388 at 272. Two years later the Supreme Court of India read the public trust doctrine directly into art 21 of the Constitution of India (1949). See *MI Builders Private Ltd v Radhey Shayam Sahu* (1999) SCC 464. See also *Formento Resorts & Hotels v Minguel Martins* (2009) INSC 100. In this decision the Court not only referred to the Roman law roots of the theory, it went on to state that the sentiment of the doctrine had been preached by the saints and sages of India since time immemorial. This reflects public trust theory, more broadly, in India. *Formento* was recently cited in the United States petition for certiorari in the matter *Alec L v Gina McCarthy* USSC (3 Oct 2014).

codification of the public trust doctrine might occur in New Zealand, and the possible constitutional prospects of the doctrine.

2 *Legislative Codification of the Public Trust Doctrine*

While augmentation of any New Zealand public trust doctrine may occur by incremental common law developments, from a functional perspective it may be better achieved by legislative action.²²⁵ This is for three reasons. First, legislative codification of an augmented doctrine would provide greater certainty to the public and local government with respect to their rights and obligations. Second, it would also likely achieve the ultimate ends of an augmented doctrine in a shorter time than the decades it would take to develop through the courts. Finally, it would mean that doctrine is not constrained by the pre-existing judicial review framework outlined in the preceding analysis: it could simply form part of the broader administrative law framework in New Zealand.

There are a number of international examples of the doctrine's legislative codification, including in fairly expansive forms. For example, in Scotland the Land Reform (Scotland) Act 2003 was passed to codify the public's common law rights to access the foreshore,²²⁶ to navigate,²²⁷ to fish,²²⁸ gather shellfish,²²⁹ and more generally to recreation.²³⁰ Importantly, however, the legislation not only codified those existing common law access rights of the public, s 5(4) of the Act expressly assumes a duty of guardianship on the Crown:²³¹

²²⁵ Patrick Deveney, for one, considers this to be the case: "As a practical, every-day tool for protecting the interests of the public, the *Illinois Central* formula is scarcely useful, both because of the problems of standing to contest a conveyance by the legislature which caused no special injury to any member of the general public, and because the legislature's determination of public purpose and no substantial harm to the public's rights is usually conclusive." See Patrick Deveney above n 54 at 62.

²²⁶ *Officers of State v Smith* (1846) 8 D 711.

²²⁷ See *Colquhoun v Duke of Montrose* (1793) Mor 12827 and *Wills' Trustees v Cairngorm Canoeing and Sailing School Ltd* 1976 SC (HL), although these decisions appear to turn on a test analogous to that for assessing customary activities.

²²⁸ See *McDoull v Lord Advocate* (1875) 2R (HL) 49 at 55 where Justice Cairns stated "[b]eyond all doubt, the law in Scotland is that white fishing in the sea round the whole coast of Scotland is perfectly free, and not only is it perfectly free, but there is a title on the part of the subjects to use the shore for the purpose of conducting white fishing in a proper mode".

²²⁹ *Duke of Argyll v James Robertson* (1859) 22 D 261.

²³⁰ See *Hope v Bennewith* (1904) 6 F 1004 where it was held that the public has a right to use the foreshore, although the precise scope of the right was not confirmed by the court; *McLeod v McLeod* 1982 SCCR 130 at 132: "I was satisfied by the foregoing Scottish authorities that, whatever the earliest position in our law, by the beginning of this century it was clearly recognised that there was a right of recreation in the public use of the foreshore."

²³¹ Land Reform (Scotland) Act 2003. Note, in 2014 the Scottish Government published a review entitled *The Land of Scotland and the Common Good*. Part of this review addressed public rights of access to the foreshore and seabed. The review reconfirms that "[i]n Scotland's system of land ownership, these

The existence or exercise of access rights does not diminish or displace any public rights under the guardianship of the Crown in relation to the foreshore.

In Canada the public trust doctrine has been codified in certain provisions of legislation, including s 1.1(2) of the Water Act 1979 (British Columbia), s 6 of the Environmental Rights Act 1988 (North West Territories) and ss 6, 7 of the Yukon Environment Act 1991 (Yukon Territory).²³² In addition, in South Africa, Kenya, India, Uganda and the Philippines an augmented form of the doctrine has either been read directly into the constitutional rights of the public, or expressly codified in the country's constitution.²³³

An opportunity to codify the public trust doctrine in New Zealand may arise in any future review of the Human Rights Act 1993, or New Zealand Bill of Rights Act 1990. It could also conceivably be considered as part of the impending review of the State Sector Act 1988.²³⁴ Should New Zealand develop an entrenched constitution this would also provide a suitable opportunity. Geoffrey Palmer and Andrew Butler are currently advocating for the establishment of a New Zealand constitution which goes beyond “a simple restatement of the constitutional framework as it is now”. They conceive of the entrenchment of New Zealand's constitution as an aspirational, reformist project and section 105 of the constitution they propose would prescribe a fundamental right to environment.²³⁵

105 Environmental rights

Everyone has the right—

rights are held in trust for the public by the Crown...” See the Land Reform Review Group Final Report – The Land of Scotland and the Common Good (23 May 2014).

²³² See Sarah Jackson above n 47 at 195. Although Canada has limited public trust doctrine case law, in 2004 the Supreme Court of Canada made obiter reference to the doctrine. See *British Columbia v Canadian Forest Products* above n 27 at 115.

²³³ See s 24 of the Constitution of the Republic of South Africa (1996) and fn 224 for a summary of the Indian doctrine's establishment. The seminal Kenyan public trust doctrine case, *Waweru v Republic*, above n 41 was made in 2006. In the decision the Kenyan High Court read the doctrine into art 71 of the Constitution of Kenya (1969). Uganda's key public trust doctrine decision came in 2005: *Advocates Coalition for Development & Environment (ACODE) v Attorney-General* Misc Case No 0100 of 2004 (July 11 2005): the High Court of Uganda held that the doctrine is enshrined in art 237(2)(b) of the Constitution of the Republic of Uganda (1995). In the 1998 decision *Oposa v Factoran* the Supreme Court of the Philippines identified that public trust doctrine was codified by art 51 of the Philippines Constitution. See *Oposa v Factoran* 224 SCRA 792, 33 ILM 173 at 187.

²³⁴ Consultation on State Sector Act Reform opens (4 August 2018) <http://www.ssc.govt.nz/consultation-state-sector-act-reform-opens>.

²³⁵ Geoffrey Palmer and Andrew Butler above n 219 at 70.

- a) to an environment that is not harmful to his or her health or wellbeing;
and
- b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that—
 - i. reduce pollution and ecological degradation;
 - ii. promote conservation;
 - iii. pursue ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

While it is not clear whether the environmental right proposed by s 105 fits under the ‘reform’ heading, it certainly would give weight to the proposed right’s inclusion in the constitution if it could be argued as based on an existing common law doctrine, such as the public trust doctrine.²³⁶ The proposed s 105 right might already be considered a codification of the public trust doctrine.²³⁷ The provision does not, however, refer to the obligation imposed by the doctrine on government. It could be modified to expressly reflect this obligation, or alternatively, the obligation may subsequently be read into the provision by the courts – as a practical reflection of how decision-makers can ensure their decisions respect the fundamental environmental rights of New Zealanders.

In the event that the doctrine is augmented, either by the courts or Parliament, the last matter to address is the range of natural resources to which it should apply. While this question will be left to the courts for as long as the doctrine remains in the common law, in the interests of certainty, the scope of its application should be made as clear as possible: the range of resources subject to the duty needs to be recorded transparently. At the same time, however, the doctrine must retain some flexibility: it is a key feature of the doctrine’s proper operation that it is able to extend to new resources in the future, and at the same time for certain resources to be excluded from its application, as appropriate. I submit that the range of resources to which the doctrine applies in New Zealand should be determined by consideration of at least two factors. One factor that should bear weight is the scarcity of the resource. Another might be how essential the resource is to human life. The Canterbury freshwater aquifers are one example of a resource which, based on

²³⁶ Note, this provision appears to replicate the right to environment prescribed by s 24 of the Constitution of the Republic of South Africa (1996) which the South African courts have read the public trust doctrine into, see Elmarie van der Schyff “Stewardship doctrines of public trust: Has the eagle of public trust landed on South African soil?” 2013 South African Law Journal 369 at 380

²³⁷ Note the specific reference to ‘present and future generations’; this is a tenet of the public trust doctrine in some jurisdictions including the United States.

these two factors, would warrant application of the doctrine. Another example might be the air we breathe.

In summary, I consider there are two normative arguments in favour of augmenting the public trust doctrine in New Zealand. Whether this augmentation is achieved by legislative codification, constitutional entrenchment, or common law development, it is difficult to ascertain any logical or policy reasons for restricting the doctrine's application to the New Zealand public's rights to access the foreshore for the purposes of fishing and navigation. There is a broader range of commonly held natural resources which should be administered for the benefit of the public and I argue that, in time, the doctrine should be interpreted to reflect this.

V Conclusion

This paper has presented an argument that the public trust doctrine is part of New Zealand's common law. In order to make this argument I started by defining the public trust doctrine, by reference to its underlying theory, its three key features and the English common law from where it originated. I then outlined why the doctrine is part of New Zealand common law. Specifically I described how New Zealand inherited the doctrine in 1840, as part of the English common law which was applicable to New Zealand at the time, and traversed the collection of decisions which indicate the doctrine subsequently came to form a part of New Zealand law.

Based on the position that the doctrine is part of New Zealand's common law, I outlined why the doctrine has survived, and now supplements, the legislative schemes established by the Resource Management Act 1991 and Marine Coastal Area (Takutai Moana) Act 2011. I then proposed that the doctrine should be considered grounds for judicial review, testing three possible avenues to asserting the doctrine as such grounds. I concluded that the most appropriate option would be for the obligation imposed by the doctrine to be treated as a 'higher norm' relevant factor which, upon the basis of the principle of legality, would be taken into consideration by a reasonable administrative decision-maker. Finally, I set out the normative arguments in favour of the augmentation of New Zealand's public trust doctrine, as it has been in other Commonwealth jurisdictions, so that it would apply to a broad range of natural resources, either by common law development or legislative codification.

It is to be hoped that New Zealand is able to institute effective legal mechanisms to avoid, rather than attempt to redress, a severely degraded natural environment. The arguable presence of this common law doctrine in New Zealand law provides a remarkable opportunity and it is one which I consider should be taken.

VI BIBLIOGRAPHY

BIBLIOGRAPHY

PRIMARY SOURCES

CASES

NEW ZEALAND

- Adams v Bay of Islands County* [1916] NZLR 65 (SC)
Agnew v Pardington [2006] 2 NZLR 520 (CA)
Attorney-General v New Zealand Maori Council [1991] 2 NZLR 129
Aoraki Water Trust v Meridian Energy Limited [2005] 2 NZLR 268 (HC)
Auckland Area Health Board v Attorney General [1993] 1 NZLR 235
B v Auckland District Law Society [2004] 1 NZLR 326 (PC)
Barnett and Grant v Campbell (1902) 21 NZLR 484 (CA)
Barton v Masterton District Council [1992] 1 NZLR 232 (HC)
Bayley v Manukau City Council [1999] 1 NZLR 568 at 576 (CA)
Bradley v Attorney-General [1988] 2 NZLR 454 (HC)
Brannigan v Davidson [1996] 2 NZLR 278(CA) at 286 and
Crawford v Lecren (1868) 1 NZCA 117 (CA)
CREEDNZ Inc v Attorney-General [1981] 1 NZLR 172 (CA)
Cropp v Judicial Committee [2008] 3 NZLR 774 (SC)
Diagnostic Medlab Ltd v Auckland District Health Board [2007] 2 NZLR 832 (HC)
Discount Brands Ltd v Westfield (NZ) Ltd [2005] NZSC 17, [2005] 2 NZLR 597 (SC)
Donnithorne v Christchurch City Council [1994] NZRMA 97
Durie & Anor v Gardiner & Anor [2018] NZCA 278 (CA)
Electricity Corp of New Zealand Ltd v Waimate District Council HC Christchurch CP47/90, 27 March 1992
Environmental Defence Society Inc v New Zealand King Salmon Co Ltd [2014] 1 NZLR 593 (SC)
Environmental Defence Society Inc v South Pacific Aluminium Ltd (No 4) [1981] 1 NZLR 530
Falkner v Gisborne District Council [1995] 3 NZLR 622 (HC)
Fuller v Macleod [1981] 1 NZLR 390 (CA)
Gill v Rotorua District Council (1993) 2 NZRMA 604

Hamed v R [2011] NZSC 101, [2012] 2 NZLR 305
Hosking v Runting [2005] 1 NZLR 1 (CA)
Hume v Auckland Regional Council [2002] 3 NZLR 363 (CA)
Imrie Family Trust v Whangarei District Council [1994] NZRMA 453
Lovelock v Waitakere City Council [1996] 3 NZLR 310
Mackenzie District Council v Electricity Corp of New Zealand [1992] 3 NZLR 41 (CA)
Marlborough District Council v Southern Ocean Seafoods Ltd [1995] NZRMA 220
McGuire v Hastings District Council [2002] 2 NZLR 577
Meadowbank Stud Farm Ltd Stratford County Council [1979] 1 NZLR 342 (SC)
Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd [1994] 2 NZLR 385 (PC)
Minotaur Custodians Ltd v Wellington City Council [2016] NZHC 238, [2016] 3 NZLR 92
Motor Mart Limited v Webb [1958] NZLR 773 (SC)
Mueller v Taupiri Coal-Mines (Limited) (1900) 20 NZLR 89 (CA)
New Zealand Air Line Pilots' Association Inc v Attorney-General [1997] 3 NZLR 269 (CA)
New Zealand Maori Council v Attorney-General [2008] 1 NZLR 318 (CA)
New Zealand Rail Ltd v Marlborough District Council (1993) 2 NZRMA 449
Ngati Apa & Anor v Attorney-General & Ors [2003] 3 NZLR 643 (CA)
Paki v Attorney-General [2012] NZSC 50, [2012] 3 NZLR 277 (SC)
Paki v Attorney-General (No 2) [2014] NZSC 118, [2015] 1 NZLR 67 (SC)
Peters v Davison [1999] 2 NZLR 164 (CA)
Ports of Auckland Limited v Auckland City Council [1991] NZLR 601 (HC)
Proprietors of Wakatū v Attorney-General [2017] NZSC 17, [2017] 1 NZLR 423 (SC)
Quarantine Waste (NZ) Ltd v Waste Resources Ltd [1994] NZRMA 529 (HC)
R v Symonds (1847) NZPCC 387(SC)
Refugee Council of New Zealand Inc v Attorney-General [2002] NZAR 717 (HC)
Ririnui v Landcorp Farming Ltd [2016] NZSC 62 (SC)
Royal Australian College of Surgeons v Phipps [1999] 3 NZLR 1 (CA)
Siemer v New Zealand Court of Appeal [2013] NZHC 3344
Skeggs v Dunedin City Council HC Dunedin CP105/87, 13 November 1987
Springs Promotions Ltd v Springs Stadium Residents Association Inc [2006] 1 NZLR 846 (HC)
South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd [1992] 2 NZLR 282 (CA)
Takamore v Clarke [2012] NZSC 116, [2013] 2 NZLR 733

Tavita v Minister of Immigration [1994] 2 NZLR 257 (CA)
Taylor v New Zealand Poultry Board [1984] NZLR 398 (CA)
Te Aroha Air Quality Protection Appeal Group v Waikato Regional Council (No 2)
 (1993) 2 NZRMA 574
Te Weehi v Regional Fisheries Officer [1986] 1 NZLR 680 (HC)
Telecom Auckland Ltd v Auckland City Council HC Auckland M185/93, 28 February
 1997
Thomson v Minister for Climate Change Issues [2018] 2 NZLR 160 (HC)
Varnier v Vector Energy Limited [2004] NZRMA 193 (HC)
Videback v Auckland City Council [2002] 3 NZLR 842 (HC)
Waitakere City Council v Lovelock [1997] 2 NZLR 385 (CA)
Wellington International Airport v New Zealand Air Line Pilots' Assoc Inc [2018] 1
 NZLR 780
West Coast ENT Inc v Buller Coal Ltd [2014] NZLR 32 (SC)
Ye v Minister of Immigration [2009] NZSC 76, [2010] 1 NZLR 104 (SC)

UNITED KINGDOM

Birmingham Corp v West Midland Baptist (Trust) Association (Inc) [1970] AC 874 (HL)
Blundell v Catterall (1821) 5 B & Ald 268
Brinckman v Matley [1904] 2 Ch 313
Bromley London Borough Council v Greater London Council [1983] 1 AC 768
Carter v Murcot (1768) 98 E R 2162
Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374 at 410
 (HL)
Duke of Argyll v James Robertson (1859) 22 D 261
Gann v Free Fishers of Whitstable 11 E R 1305 (1865) 11 HL Cas192
Hope v Bennewith (1904) 6 F 1004
Kinloch v Secretary of State for India (1882) 7 App Cas 619
Malcomson v O'Dea (1863) 10 HLC 593, 11 E R 1155
McDoull v Lord Advocate (1875) 2R (HL) 49
McLeod v McLeod 1982 SCCR 130
Murphy v Ryan (1868) Ir R 2 CL 143
Prescott v Birmingham Corporation [1955] Ch 210
R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax [2002] 2 WLR
 1299

R (on the application of Newhaven Port and Properties Limited) v East Sussex County Council [2015] UKSC 7

R v Panel on Takeovers and Mergers, ex parte Guinness [1990] 1 QB 146 at 160 (CA)

R v Roberts [1924] 2 KB 695

R v Secretary of the State for the Home Department, ex p Pierson [1997] UKHL 37, [1997] 3 All ER 577, [1998] AC 539

R v Secretary of State for the Home Department, Ex parte Simms [2000] 2 AC 115 (HL)

Roberts v Hopwood [1925] AC 578

R v Secretary of State for the Home Department ex parte Simms [200] 2 AC 115 (HL)

The Royal Fishery of the River Banne (1611) 80 E R 540 (KB)

Thoburn v Sunderland City Council [2003] QB 151

Wills' Trustees v Cairngorm Canoeing and Sailing School Ltd 1976 SC (HL)

Officers of State v Smith (1846) 8 D 711

Colquhoun v Duke of Montrose (1793) Mor 12827

UNITED STATES

Alec L v Gina McCarthy USSC (3 Oct 2014) (SC)

Aquino v Riegelman (1918) 104 Misc. 28, 171 N Y S 716 (SC) (Kings County)

Arnold v Mundy (1821) 6 N.J.L 1 (SC)

Borough of Neptune v Borough of Avon-By-The-Sea 61 NJ 296 (1972) 294 A2d 47

National Audubon Society v Superior Court (1983) 33 Cal 3d 419, 189 Cal Rptr 346; 658 P2d 709

Illinois Central Railroad v People of the State of Illinois (1892) 146 US 387

Juliana v United States No 6:15-CV-1517-TC (DC Or, 8 April 2016)

Juliana v United States 217 F Supp 3d 1224 (DC Or, 10 November 2016)

Lansing v Smith (1829) 4 Wend 9 21 (SC) (New York)

Martin v Waddell's Lessee (1842) 41 US (16 Pet) 367

Marks v Whitney (1971) 491 P2d 374, 381- 82 (Cal)

People v New York 46 Staten Island Ferry Co (1877) 68 NY 71

AUSTRALIA

Mabo v Queensland (No 2) (1992) 175 CLR 1

Willoughby City Council v Minister for Administering the National Parks and Wildlife Act (1992) 78 LGERA 19

CANADA

British Columbia v Canadian Forest Products Ltd (2004) SCC 38 CarswellBC 1278

Green v Ontario 1972 CarswellOnt 438 D L R (3d) 20 (HC)

Hawrelak v The City of Edmonton [1976] 1 SCR 387

Tito v Waddell (No 2) [1977] Ch. 106

INDIA

Environment Protection Authority v Port Kembla Copper Pty Ltd [2001] NSWLEC 174, 115 LGERA 391

Formento Resorts & Hotels v Minguel Martins (2009) INSC 100

MC Mehta v Kamal Nath (1997) 1 SCC 388 at 272

MI Builders Private Ltd v Radhey Shayam Sahu (1999) SCC 464

Perumatty Grama Panachayat v State of Kerala 2004 (1) KLT 731

KENYA

Waweru v Republic (2006) 1 Kenya Law Reports 677

UGANDA

Advocates Coalition for Development & Environment (ACODE) v Attorney-General Misc Case No 0100 of 2004 (July 11 2005)

PHILIPPINES

Oposa v Factoran 224 SCRA 792, 33 ILM 173

*LEGISLATION**NEW ZEALAND*

Conservation Act 1987
Crown Minerals Act 1991
High Court Rules
Imperial Laws Application Act 1988
Marine Coastal Area (Takutai Moana) Act 2011
New Zealand Bill of Rights Act 1990
Resource Management Act 1991

CANADA

Environmental Rights Act 1988 (North West Territories)
Water Act 1979 (British Columbia)
Yukon Environment Act 1991 (Yukon Territory)

INDIA

Constitution of India (1949)

KENYA

Constitution of Kenya (1969)
Constitution of Kenya (2010)

*SCOTLAND**SOUTH AFRICA*

Constitution of the Republic of South Africa (1996)

UGANDA

Constitution of the Republic of Uganda (1995)

UNITED KINGDOM

Land Reform (Scotland) Act 2003

UNITED STATES

Constitution of Rhode Island (1842)

Constitution of the State of Vermont (1777)

Hawaii Constitution (1959)

Illinois Constitution (1970)

Louisiana Constitution of 1974

OTHER

Corpus Juris Civilis

International Covenant on Civil and Political Rights (1976)

International Covenant on Economic, Social and Cultural Rights (1976)

Magna Carta (Eng 1225)

Universal Declaration of Human Rights (1948)

*SECONDARY SOURCES**BOOKS*

Klaus Bosselmann and Vernon Tava (eds) *Water and Sustainability: New Zealand Centre for Environmental Law Monograph Series: Volume 3* (NZCEL, Auckland, 2011)

George Woodbine *De Legibus et Consuetudinibus Angliae* (Yale University Press, London, 1915 – 1942)

Ross Carter *Burrows and Carter Statute law in New Zealand* (5 ed Lexis Nexis NZ Limited, Wellington, 2015)

Richard Rorty (ed) *Philosophy in History* (Cambridge University Press, Cambridge, 1984)

Paul Finn *Essays on Law and Government* (Vol 1, North Ryde NSW, Law Book Co, 1995)

Evan Fox-Decent *Sovereignty's Promise: The State as Fiduciary* (Oxford University Press, Oxford, 2011)

Lord Hale *De Jure de Maris et Brachiorum Ejusdem* reprinted in Stuart Moore *History of Law of the Foreshore and Seashore* (3 ed, Sweet & Maxwell, London, 1910)

William Holdsworth *Sources and Literature of English Law* (Oxford Clarendon Press, Great Britain, 1925)

James Holt *Magna Carta and Medieval Government* (Hambledon Press, London, 1985)

James Jerwood *A dissertation on the Rights to the Sea Shores and to the Soil and Bed of Tidal Harbours and Navigable Rivers* (Butterworths, London, 1850)

Phillip Joseph *Constitutional and Administrative law in New Zealand* (4 ed, Brookers, Wellington, 2014)

Dean Knight *Vigilance and Restraint in the Common Law of Judicial Review* (Cambridge University Press, Cambridge, 2018)

Robert W Lee *The Elements of Roman Law* (Legal Publications Limited, Wellington, 1956)

John Locke *The Second Treatise of Government (an Essay Concerning the True Original, Extent and End of Civil Government)* Richard Cox (ed) (Harlan Davidson, Illinois, 1982)

Geoffrey Palmer and Andrew Butler *A constitution for Aotearoa New Zealand* (Victoria University Press, Wellington, 2016)

Matthew Palmer *The Treaty of Waitangi in New Zealand's Law and Constitution* (Victoria University Press, Wellington, 2008)

Paul du Plessis, *Borkowski's Textbook on Roman Law* (4 ed, Oxford University Press, New York, 2010)

Theodore Plucknett *A Concise History of the Common Law* (5 ed, Little Brown and Company, Boston, 1956)

William Pitt *The Speeches of the Right Honourable the Earl of Chatham in the Houses of Lords and Commons: With a Biographical Memoir and Introductions and Explanatory Notes to the Speeches* (London, Aylott & Jones, 1848)

Matthew Smith *The New Zealand Judicial Review Handbook* (Thomson Reuters, New Zealand, 2011)

Stanley de Smith and Rodney Brazier *Constitutional and Administrative Law* (8 ed, Penguin Books, London, 1998)

Thomas Taswell-Langmead *English Constitutional History* (11 ed, Sweet & Maxell, London, 1960)

Joseph Thomas *The Institutes of Justinian* (North-Holland Publishing Company, Amsterdam, Oxford, 1975)

Samuel Thorne *Bracton on the Laws and Customs of England, attributed to Henry of Bratton c. 1210-1268, Translated with revisions and Notes* (Harvard University Press Cambridge, Massachusetts, and London, 1977)

Mary Wood *Nature's Trust, Environmental Law for a New Ecological Age* (Cambridge University Press, New York, 2014)

JOURNAL ARTICLES

Thomas Appleby "The public right to fish: Is it fit for purpose?" (2005) 16 (6) *Journal of Water Law* 201

John Baldwin “Explaining the Queen’s Chain Myth: the Evolution of Laws for Marginal Strips” (1999) 289 *New Zealand Surveyor*

Randy Barnett “Why We Need Legal Philosophy, Foreword to the Symposium to Law and Philosophy” (1985) 8 *Harvard Journal of Law & Public Policy*

Michael Blumm “The Public Trust Doctrine and Private Property: The Accommodation Principle” (2010) 27 *Pace Environmental Law Review* 649

Lindsay Breach “Fiducia in Public Law” (2017) 48 *VUWLR* 413

Jedidiah Brewer and Gary Libecap “Property rights and the public trust doctrine in environmental protection and natural resource conservation” (2009) 53 (1) *Australian Journal of Agricultural and Resource Economics* 1

FM Brookfield “Communal ownership of (non-Maori) sea land” [2006] *New Zealand Law Journal* 253

Lord Cooke of Thorndon “The Road Ahead for the Common Law” (2004) *ICLQ* 273

Robin Cooke “Third Thoughts on Administrative Law [1979] *NZ Recent Law* 218

Robin Craig “Adapting to Climate Change: The Potential Role of State Common-Law Public Trust Doctrines” (2010) 34 *Vermont Law Review* 781

Patrick Deveney “Title, Jus Publicum and the Public Trust: An Historical Analysis” (1976) 1 *Sea Grant Law Journal* 13

Keala Ede “*He Kānāwai Pono no ka Wai* (A Just Law for Water): The Application and Implications of the Public Trust Doctrine in Water Use Permit Applications” (2002) 29 *Ecology Law Quarterly* 283

Robert Flannigan “Fiduciary Control of Political Corruption” (2002) 26 *Advocates Quarterly* 252

Bradley Freeman and Emily Shirley “England and the public trust doctrine” (2014) 8 *Journal of Planning and Environment Law* 839

Justice Susan Glazebrook “Human Rights and the Environment” (2009) 40 VUWLR 293

David Grinlinton “The Continuing Relevance of Common Law Property Rights and Remedies in Addressing Environmental Challenges” (2017) 62 McGill Law Journal 633

James Huffman “Speaking of Inconvenient Truths – A History of the Public Trust Doctrine” (2007) 18 Duke Environmental Law and Policy Forum 1

Nicola Hulley “The public trust doctrine in New Zealand” (2015) Resource Management Journal 31

Nicola Hulley “The public trust doctrine: An analysis of the original theory and its historical foundations” (2016) 12 RM Theory & Practice XX

Sarah Jackson, Oliver M Brandes and Randy Chistensen “Lessons from an Ancient Concept: how the Public Trust Doctrine will meet obligations to protect the environment and the public interest in Canadian water management and governance in the 21st century” (2012) 23 Journal of Environmental Law and Practice 176

Jeffery Jowell “Beyond the Rule of Law: Towards Constitutional Judicial Review” (2000) PL 671

John Laws “Law and Democracy” (1995) PL 72

Gerald Lanning “The Crown-Maori Relationship: the Spectre of a Fiduciary Duty” (1991) 8 Auckland University Law Review 44

Anna Lund “Canadian Approaches to America’s Public Trust Doctrine: Classic Trusts, Fiduciary Duties and Substantive Review” (2012) 23 Journal of Environmental Law & Policy 136

Glenn McGrady “The Navigability Concept in the Civil and Common Law, Historical Developments, Current Importance, and Some Doctrines that Don’t Hold Water (1975) 3 Florida State University Law Review 513

Arnold Morris “Book Review. De Legibus et Consuetudinibus Angliae” Paper 1135 (1977) 91 Articles by Maurer Faculty 517

Caleb O'Fee "A New Perspective on the Public – Private Divide? Justiciability of Government Contracting Decisions Following Ririnui and Problem Gambling" (2018) 49 VUWLR 133

Matthew Palmer "What is New Zealand's constitution and who interprets it? Constitutional realism and the importance of public office-holders." (2006) 17 PLR 133

Thomas Poole "Back to the Future? Unearthing the Theory of Common Law Constitutionalism" (2003) 23 OJLS 435

Thomas Poole "Questioning Common Law Constitutionalism" (2005) 25 Legal Stud 142

Erin Ryan "The Public Trust Doctrine, Private Water Allocation, and Mono Lake: The Historic Saga of National Audubon Society v. Superior Ct." (2015) 45 Environmental Law 561

Rafe Sagarin and Mary Turnipseed "The public trust doctrine: where ecology meets natural resources management" (2012) 37 Annual Review of Environmental Resources 473

Katherine Sanders "Public Access and Private Property: The Queen's Chain and the Custom of Recreational Access (2012) 2 New Zealand Law Review

Joseph Sax "Defending the Environment: A Strategy for Citizen Action" (1971) 47 (2) Indiana Law Journal 175

Joseph Sax "The Public Trust Doctrine in Natural Resource law: Effective Judicial Intervention" (1970) 68 Michigan law Review 471

Elmarie van der Schyff "Stewardship doctrines of public trust: Has the eagle of public trust landed on South African soil?" 2013 South African Law Journal 369

Mary 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" (2009) 39 Environmental Law 43

Mary Wood “Advancing the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations (Part II): Instilling a Fiduciary Obligation in Governance” (2009) 39 *Environmental Law* 91

OTHER

Anticipated Resource Consent Process for WIAL’s Runway Extension Project, under s 87D Resource Management Act 1991 (28 April 2016), available at <http://www.connectwellington.co.nz>

Ceri Warnock, Associate Professor Otago University, “Environment and the Law: The normative force of context” (RMLA Salmon Lecture 2018, Auckland, 26 July 2018).

Jenny Cassie and Dean Knight, “The Scope of Judicial Review: Who and What May be Reviewed” (Paper presented to the New Zealand Law Society Administrative Law Intensive Conference, August 2008).

Land Reform Review Group Final Report – The Land of Scotland and the Common Good (23 May 2014) available at <http://www.gov.scot/Publications/2014/05/2852>

Parliamentary Commissioner for the Environment “The state of New Zealand’s environment: Commentary by the Parliamentary Commissioner for the Environment on Environment Aotearoa 2015” (June 2016).

Parliamentary Commissioner for the Environment “Update Report Water quality in New Zealand: Land use and nutrient pollution” (June 2015)

Parliamentary Commissioner for the Environment “Water quality in New Zealand: Land use and nutrient pollution” (November 2013).

Explanatory Note, Foreshore and Seabed Act (2004)

Consultation on State Sector Act Reform opens (4 August 2018) <http://www.ssc.govt.nz/consultation-state-sector-act-reform-opens>.