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## Look to Windward: The Michigan Environmental Protection Act and the Case for Atmospheric Trust Litigation in the Mitten State

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# LOOK TO WINDWARD: THE MICHIGAN ENVIRONMENTAL PROTECTION ACT AND THE CASE FOR ATMOSPHERIC TRUST LITIGATION IN THE MITTEN STATE

Jonathan M. Coumes<sup>\*</sup>

*Failure to address climate change or even slow the growth of carbon emissions has led to innovation in the methods activists are using to push decisionmakers away from disaster. In the United States, climate activists frustrated by decades of legislative and executive inaction have turned to the courts to force the hand of the state. In their most recent iteration, climate cases have focused on the public trust doctrine, the notion that governments hold their jurisdictions' natural resources in trust for the public. Plaintiffs have argued that the atmosphere is part of the public trust and that governments have a duty to protect it.*

*These types of lawsuits, known as Atmospheric Trust Litigation, have foundered on the shoals of courts wary of exceeding their powers, whether granted by Article III or state constitutions. The trouble in many cases, including Juliana v. United States, has been standing. Courts balk at declaring that any one actor has the power to affect climate change. Since they usually think one actor can't fix the climate, redressability is out the window. Even if courts get past redressability, they believe the scale of any potential relief is just beyond the ability of a court to order. The number of lawsuits that have been filed suggests that that reasonable minds can differ, but most judges have found plaintiffs do not have standing before clearing the cases off their dockets.*

*This Note contends that at least one state remains fertile ground for an atmospheric trust lawsuit. Michigan's 1963 Constitution implies that the atmosphere is within the public trust, and the Michigan Environmental Protection Act, passed to carry out the state's constitutional duties towards the natural world, does away with most, if not all, of the standing issues that have stymied climate cases across the nation. Motions, briefs, and equitable relief are not the only way to avoid the onset of what could be the greatest calamity in the history of humanity, but in Michigan, at least, Atmospheric Trust Litigation may well be what breaks and rolls back the carbon tide.*

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<sup>\*</sup> University of Michigan Law School, J.D. Candidate, 2021. I am grateful to Marielle Coutrix, Jared Looper, Evan Neustater, Amita Maram, and Jeff Haynes for their commentary and incisive critiques of this Note, and especially to the entire *MJEAL* staff for their tireless efforts in editing and cite-checking—in the law journal business, we all know who the real heroes are.

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## INTRODUCTION

Every year, the climate prognosis worsens. Every year, there's less ice at the poles, more wildfires, more storms and hurricanes. Every year, more shock at how far the changing atmosphere has overshot our estimates of carbon gained, degrees raised, and ice lost.<sup>1</sup> And as the years tick by, it becomes ever clearer that our politics has no grasp on the problem.<sup>2</sup> The Paris Agreement, the world's foremost collective compact on climate, sets emissions targets far too lax to keep global warming under two degrees Celsius.<sup>3</sup> Four years out and states are already missing the Paris targets widely.<sup>4</sup> Not only has the world's largest economy left the agreement, but its leader seems determined to accelerate carbon emissions.<sup>5</sup> Between

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1. See David Wallace-Wells, *The Uninhabitable Earth*, N.Y. MAG. (July 10, 2017), <http://nymag.com/intelligencer/2017/07/climate-change-earth-too-hot-for-humans.html>.

2. *Id.*

3. David Roberts, *No Country on Earth Is Taking the 2 Degree Climate Target Seriously*, VOX (Apr. 29, 2017, 11:20 AM), <https://www.vox.com/2016/10/4/13118594/2-degrees-no-more-fossil-fuels>.

4. Brad Plumer & Nadja Popovich, *The World Still Isn't Meeting Its Climate Goals*, N.Y. TIMES (Dec. 7, 2018), <https://www.nytimes.com/interactive/2018/12/07/climate/world-emissions-paris-goals-not-on-track.html>.

5. See, e.g., Lisa Friedman, *Trump Serves Notice to Quit Paris Climate Agreement*, N.Y. TIMES (Nov. 4, 2019), <https://www.nytimes.com/2019/11/04/climate/trump-paris-agreement-climate.html>; see also

American intransigence and the weakness of the Paris Agreement, worldwide effort has not been moving in a positive direction.<sup>6</sup>

As international institutions fail to address climate change, it's no wonder that every year, more people from more disciplines are looking for ways to bring their expertise to bear on the crisis.<sup>7</sup> Given the current American administration's obduracy on climate,<sup>8</sup> it's unsurprising that activists in the United States are on the hunt for new ways to put legal force behind their arguments. One of the most exciting avenues being pursued is the public trust suit.

The flagship public trust climate case is *Juliana v. United States*, in which a group of young people have sought to force the federal government to curtail the fossil fuel industry's ability to emit greenhouse gases ("GHGs").<sup>9</sup> While the Ninth Circuit has dismissed the case on standing grounds, other plaintiffs have made similar arguments using state public trust doctrines.<sup>10</sup> The possibility of a state-by-state approach comes with several advantages.<sup>11</sup> State public trust doctrine is often stronger than the federal version (if one even exists), and plaintiffs are not tasked with devising a national climate regime in their prayers for relief.<sup>12</sup> The first waves

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Maya Kosoff, *Trump's Ignorance Is Exacerbating an Ecological Apocalypse*, VANITY FAIR (Nov. 28, 2018), <https://www.vanityfair.com/news/2018/11/trumps-ignorance-is-exacerbating-an-ecological-apocalypse>.

6. See, e.g., Graham Readfearn, *Australia's Climate Response Among the Worst in the G20*, GUARDIAN (Nov. 11, 2019, 12:34 AM), <https://www.theguardian.com/environment/2019/nov/11/australia-a-climate-response-among-worst-g20>; Gary Fuller, *Pollutionwatch: Africa Increases its Reliance on Fossil Fuels*, GUARDIAN (Nov. 7 2019, 04:30 PM), <https://www.theguardian.com/environment/2019/nov/07/pollutionwatch-africa-increases-reliance-fossil-fuels>; Andrew Freedman, *Amazon Fires Could Accelerate Global Warming and Cause Lasting Harm to a Cradle of Biodiversity*, WASH. POST (Aug. 22, 2019), <https://www.washingtonpost.com/weather/2019/08/21/amazonian-rainforest-is-ablaze-turning-day-into-night-brazils-capital-city/>.

7. See, e.g., *Top 50 Non-Profit Organizations Working to Stop Climate Change*, CLIMATESTORE (Mar. 18, 2020, 4:49 PM), <https://climatestore.com/take-action/get-involved/non-profit-organizations-working-on-climate-change> (listing, *inter alia*, Mothers Out Front and the Catholic Climate Covenant).

8. See, e.g., Coral Davenport, *E.P.A. Watchdog, Citing 'Open Defiance' of Inquiries, Rebukes Top Agency Aide*, N.Y. TIMES (Nov. 6, 2019), <https://www.nytimes.com/2019/11/06/climate/epa-watchdog-chief-of-staff.html>.

9. *Juliana v. United States*, 217 F. Supp. 3d 1224, 1234 (D. Or. 2016).

10. See *infra* Section II.A.

11. See generally Matthew Schneider, *Where Juliana Went Wrong: Applying the Public Trust Doctrine to Climate Change Adaptation at the State Level*, 41 ENVIRONS ENVTL. L. & POL'Y J. 47, 59 (2017).

12. See *id.* at 59-60.

of state-level cases have encountered resistance,<sup>13</sup> but atmospheric public trust advocates fight on.<sup>14</sup>

This Note will lay out the historical foundations of the public trust doctrine in Part I, explore past and ongoing state-level efforts to expand the public trust doctrine to include the atmosphere in Part II, survey Michigan's public trust doctrine in Part III, and then evaluate the chances that a public trust lawsuit would have in Michigan in Part IV. Finally, this Note will conclude that Michigan's peculiar standing law and its Environmental Protection Act show the state is fertile ground for an atmospheric trust lawsuit.

## I. THE ROOTS OF THE PUBLIC TRUST

Public trust is one of the more ancient doctrines alive in American law. Scholars and practitioners alike trace its origins to the Institutes of Justinian,<sup>15</sup> which provide that “the following things are by natural law common to all—the air, running water, the sea, and consequently the seashore.”<sup>16</sup> That is, there are certain things which no one owns because they cannot rightly *be* owned, “for [they] are not, like the sea itself, subject to the law of nations,” and are instead reserved by the sovereign for the use of all.<sup>17</sup> The ‘public trust doctrine’ posits that certain natural resources—including the air, the navigable waters, and the shore—are held in trust for the people and managed by the government.<sup>18</sup> The trust doctrine operates the same way today that it did, at least theoretically, in the time of Justinian.<sup>19</sup>

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13. See Caroline Cress, *It's Time to Let Go: Why the Atmospheric Trust Won't Help the World Breathe Easier*, 92 N.C. L. REV. 236, 261 (2013).

14. See Randall S. Abate, *Atmospheric Trust Litigation in the United States: Pipe Dream or Pipeline to Justice for Future Generations?*, in CLIMATE JUSTICE: CASE STUDIES IN GLOBAL AND REGIONAL GOVERNANCE CHALLENGES 542, 557 (Randall S. Abate ed., 2016) (collecting cases).

15. See Carolyn Kelly, *Where the Water Meets the Sky: How an Unbroken Line of Precedent from Justinian to Juliana Supports the Possibility of a Federal Atmospheric Public Trust Doctrine*, 27 N.Y.U. ENVTL. L.J. 183, 193-202 (2019) (collecting cases citing Justinian).

16. CAESAR FLAVIUS JUSTINIAN, THE INSTITUTES OF JUSTINIAN bk. II, I.1 (J.B. Moyle trans., Oxford 1911). The Institutes are part of Justinian's *Corpus Juris Civilis*, an attempted compilation of existing Roman law in the sixth century AD. The Institutes, as opposed to the other component parts of the *Corpus*—the *Digest*, the *Codex*, and the *Novellae Constitutiones*—were meant to work as a kind of introductory textbook for law students. See *Justinian's Codification*, OXFORD CLASSICAL DICTIONARY (3d ed. 2003).

17. CAESAR FLAVIUS JUSTINIAN, THE INSTITUTES OF JUSTINIAN bk. II, I.1 (J.B. Moyle trans., Oxford 1911).

18. See Gerald Torres & Nathan Bellinger, *The Public Trust: The Law's DNA*, 4 WAKE FOREST J.L. & POL'Y 281, 286-87 (2014).

19. See *id.* at 283, 286 n.10. Scholars are not at all in agreement that an unbroken line of Public Trust Theory runs from the Romans through to today, but American courts routinely treat the PTD as if such a connection existed. See, e.g., *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 284 (1997).

### A. Public Trust from Justinian to Lord Hale

Roman civil law shaped the Canon and English law that came down to American jurisprudence.<sup>20</sup> Under the English common law, the public trust doctrine governed the use of waterways for fishing and navigation, as well as the local use of common land.<sup>21</sup> One of the Magna Carta's provisions touched on the public trust in the thirteenth century,<sup>22</sup> and English courts hundreds of years later continued to refer back to that incorporation.<sup>23</sup> Over time, the common law came to hold that the doctrine prevented the sovereign from granting certain property, or certain interests in that property, to private owners—the sovereign 'owned' the common lands and navigable waters, and was entrusted with ensuring their public use.<sup>24</sup> As the Supreme Court noted in *Shively v. Bowlby*:

In England, from the time of Lord Hale, it has been treated as settled that the title in the soil of the sea, and the arms of the sea . . . is in the King, except so far as an individual or a corporation has acquired rights in it . . . and that this title, *jus privatum* . . . is held subject to the public right, *jus publicum*, of navigation and fishing.<sup>25</sup>

Thus, no matter the sovereign's degree of interest in granting the title of shores, rivers, lakes, or other lands in which the public has an interest to private owners, the sovereign *does not have the power* to grant the full title. As the Michigan Supreme Court wrote when explaining the origins of the public trust in a recent case:

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20. See generally William Wirt Howe, *Roman and Civil Law in America*, 16 HARV. L. REV. 342 (1903); R.C. Dale, *The Adoption of the Common Law by the American Colonies*, 30 AMER. L. REG. 554, 564 (1882).

21. Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 475, 475 n.15 (1970).

22. Magna Carta § 33. This provision prohibits "kydells" or fishing weirs, river-spanning nets which prevented navigation and destroyed fish populations. It's a long stretch from this section to public trust in its entirety, but modern writers—Kelly, *supra* note 15, at 187-88—and English lawyers—Sax, *supra* note 21—say that this is where it all began in the English law.

23. See, e.g., *Gann v. Free Fishers of Whitstable* (1865) 11 Eng. Rep. 1305 (HL) 1314 (appeal taken from Eng.).

24. Expressed in the dense prose of the period by Sir William Scott, "[a]ll grants of the crown are to be strictly construed against the grantee, contrary to the usual policy of the law in the consideration of grants, and upon this just ground: that, the prerogatives and rights and emoluments of the crown being conferred upon it for great purposes, and for the public use, it shall not be intended that such prerogatives, rights, and emoluments are diminished by any grant, beyond what such grant, by necessary and unavoidable construction, shall take away." *The Rebeckah* (1799) 165 Eng. Rep. 158 EWHC (admlty) 159.

25. 152 U.S. 1, 13 (1894) (citations omitted).

Thus, when a private party acquire[d] littoral property from the sovereign, it acquire[d] only the *jus privatum* . . . Public rights in certain types of access to the waters and lands beneath them remain under the protection of the state. Under the public trust doctrine, the sovereign never had the power to eliminate those rights, so any subsequent conveyances of littoral property remain subject to those rights.<sup>26</sup>

It was in this form—a protection of public rights against private grants—that the public trust doctrine made its way to the United States.

### B. Public Trust from the 19th to the 21st Century

Public trust litigation in American courts has mirrored the ideal form described by English legal scholars—it has prevented the government from placing public lands in private hands, and it has prevented sales or grants of public land from interfering with public use.<sup>27</sup> *Illinois Central Railroad Company v. Illinois*, the premier American public trust case, illustrates the similarity.<sup>28</sup> The Illinois legislature granted what amounted to the entire commercial waterfront of Chicago to the Illinois Central Railroad in 1869.<sup>29</sup> The grant included the bed of Lake Michigan extending a mile from the shoreline, more than a thousand acres of what was traditionally part of the public trust.<sup>30</sup> A more vigilant legislature rescinded the grant in 1873 and sued the railroad company to invalidate the original legislation.<sup>31</sup> The Supreme Court found for Illinois and wrote that the state's title to the lake-bed and waters was:

[D]ifferent in character from that which the state holds in lands intended for sale . . . It is a title held in trust for the people of the state that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties.<sup>32</sup>

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26. *Glass v. Goeckel*, 703 N.W.2d 58, 66 (Mich. 2005). For the uninitiated reader, “littoral” means, “[o]f or relating to the coast or shore of an ocean, sea, or lake.” *Littoral*, BLACK'S LAW DICTIONARY (9th ed. 2009).

27. *See Sax*, *supra* note 21, at 488-89.

28. 146 U.S. 387 (1892).

29. *See id.* at 454.

30. *See id.* at 433, 454.

31. *See id.* at 439.

32. *See id.* at 452-54.

The Court explained that while the state was free to grant use of the shoreline to private parties for the construction of “wharves, piers, docks, and other structures” which would facilitate the public’s use of the shore, it could not transfer the title to and surrender control of an entire harbor to a self-interested corporation.<sup>33</sup> The enjoyment of the harbor belonged to the people, and “the state [could] no more abdicate its trust over property in which the whole people are interested . . . than it [could] abdicate its police powers in the administration of government and the preservation of the peace.”<sup>34</sup>

That kind of holding is largely how courts have implemented the public trust doctrine, giving the third branch an avenue to invalidate otherwise apparently legal sales and grants of public lands and waters to private actors.<sup>35</sup> Public trust has enjoyed renewed popularity in recent decades in part because of Professor Joseph Sax’s advocacy for the use the public trust doctrine to further democratize state government and preserve natural resources.<sup>36</sup> State legislatures, whether in good or bad faith, often allow industrial and commercial interests to make use of public lands. Sax posited that private citizens could challenge these grants by using the courts to force legislatures to reconsider their decisions in the light of public scrutiny.<sup>37</sup> Sax thought that by using the public trust doctrine to bring suit, the small groups of citizens concerned with untoward public-private action could bring wider public attention to what would otherwise go unnoticed.<sup>38</sup> Sax wrote that while many or most legislative grants of public land go unnoticed, citizen suits could focus wider attention on those that harmed public interests.<sup>39</sup> Through the 1980s and into this century, “the doctrine has been expanded to protect additional water-related uses such as swimming and similar recreation, aesthetic enjoyment of rivers and lakes, and preservation of flora and fauna indigenous to public trust lands.”<sup>40</sup> Recent developments have taken the concept of public trust from its traditional roots in the enjoyment of water to the enjoyment of the air and the biosphere.<sup>41</sup>

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33. *See id.* at 453.

34. *See id.*

35. *See Kelly, supra* note 15, at 195-99 (collecting cases).

36. *See Sax, supra* note 21, at 556-61.

37. *Id.* at 558-59.

38. *See id.*

39. *See id.*

40. *District of Columbia v. Air Fla., Inc.*, 750 F.2d 1077, 1083 (D.C. Cir. 1984).

41. *Id.*



## II. THE SHAPE OF ATMOSPHERIC PUBLIC TRUST LITIGATION

In 2011, non-profit organizations like Our Children's Trust and Kids vs. Global Warming began filing 'atmospheric trust' lawsuits against states and the federal government, alleging they had breached their fiduciary duties by allowing polluters to discharge greenhouse gases and warm the Earth.<sup>42</sup> Atmospheric trust litigation ("ATL") attempts to bring the air that Justinian's Institutes described as "common to all" back within the fold of the public trust and to apply the doctrine to climate change. This section will survey this effort and its results at the state level before turning to *Juliana* to explore the standing issues that stymied the suit in the Ninth Circuit.

### A. Atmospheric Trust Across the States

ATL proceeds by way of five claims: (1) that the air and atmosphere are part of the body of the public trust; (2) that present *and future* generations are beneficiaries of the trust; (3) that the government's fiduciary duty is not just to retain the trust in public hands but to protect against impairment of the air and climate, amounting to a duty to rectify the carbon imbalance; (4) that courts have the inherent power to enforce these trust obligations without specific reference or challenge to a particular legislative or executive action; and (5) that, in state courts, governments must produce a full accounting of the state's carbon emissions and a plan to draw down emissions by six percent per annum.<sup>43</sup>

In each suit, plaintiffs must find the public trust doctrine in the law and frame a cause of action. The best case is where a state constitution contains a public trust provision, like in Alaska and New Mexico.<sup>44</sup> In states like Oregon, plaintiffs

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42. Felicity Barringer, *Suit Accuses U.S. Government of Failing to Protect Earth for Generations Unborn*, N.Y. TIMES (May 4, 2011), <https://www.nytimes.com/2011/05/05/science/earth/05climate.html>; Claire Thompson, *The Young and the Restless: Kids Sue Government over Climate Change*, GRIST (Dec. 9, 2011), <https://grist.org/climate-change/2011-12-08-the-young-and-the-restless-kids-sue-government-over-climate-chan/>; K.J. Dell Antonia, *Kids v. the Government*, SLATE (May 5, 2011), [https://slate.com/human-interest/2011/05/kids-v-the-government.html?via=recirc\\_recent](https://slate.com/human-interest/2011/05/kids-v-the-government.html?via=recirc_recent). Kids vs. Global warming has been rebranded to "iMatter." See IMATTER, <https://www.imatteryouth.org/> (last visited Sept. 28, 2020).

43. See generally MARY CHRISTINA WOOD, NATURE'S TRUST: ENVIRONMENTAL LAW FOR A NEW ECOLOGICAL AGE 221 (Cambridge Univ. Press 2014) (describing the common claims of atmospheric trust litigation). For state claims, see, e.g., *Sanders-Reed ex rel. Sanders-Reed v. Martinez*, 350 P.3d 1221, 1222-23 (N.M. Ct. App. 2015); *Kanuk ex rel. Kanuk v. State*, 335 P.3d 1088, 1091 (Alaska 2014); *Sinnok v. State*, No. 3AN-17-09910 CI, 2018 WL 7501030 at \*5-6 (Alaska 2018); *Chernaik v. Brown*, 436 P.3d 26, 28-29 (Or. Ct. App. 2019); *Aji P. ex rel. Piper v. State*, No. 18-2-04448-1 SEA, at \*4-5 (Wash. Super. Ct. 2018); First Amended Complaint at \*3-6, *Reynolds v. Florida*, No. 18-CA-000819, 2020 WL 3410846 (Fla. Cir. Ct. 2018).

44. Article XX § 21 of the New Mexico Constitution provides that "[t]he legislature shall provide for . . . control of despoilment of the air, water, and other natural resources of the state," which the court in *Sanders-Reed* found had created a public trust duty on the part of the state. 350 P.3d at 1222, 1225.

have appealed to state common law more generally and pointed to the robust public trust doctrines of other jurisdictions.<sup>45</sup> In Oregon, Our Children’s Trust has attempted to make its case under the Federal Constitution, arguing that the Due Process clause provides the right to a stable climate.<sup>46</sup>

Courts have not viewed sweeping claims for injunctive relief favorably. Some have insisted that the public “trust” is just a metaphor and that states bear no positive or fiduciary duties towards the people as regards public lands.<sup>47</sup> Others have refused to expand a doctrine narrowly concerned for most of American history with submerged lands to the atmosphere.<sup>48</sup> Judges have balked at what they see as an expansive scope of requested relief and relied on the political question doctrine to kick the issue back to the legislature, even after acknowledging the merits of the public trust claims.<sup>49</sup> They have frowned on the constitutional claims, with one Washington judge noting that “a stable and healthy climate, like world peace and economic prosperity, is a shared aspiration—the goal of a people, rather than the [substantive due process] right of a person.”<sup>50</sup> Finally, at least one court has assumed that states bear atmospheric trust duties but held that state environmental agencies were the manifestation of that duty and pointed plaintiffs to rulemaking rather than litigation.<sup>51</sup>

Organizations attempting ATL have not been stymied by these initial setbacks. Our Children’s Trust alone has cases in progress throughout the country. *Chernaik* in Oregon, *Sinnok* in Alaska, and *Aji P.* in Washington are on appeal, while *Reynolds* in Florida is awaiting trial.<sup>52</sup> Michigan, Florida, and Colorado stonewalled Our Children’s Trust’s attempts at rulemaking, but more attempts are in progress in

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Article VIII of the Alaska Constitution recognizes a more traditional public trust in navigable waters, though its first section announces a broader aim: “It is the policy of the State to encourage the settlement of its land and the development of its resources by making them available for maximum use consistent with the public interest.” ALASKA CONST. art. VIII, § 1. The court in *Kanuk* recognized those public trust duties. 335 P.3d at 1099 (finding precedent for the public trust doctrine constitutionalized in the Constitution of Alaska, article VIII, section 3).

45. *Chernaik*, 436 P.3d at 33.

46. *See Juliana v. United States*, 947 F.3d 1159, 1164-65 (9th Cir. 2020).

47. *E.g., Chernaik*, 436 P.3d at 35.

48. *E.g., Filippone ex rel. Filippone v. Iowa Dep’t. of Nat. Res.*, 829 N.W.2d 589 at 2 (Iowa Ct. App. 2013); *Aronow v. State*, No. A12-0585, 2012 WL 4476642, at \*2 (Minn. Ct. App. 2012).

49. *E.g., Kanuk*, 335 P.3d at 1097; *see also Juliana*, 947 F.3d at 1165.

50. *Aji P. ex rel. Piper v. State*, No. 18-2-04448-1 SEA, at \*8 (Wash. Super. Ct. 2018).

51. *See Sanders-Reed ex rel. Sanders-Reed v. Martinez*, 350 P.3d 1221, 1225 (N.M. Ct. App. 2015).

52. *Reynolds v. State*, No. 18-CA-000819, 2020 WL 3410846 (Fla. Cir. Ct. 2018).

Maine, North Carolina, and New Mexico.<sup>53</sup> And of course, *Juliana v. United States* has become Our Children's Trust's most famous lawsuit, a test case for the application of the public trust doctrine to the atmosphere at the federal level.<sup>54</sup>

*B. No Ordinary Lawsuit: Juliana and the Fate of ATL on the Federal Level*

*Juliana v. United States*, the flagship federal ATL case, represents the best arguments for incorporating the atmosphere into the public trust at the federal level but also demonstrates why the federal approach is, for the foreseeable future, a non-starter. Unlike in some of the states, the public trust doctrine was not written into the U.S. Constitution and has not been codified by statute or explicitly incorporated into federal common law.<sup>55</sup> The plaintiffs thus had to argue for the creation or incorporation of the public trust doctrine on its own merits, without the support of binding precedent. Also, the size, power, and carbon output of the country as a whole made the federal government the best target for a suit—in terms of carbon reduction—and the candidate for the most straightforward standing analysis. Yet it was the same issue of scale that led the Ninth Circuit to reject the plaintiffs' proposed relief, leaving the states as the only viable avenues for ATL.

Filing in U.S. District Court for the District of Oregon in 2015, *Juliana's* child-plaintiffs alleged that the U.S. government had known about and failed to address the dangers of greenhouse gases for decades.<sup>56</sup> They sought a declaration that "their constitutional and public trust rights had been violated" as well as an injunction directing the federal government to reduce carbon emissions.<sup>57</sup> The federal government and several industry intervenors moved to dismiss the case for lack of subject matter jurisdiction, the failure of the plaintiffs to state a cognizable due process claim, and the fact that the case presented a political question. Judge Ann Aiken denied the defendants' motions in November, 2016.<sup>58</sup>

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53. See *State Judicial Actions Now Pending*, OUR CHILDREN'S TRUST, <https://www.ourchildrenstrust.org/pending-state-actions> (last visited Oct. 12, 2020).

54. See John Schwartz, *Young People Are Suing the Trump Administration Over Climate Change. She's Their Lawyer*, N.Y. TIMES (Oct. 23, 2018), <https://www.nytimes.com/2018/10/23/climate/kids-climate-lawsuit-lawyer.html>.

55. See Richard M. Frank, *The Public Trust Doctrine: Assessing Its Recent Past & Charting Its Future*, 45 U.C. DAVIS L. REV. 665, 680-81 (2012). Recall that although *Illinois Railroad*, 146 U.S. 387 (1892), ended up in the Supreme Court, the Court was applying Illinois common law. See *supra* Section I.B.

56. See Complaint at 4, *Juliana v. United States*, 217 F. Supp. 3d 1224 (D. Or. 2016) (No. 6:15-cv-01517-TC).

57. *Juliana*, 217 F. Supp. 3d at 1233.

58. *Id.* at 1233-34.

Judge Aiken took a broad view of the public trust doctrine in her reasoning.<sup>59</sup> First, since the suit asked “the Court to determine whether Defendants have violated Plaintiffs’ constitutional rights,” Judge Aiken ruled that the issue was “squarely within the purview of the judiciary” and was not a political question.<sup>60</sup> Second, Judge Aiken found that the plaintiffs had satisfied each of the three standing requirements, injury, causation, and redressability.<sup>61</sup> On the injury prong, where “general allegations” suffice at the pleading stage, Judge Aiken found that by detailing concrete ways the plaintiffs had been harmed by climate change, they had satisfied the injury-in-fact requirement.<sup>62</sup> For the causation prong, Judge Aiken agreed with the plaintiffs that fossil fuel combustion accounts for the majority of U.S. carbon emissions, that the government has the power to control emissions, and that the government has historically encouraged rather than discouraged emissions.<sup>63</sup> For the redressability prong, Judge Aiken found that plaintiff’s broad request for relief that the government take whatever actions “necessary to ensure that atmospheric CO<sub>2</sub> is no more concentrated than 350 ppm by 2100[,] . . . develop a national plan to restore Earth’s energy balance, and implement that national plan so as to stabilize the climate system,” was sweeping enough to mitigate plaintiffs’ claimed injuries.<sup>64</sup>

Judge Aiken allowed *Juliana* to proceed to trial,<sup>65</sup> but the case then became mired in repeated motions for stays, interlocutory appeals, dismissals, and writs of mandamus, and was eventually appealed up to the Ninth Circuit.<sup>66</sup> *Juliana*’s fate, barring certiorari, was decided by the Court of Appeals in January 2020.<sup>67</sup>

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59. *Id.* at 1272.

60. *Id.* at 1241.

61. At the federal level, plaintiffs must allege facts which meet standing’s three “prongs.” They must claim: (1) that they have suffered an “injury in fact,” meaning “an invasion of a legally-protected interest which is (a) concrete and particularized,” and “(b) actual or imminent, not conjectural or hypothetical;” (2) that there exists “a causal connection between the injury and the conduct complained of—the injury has to be fairly . . . trace[able] to the challenged action of the defendant, and not . . . the result of the independent action of some third party not before the court”; and (3) that (a) it must be “likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision,” and (b) the remedy must be within the district court’s power to award. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (alteration in original) (citations omitted) (internal quotation marks omitted).

62. *Juliana*, 217 F. Supp. 3d at 1242–43.

63. *Id.* at 1246–47.

64. *Id.* at 1247–48.

65. *Id.* at 1234.

66. See John Schwartz, *Judges Give Both Sides a Grilling in Youth Climate Case Against the Government*, N.Y. TIMES (June 4, 2019), <https://www.nytimes.com/2019/06/04/climate/climate-lawsuit-juliana.html>.

67. John Kruzel, *Appeals Court Tosses Kids’ Climate Change Lawsuit*, HILL (Jan. 17, 2020), <https://thehill.com/regulation/court-battles/478817-appeals-court-tosses-kids-climate-change-lawsuit>.

The Ninth Circuit agreed with Judge Aiken on some points, but ultimately dismissed the case on standing. The court quickly dispensed with the government's first argument that "the [Administrative Procedures Act's] 'comprehensive remedial scheme' for challenging the constitutionality of agency actions implicitly bars the plaintiffs' freestanding constitutional claims" as meritless.<sup>68</sup> But the government's objections to plaintiffs' standing under Article III were more successful. The court agreed with Judge Aiken that the *Juliana* plaintiffs had identified both concrete injuries and causation.<sup>69</sup> The court assumed the plaintiffs could establish the first prong of redressability—that a comprehensive climate injunction would ameliorate the plaintiffs' injuries—in order to determine whether the court had the power to compel remedial action.<sup>70</sup>

It was here that federal ATL met a dead end. The Ninth Circuit wrote that the Supreme Court had linked the redressability prong of standing with the political question doctrine in *Rucho v. Common Cause*, the landmark gerrymandering case.<sup>71</sup> In *Rucho*, the Court found that a proposed mathematical comparison based on expert testimony would be "too difficult for the judiciary to manage," and the Ninth Circuit argued that the same conclusion applied in the climate context.<sup>72</sup> Even if the court agreed with plaintiffs' experts that carbon must be kept below 350 parts per million with a comprehensive government plan, the majority doubted "that any such plan can be supervised or enforced by an Article III court."<sup>73</sup> The Ninth Circuit noted that while district courts in the past have ordered the executive to create and implement wide-ranging plans for reform,<sup>74</sup> the scope of the plaintiffs' requested relief would involve enjoining and evaluating actions by *both* of the other branches of government "for many decades."<sup>75</sup> At that time-scale and level of complexity, operating without "a constitutional directive or legal standards' [to] guide the courts' exercise of equitable power," a district court was ill-positioned to set carbon limits across the country.<sup>76</sup> Despite Judge Staton's plea in dissent that "the most basic structural principle embedded in our system of ordered liberty [is] that the

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68. *Juliana v. United States*, 947 F.3d 1159, 1167-68 (9th Cir. 2020).

69. *Id.* at 1168-69.

70. *Id.* at 1169-70.

71. *Id.* at 1173; *Rucho v. Common Cause*, 139 U.S. 2484 (2019).

72. *Juliana*, 947 F.3d at 1173 (citing *Rucho*, 139 U.S. at 2500-02).

73. *Id.*

74. *Id.* at 1172 (citing *Brown v. Plata*, 536 U.S. 493, 537-38 (2011)).

75. *Id.*

76. *Id.* at 1173 (citing *Rucho*, 139 U.S. at 2508).

Constitution does not condone the Nation's willful destruction," *Juliana* marked the end of ATL in the federal courts.<sup>77</sup>

Piecemeal action will never be as comprehensive as at the national level, but the structure of the law makes ATL an easier prospect in the states.<sup>78</sup> Likewise, given that individual state climate actions have spread across the country in the past, one successful suit might spur change faster than we think.<sup>79</sup> Michigan might offer some of the most fertile ground yet for a public trust challenge of climate policy.

### III. THE PUBLIC TRUST DOCTRINE IN MICHIGAN

The public trust doctrine has a long history in Michigan, one that judges routinely date back to a time before the state entered the Union.<sup>80</sup> The Constitutional Convention of 1963<sup>81</sup> incorporated the doctrine in Article IV, Section Fifty-Two, declaring that "the conservation and development of the natural resources of the state" to be "of paramount public concern" and calling the legislature to "provide for the protection of the air, water, and other natural resources of the state from pollution, impairment, and destruction."<sup>82</sup> To enforce this mandate, the legislature created state environmental agencies like the Department of Environment, Great Lakes, and Energy ("DEGLE")<sup>83</sup> and passed the Michigan Environmental Protection Act ("MEPA") in 1970.<sup>84</sup> The Act provides that:

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77. *Id.* at 1175 (Staton, J. dissenting).

78. See generally Benjamin T. Sharp, *Stepping into the Breach: State Constitutions as a Vehicle for Advancing Rights-Based Climate Litigation*, 14 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 39 (2019).

79. See *States Adopting California's Clean Cars Standards*, MD. DEPT. OF THE ENV'T., <https://mde.maryland.gov/programs/air/mobilesources/pages/states.aspx> (last visited July 23, 2020).

80. See, e.g., *Moore v. Sanborne*, 2 Mich. 519, 520 (Mich. 1853).

81. Michigan has had an unusually tumultuous constitutional history. See CITIZENS RSCH. COUNCIL OF MICH., NO. 360-02, A BRIEF MICHIGAN CONSTITUTIONAL HISTORY 1 (2010).

82. MICH. CONST. art. IV § 52.

83. Previously the Michigan Department of Environmental Quality, née a part of the Department of Natural Resources, the agency formerly known as the Department of Environmental Quality, before that again a part of the Department of Natural Resources, which was itself originally the Natural Resources Commission, all the result of a partisan disagreement over whether development and conservation should live under the same umbrella department or not. See Jeffrey K. Haynes et al., MICHIGAN ENVIRONMENTAL LAW DESKBOOK 1 (Jeffrey K. Haynes et al. eds., 2d ed. 2012) (noting that "[r]easonable minds can differ on the wisdom of each of these moves, but each became a fact of our law practice.").

84. MICH. COMP. LAWS § 324.1701. MEPA's text clarifies that the Constitution incorporates the atmosphere within the public trust or, to the very least, recognizes a "public trust in" the "resource" that is "the air."

The attorney general or any person may maintain an action in the circuit court having jurisdiction where the alleged violation occurred or is likely to occur for declaratory and equitable relief against any person for the protection of the air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction.<sup>85</sup>

The Michigan Supreme Court's treatment of MEPA has waxed and waned in its generosity but seems to be on the upswing, and the Court's respect for public trust has always been strong—a promising foundation on which to build an ATL claim. This section will survey the history of the public trust doctrine in Michigan, its traditional application to water rights, and its recent expansion, which may open the door to the explicit inclusion of the atmosphere in case law. This section will also explore the courts' treatment of MEPA and the whirlwind of state standing revisions which have cleared the way for an ATL suit.

*A. Michigan's Public Trust Doctrine from the Northwest Territory through the Modern Day*

Michigan is a watery state, and its public trust cases have centered on water rights. Early on, these cases established which rivers were navigable for purposes of logging and freight; later, they determined residents' rights to passage and recreation on its rivers and its small and Great lakes.<sup>86</sup>

Courts had no doubt that the public trust had passed into the state's hands:

It will be helpful to recall that Michigan was carved out of the Northwest Territory; that the Territory was ceded to the United States by Virginia; that the United States held this territory in trust for future states to be created out of it; that the United States held the waters of navigable rivers and lakes and the soil under them in trust for the people, just as the British crown had formerly held them in trust for the public uses of navigation and fishery; that when Michigan entered the union of states, she became vested with the same qualified title that the United States had; that these waters and the soil under them passed to the state in its

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85. *Id.* § 324.1701(1).

86. *See, e.g.,* *Nedtweg v. Wallace*, 208 N.W. 51, 54-55 (Mich. 1926) (holding that the public trust does not govern dry land created from lake bottom); *Moore v. Sanborne*, 2 Mich. 519, 527-28 (Mich. 1853) (reasoning that all navigable-in-fact rivers are subject to the trust, rather than just tidal waters according to the English rule); *Rushton ex. rel. Hoffmaster v. Taggart*, 11 N.W.2d 193, 197 (Mich. 1943) (ruling that owners of land on both sides of a sizeable section of navigable river cannot dig trenches in the river—or employ any other measures—to prevent wading by fly-fishermen).

sovereign capacity, impressed with a perpetual trust to secure to the people their rights of navigation, fishing, and fowling.<sup>87</sup>

Until the latter half of the last century, the Michigan Supreme Court largely (and perhaps exclusively) applied the doctrine to the state's waters; if a case touched "soil," it was only that soil lying beneath a lake or river.<sup>88</sup> Even today, the major public trust cases in Michigan concern riparian and littoral rights. The most recent, *Glass v. Goeckel*, established that the land between the water of the Great Lakes and the "ordinary high water mark" is held in trust by the state, meaning that lakeshore property owners cannot prevent visitors from walking along their beaches.<sup>89</sup>

### B. *Bringing the Public Trust out of the Water and onto the Land*

It was in the 1970s, in *Michigan Oil Company v. Natural Resources Commission*, that Michigan courts first saw fit to bring the public trust doctrine onto dry land; in doing so, they broadened it in a way that could be amenable to ATL. In 1968, the Michigan Department of Natural Resources ("DNR") leased part of the Pigeon River Forest to the Michigan Oil Company.<sup>90</sup> It was a bid for quick cash—the Department apparently believed that there was no oil in the forest and thus no danger of environmental destruction.<sup>91</sup> The wisdom of the lease became clear when the Oil Company discovered oil in the forest, the home to the only black bear population in the lower peninsula, the only elk herd this side of the Mississippi River, and one of the only homes for bobcat left in the state.<sup>92</sup> As the Court of Appeals wrote, "the term 'blunder' [was] not too strong a word to describe" the agency's "decision to offer, at public auction, oil and gas leases covering some one-half million acres of state owned land . . . with little investigation or consideration of the effects of possible drilling."<sup>93</sup>

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87. *Collins v. Gerhardt*, 211 N.W. 115, 117 (Mich. 1926). This recitation is typical.

88. *E.g.*, *Pigorsh v. Fahner*, 194 N.W.2d 343, 353 (Mich. 1972) (establishing that while ownership of the entire shore of a lake conferred ownership of the lake-bottom, the public maintained a trust interest in use of the waters of the lake itself and an interest in the bottom to the extent that owners could not fill or dredge without approval by the state).

89. *Glass v. Goeckel*, 703 N.W.2d 58, 62 (Mich. 2005).

90. *Mich. Oil Co. v. Nat. Res. Comm'n*, 249 N.W.2d 135, 139 (Mich. Ct. App. 1976), *aff'd*, 276 N.W.2d 141 (Mich. 1979). The National Resources Commission was a part of the DNR and, as the courts have done, both designations will be used interchangeably.

91. *Id.* ("It appears from the record presented here that a major reason for leasing the land, and a likely reason for the limited consideration of the wisdom of that decision, was a feeling within the department that no one would actually do any drilling.")

92. *Id.* at 674.

93. *Id.* at 674-75.



In “an effort by the commission to redeem an apparent mistake,” the DNR directed the Supervisor of Wells to deny all permits because drilling would cause “serious damage to animal life and molest[] or spoil[] state-owned lands.”<sup>94</sup> The Oil Company’s position was that the DNR did not have the statutory authority to deny the permits.<sup>95</sup> It argued in the first place that the State’s Oil Conservation Act had placed permitting authority in the hands of the Supervisor of Wells (another state authority), not the DNR,<sup>96</sup> and in the second, that the Act did not prohibit vague spoliation but only unnecessary “waste” in oil exploration.<sup>97</sup>

Nonetheless, the Court of Appeals saw “nothing wrong with a public agency, entrusted with preserving valuable resources to the people of the State of Michigan, having once jeopardized those resources, taking all necessary and proper steps to rectify previous errors so as to benefit the public.”<sup>98</sup> The court interpreted the DNR’s directive to the Supervisor as relying not only on the Oil Conservation Act, but on the DNR’s “more general powers as trustee of stand land and resources.”<sup>99</sup> While the DNR had not explicitly made the claim, the Court of Appeals determined that the acts which had created the Department had made it a trustee, and despite signing the original lease, the DNR “retained its statutory authority to fulfill its duty to the people of the State of Michigan by regulating the use of the state lands and resources placed in its control and held by it as a public trust.”<sup>100</sup>

The Michigan Supreme Court agreed with the Court of Appeals, writing that the Oil Conservation Act “placed an affirmative duty on the Supervisor of Wells” to prevent “serious or unnecessary damage to or destruction of wildlife, even in the absence of specifically promulgated rules and regulations.”<sup>101</sup> It likewise held that in creating the DNR, the Michigan Legislature had charged the agency with an “affirmative duty to protect and conserve the natural resources of the state of Michigan.”<sup>102</sup> With this understanding, the court found that the DNR not only had the statutory authority to deny the drilling permits, but the affirmative duty to do so.<sup>103</sup>

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94. *Id.* at 678, 683.

95. *Id.* at 679-80.

96. *Id.* at 681.

97. *Id.* at 682.

98. *Id.* at 683.

99. *Id.* at 685.

100. *Id.* at 688-89.

101. *Mich. Oil Co. v. Nat. Res. Comm’n*, 276 N.W.2d 141, 148 (Mich. 1979).

102. *Id.* (quoting MICH. COMP. LAWS § 299.3 (repealed 1994)).

103. *Id.*

Finally, MEPA had been raised on appeal. The Michigan Supreme Court decided that the public trust duties accorded to the DNR resolved the case without reference to MEPA, but it “nevertheless” held that MEPA should be read as applying to laws like the Oil Conservation Act.<sup>104</sup> The court was nodding to the notion that *even if* the DNR’s originating statute had not created public trust duties, it could have looked to the Environmental Protection Act to find the same.<sup>105</sup>

In the end, the forest stayed pristine and the Company was left without a lease.<sup>106</sup> *Michigan Oil Company* remains good law, which bodes well for the success of ATL in Michigan. Any comprehensive atmospheric injunction would force the state to back out of contracts made with and permits issued to current carbon producers.

#### IV. THE ISSUE OF STANDING

While standing led to *Juliana’s* dismissal in the federal system, it should present less of a problem in Michigan. The state’s standing doctrine has historically been looser than that of the federal courts. Article III of the 1963 Michigan Constitution allows the Michigan Supreme Court to issue advisory opinions on pending legislation regardless of the existence of a “case or controversy.”<sup>107</sup> Article VI grants the circuit courts original jurisdiction “in all matters not prohibited by law.”<sup>108</sup> Working under both articles, the state’s courts have treated standing as a prudential, rather than a necessary, requirement, and have resolved cases when federal Article III standing was not apparent or was entirely absent.<sup>109</sup>

The state Supreme Court briefly tightened Michigan’s standing doctrine when it adopted the federal requirements in 2001 in *Lee v. Macomb County Board of Commissioners* and 2004 in *National Wildlife Federation v. Cleveland Cliffs Iron Co.*<sup>110</sup> Luckily for litigious environmentalists in the state, the Court reversed its stance on

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104. *Id.* at 150.

105. *Id.* (“Since the MEPA specifically speaks to ‘any alleged pollution, impairment or destruction of the air, water or other natural resources,’ it is logical that MEPA should be read in *pari materia* with other statutes relating to natural resources.”).

106. *Id.* at 151.

107. MICH. CONST. art. III, § 8.

108. MICH. CONST. art. VI, § 13 (granting the circuit courts “original jurisdiction in all matters not prohibited by law . . .”).

109. Issuing advisory opinions is an obvious case, but ordinary Michiganders have often made use of this oddity of the state’s standing doctrine to do what would elsewhere be impossible: suing public entities to force compliance with legal duties or to enforce a public right without any statutory or common law cause of action. *See, e.g.*, *Bd. of Educ. v. Gilleland*, 157 N.W. 609, 609 (Mich. 1916) (collecting cases); *see also* *Lansing Schs. Educ. Ass’n v. Lansing Bd. of Educ.*, 792 N.W.2d 686, 690 (Mich. 2010) (collecting cases).

110. *See* *Lee v. Macomb Cnty. Bd. of Comm’rs*, 629 N.W.2d 900, 907 (Mich. 2001); *Nat’l Wildlife Fed’n v. Cleveland Cliffs Iron Co.*, 684 N.W.2d 800, 805-06 (Mich. 2004).

both issues a few years later in *Lansing Schools Education Association v. Lansing Board of Education*, which now controls standing in the state.<sup>111</sup> Over a few pages, the majority rejected the logic of *Lee* and *Cleveland Cliffs*:

[N]ot only does the federal standing jurisprudence have no basis in Michigan law, it is contrary to it. As explained above, before *Lee*, the standing doctrine was not treated as a constitutional requirement in Michigan jurisprudence; that is, the Court never concluded that a lack of standing equated to the lack of a controversy necessary for the invocation of the judicial power under the Michigan Constitution. As discussed, before *Lee*, from the doctrine's inception this Court has at times addressed a case's merits despite concluding that the parties lacked standing. And, more generally, before *Lee*, "controversy" was never interpreted, as it is under *Lujan*, to refer only to instances where the party suffered a concrete and particularized injury caused directly by the challenged conduct. Thus, the Michigan Constitution does not compel adoption of the federal standing doctrine, and there is no support for doing so in this Court's historical jurisprudence.<sup>112</sup>

The state's standing requirements would be "restored to a limited, prudential doctrine" under which "a litigant has standing wherever there is a legal cause of action."<sup>113</sup> Where no cause of action exists by statute, standing will exist (1) "if the litigant has a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large," or, (2) as in the case of laws like MEPA, "if the statutory scheme implies that the Legislature intended to confer standing on the litigant."<sup>114</sup>

The *Lansing Schools* court's explicit purpose in returning to Michigan's traditional approach was to remove the barriers that federal standing presents to plaintiffs<sup>115</sup> and to return to a doctrine whose aim is only "to ensure sincere and vigorous advocacy."<sup>116</sup> While the *Lansing Schools* decision is brief on what exactly

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111. 792 N.W.2d at 695-96.

112. *Id.* at 695 (citations omitted).

113. *Id.* at 699.

114. *Id.*

115. *Id.* at 698 ("[T]he federal standing doctrine has the effect of encouraging courts to decide the merits of a case under the guise of merely deciding that the plaintiff lacks standing, thus using standing to slam the courthouse door against plaintiffs who are entitled to full consideration of their claims on the merits." (quoting *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 490 (1982) (Brennan, J., dissenting) (internal quotation marks omitted)).

116. *Id.*

ensures such advocacy, pre-*Lee* cases indicate that plaintiffs must possess an “interest in the outcome of the litigation that will ensure sincere and vigorous advocacy.”<sup>117</sup> Where the litigation concerns the enforcement of a public right, as *ATL* would, plaintiffs must also show that a failure to enforce that right would harm them in some “manner differently than the citizenry at large.”<sup>118</sup> Exactly how causation works in the Michigan standing context is unclear. *Lansing Schools* did not address it, and those pre-*Lansing* and pre-*Lee* opinions which exist rely on the U.S. Supreme Court’s analysis in *Lujan* that *Lansing* rejected.<sup>119</sup> Post-*Lansing Schools* cases point to the intuitive conclusion that there must be some causal connection between the claimed violation of right or interest and the resulting harm.<sup>120</sup> Neither *Lansing Schools* nor any Michigan case that followed has addressed redressability, but the *Lansing Schools* court did take pains to point out that Michigan courts retain significantly more power than their federal counterparts.<sup>121</sup>

#### A. *The Michigan Environmental Protection Act*

The Michigan Supreme Court has also largely been amenable to plaintiffs seeking to preserve the public trust through the Michigan Environmental Protection Act. The Act allows any person to bring an action against any person, including legal persons like corporations and the state, “for the protection of the air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction.”<sup>122</sup> The purpose of the law was to grant private citizens the power and the obligation “to prevent or minimize degradation of the environment,”<sup>123</sup> reasoning that citizen action was “now practically necessary to expedite what the ideal of *laissez*

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117. *Dodak v. State Admin. Bd.*, 495 N.W.2d 539, 543 (Mich. 1993).

118. *Alexander v. City of Norton Shores*, 307 N.W.2d 476, 476 (Mich. Ct. App. 1981) (citations omitted) (internal quotation marks omitted).

119. *See, e.g., Detroit Fire Fighters Ass’n v. City of Detroit*, 537 N.W.2d 436, 445 (Mich. 1995) (Cavanagh, J., concurring in part and dissenting in part); *Killeen v. Wayne Cnty. Rd. Comm’n*, 357 N.W.2d 851, 855 (Mich. Ct. App. 1984).

120. *See Duncan v. State*, 832 N.W.2d 761, 785 (Mich. Ct. App. 2013) (Whitbeck, P.J., concurring in part and dissenting in part).

121. *Lansing Schs. Educ. Ass’n v. Lansing Bd. of Educ.*, 792 N.W.2d 686, 694 (Mich. 2010).

122. MICH. COMP. LAWS § 324.1701(1); MICH. COMP. LAWS § 324.301(h) (defining “person” as an “individual, partnership, corporation, association, governmental entity, or other legal entity”).

123. *Ray v. Mason Cnty. Drain Comm’r*, 224 N.W.2d 883, 888 (Mich. 1975).

*faire* has been too slow in accomplishing.”<sup>124</sup> The legislature hoped that under MEPA, courts would begin to develop “a common law of environmental quality.”<sup>125</sup>

MEPA dispels many of the problems that ATL has encountered in federal and state courts. It grants standing to the public at large to bring suit on behalf of the environment.<sup>126</sup> The statute directs courts to examine, and if necessary revise, existing environmental standards; and where standards are absent, the statute mandates that courts create them.<sup>127</sup> MEPA directs the state’s administrative agencies to take the same care to prevent “pollution, impairment, or destruction” of natural resources “or the public trust in these resources,”<sup>128</sup> and directs courts *not* to defer to administrative agencies.<sup>129</sup> Under MEPA, courts may direct parties to administrative proceedings but retain jurisdiction over the action and review results *de novo*.<sup>130</sup> MEPA does not require exhaustion of administrative or other remedies.<sup>131</sup>

With such broad language and sweeping grants of power to private citizens and the courts, MEPA immediately faced challenges, but the state’s third branch of government has largely been constant in its defense. Attacked for vagueness in *Ray v. Mason City Drain Commissioner*, the Michigan Supreme Court wrote that the law’s diction “is neither illusive nor vague;” that “[p]ollution,’ ‘impairment,’ and ‘destruction’ are taken directly” from the state’s constitution, and that those terms had acquired definite meanings in “this new area of common law.”<sup>132</sup> In the same case, the Court denied that MEPA improperly passes legislative or executive authority to the courts.<sup>133</sup> MEPA expanded the jurisdiction of the courts to *all* natural resources, not just those in the traditional public trust—navigable waters and state-owned land—and the courts have shut down challenges to that expansion.<sup>134</sup> MEPA’s

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124. *Daniels v. Allen Industries, Inc.*, 216 N.W.2d 762, 768 (Mich. 1974).

125. *Ray*, 224 N.W.2d at 888 (quoting Thomas J. Anderson, one of the architects of MEPA, from a press release at the time of passage).

126. *Id.*

127. See MICH. COMP. LAWS § 324.1701(2)(a)-(b).

128. § 324.1705.

129. See *W. Mich. Env’t Action Council, Inc. v. Nat. Res. Comm’n*, 275 N.W.2d 538, 546-47 (Mich. 1979) [hereinafter *WMEAC*].

130. See *id.* at 542; MICH. COMP. LAWS § 324.1704(1).

131. See *Addison Twp. v. Gout*, 429 N.W.2d 612, 614 (Mich. Ct. App. 1988), *rev’d on other grounds*, 443 N.W.2d 139 (Mich. 1989), *vacated, leave granted*, 444 N.W.2d 528 (Mich. 1989), *aff’d*, 460 N.W.2d 215 (Mich. 1990).

132. *Ray v. Mason Cnty. Drain Comm’r*, 224 N.W.2d 883, 888 n.10 (Mich. 1975).

133. *Id.* at 888.

134. *E.g.*, *Stevens v. Creek*, 328 N.W.2d 672, 674 (Mich. Ct. App. 1982) (“We find nothing in the language which would limit the protection in the act to natural resources affecting land in which there is a public trust or a right to public access.”).

broad sweep is well established in Michigan, and so is the first hurdle that any MEPA plaintiff has to clear at the outset is the prima facie case.

Under MEPA, a plaintiff must first make a prima facie showing that the defendant's conduct "has, or is likely to pollute, impair, or destroy" natural resources or the public trust in them.<sup>135</sup> For a prima facie case, the extent of damage need not be certain; "apparently serious and lasting, though unquantified" environmental destruction suffices.<sup>136</sup> Even the *fact* of damage can be indeterminate, as long as some probability of that damage exists.<sup>137</sup> The defendant then has two options: (1) she may attempt to rebut the claim with contrary evidence or; (2) she may offer the affirmative defense that there is "no feasible and prudent alternative" to her conduct and that her actions are "consistent with the promotion of the public health, safety and welfare in light of the state's paramount concern for the protection of its natural resources . . . ."<sup>138</sup>

The required *degree* of damage has risen and fallen over time, with the Court of Appeals creating different standards and tests to narrow MEPA's application, but the controlling case is now *Nemeth v. Abonmarche Development, Inc.*<sup>139</sup> The *Nemeth* court set out to determine "the proper threshold of harm for a prima facie MEPA case."<sup>140</sup> The court repudiated various lower court rulings which had restricted the definitions of "natural resource" and "harm" under MEPA,<sup>141</sup> writing that "their use in every case has stifled the development of the 'common law of environmental quality.'"<sup>142</sup> The Court ultimately decided that, first, if plaintiffs can show that a defendant has violated a pollution statute, they have established a prima facie case.<sup>143</sup> Second, where there is no applicable statute, the general rules of evidence set the floor of the inquiry: "[A] plaintiff has established a prima facie case when his case is

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135. See MICH. COMP. LAWS § 324.1703(1).

136. *WMEAC*, 275 N.W.2d 538, 545 (Mich. 1979).

137. *Mich. United Conservations Clubs v. Anthony*, 280 N.W.2d 883, 889 (Mich. Ct. App. 1979) (holding that the standard is "probable rather than guaranteed harm"); *Ray*, 224 N.W.2d at 889 ("[A] showing is not restricted to actual environmental degradation but also encompasses probable damage . . . .").

138. *Ray*, 224 N.W.2d at 889.

139. *Kimberly Hills Neighborhood Ass'n v. Dion*, 320 N.W.2d 668, 673 (Mich. Ct. App. 1982); *City of Portage v. Kalamazoo Cnty. Rd. Comm'n*, 355 N.W.2d 913, 915-16 (Mich. Ct. App. 1984). Both cases elaborate on factors which narrowed the arguable breadth of MEPA's undefined vocabulary.

140. *Nemeth v. Abonmarche Dev., Inc.*, 576 N.W.2d 641, 651 (Mich. 1998).

141. *Id.* at 649-50 (Rather than determining whether a "resource" is at issue, "[w]hat is most significant is determining whether the effect on the environment rises to the level of actual or likely pollution, impairment, or destruction . . . .").

142. *Id.* at 651.

143. *Id.* at 646-47.

sufficient to withstand a motion by the defendant that the judge direct a verdict in the defendant's favor."<sup>144</sup> The end result is that litigants need to make a detailed factual showing of *some* concrete harm to the environment, actual or potential, in a freewheeling common law inquiry that leaves space for plaintiff creativity.

## V. A MICHIGAN ATMOSPHERIC TRUST LAWSUIT

Plaintiffs looking to file an ATL suit would have two options: they could pursue a comprehensive ATL claim under the public trust provisions of the Michigan Constitution or they could go the MEPA route. For the purposes of this Note, comprehensive ATL means making the five classic claims referenced earlier: (1) that the air and atmosphere are part of the body of the public trust; (2) that present *and future* generations are beneficiaries of the trust; (3) that the government's fiduciary duty is not just to retain the trust in public hands but to protect against impairment of the air and climate, amounting to a duty to rectify the carbon imbalance; (4) that courts have the inherent power to enforce these trust obligations, without specific reference or challenge to a particular legislative or executive action; and (5) that, in state courts, governments must produce a full accounting of the state's carbon emissions and a plan to draw down emissions by six percent per annum.<sup>145</sup> Each tack would present its own obstacles, and both would have to contend with the political question and separation of powers analysis that ended ATL's run in the federal courts.

### A. Under a Theory of Naked Public Trust

Pursuing ATL through the public trust doctrine in Michigan should be more straightforward than in the federal courts. The Michigan Constitution incorporates the doctrine, *Lansing Schools* outlines a cause of action, and standing in the state is less restrictive. Rather than needing to frame and place a cause in an inapt part of a statute or constitution, Michigan allows standing to handle as-yet unused causes. Under *Lansing Schools*, "[w]here a cause of action is not provided at law, then a court should, in its discretion, determine whether a litigant has standing."<sup>146</sup>

As simplified by *Lansing Schools*, to achieve standing, a litigant need only show that she has a special right or substantial interest harmed differently than the

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144. *Id.* at 646 (citing *Ray v. Mason Cnty. Drain Comm'r*, 224 N.W.2d 883, 889-90 (Mich. 1975) (first citing *Gibbons v. Farwell*, 29 N.W. 855, 857 (Mich. 1886); and then quoting *Prima Facie Case*, BLACK'S LAW DICTIONARY (4th ed. 1951) ("A litigating party is said to have a *prima facie* case when the evidence in his favor is sufficiently strong for his opponent to be called upon to answer it. A *prima facie* case, then, is one which is established by sufficient evidence, and can be overthrown only by rebutting evidence adduced on the other side."))).

145. *See supra* Section II.A.

146. *Lansing Schs. Educ. Ass'n v. Lansing Bd. of Educ.*, 792 N.W.2d 686, 699 (Mich. 2010).

general population.<sup>147</sup> Public trust itself, as codified in the Michigan Constitution of 1963, grants plaintiffs this “substantial interest” in the atmosphere.<sup>148</sup> Potential Michigan litigants could plead “special injur[ies] . . . different from the citizenry at large” in the same way as the *Juliana* plaintiffs, detailing the concrete and particularized ways that climate change has affected them personally as opposed to society in general.<sup>149</sup> While the state Supreme Court has not clarified whether causation and redressability apply at all in Michigan standing analysis,<sup>150</sup> it stands to reason that plaintiffs would benefit, or at least not be harmed, by showing that the state has caused their harms and that the court has the power to redress them.

For causation, plaintiffs will want to show that their injuries are traceable to the challenged action of the state of Michigan. Given that Michigan is not one of the nation’s top energy consumers,<sup>151</sup> the shape of the pleading here is important—plaintiffs should not allege that Michigan has alone caused climate change or that equitable relief against Michigan would stop it. Plaintiffs should instead argue by analogy to *Massachusetts v. Environmental Protection Agency* (“*Massachusetts v. EPA*”), where the U.S. Supreme Court pointed out that although Massachusetts’ own carbon emissions might not be a major global source of greenhouse gases, the EPA’s failure to regulate the state’s emissions “at a minimum, ‘contribute[d]’” to the state’s injuries.<sup>152</sup> Plaintiffs should also point out that the state Constitution does not only protect the “air” and “natural resources” of the state from “destruction,” but also “impairment” and “pollution” of the same, both of which are caused by excess carbon.<sup>153</sup>

For lack of an established Michigan structure, it may help to look at redressability as it is laid out in the federal courts.<sup>154</sup> The first prong of redressability—whether the requested relief will ameliorate the plaintiffs’ harms—falls into the same analysis as causation. After all, the two prongs “overlap and are two facets of a single causation requirement,” with causation examining “the

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147. See *supra* Section III.A.2. In contrast, the federal formulation requires (1) harm, (2) causation, and (3) redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

148. MICH. CONST. art. IV, § 52.

149. *Juliana v. United States*, 217 F. Supp. 3d 1224, 1242–43 (D. Or. 2016).

150. See *supra* Section III.B.

151. Michigan is ranked 30th out of 50 states in total energy consumed per capita. *Rankings: Total Energy Consumed per Capita, 2018*, U.S. ENERGY INFO. ADMIN., <https://www.eia.gov/state/rankings/?sid=MI> (last visited Oct. 13, 2020).

152. 549 U.S. 497, 499 (2007). As Justice Weaver concurred in *National Wildlife Federation v. Cleveland Cliffs Iron Co.*, “[i]n developing prudential standing rules, Michigan courts have often drawn from federal case law discussing prudential standing requirements,” 684 N.W.2d 800, 830 (Mich. 2004).

153. MICH. CONST. art. IV, § 52.

154. See *Juliana v. United States*, 217 F. Supp. 3d 1224, 1247–48 (D. Or. 2016).



connection between the alleged misconduct and injury,” while “redressability analyzes the connection between the alleged injury and requested judicial relief.”<sup>155</sup> Michigan’s emissions are not a primary cause of climate change and reducing them would not halt the process, but plaintiffs should again analogize to *Massachusetts v. EPA*, where the U.S. Supreme Court wrote that while an injunction “may not by itself reverse global warming, it does not follow that the Court lacks jurisdiction to decide whether [a party] has a duty to take steps to *slow or reduce* it.”<sup>156</sup> No action on Michigan’s part would reverse climate change, but given that the state Constitution specifies that the “conservation . . . of the natural resources of the state” are a matter of “paramount public concern,” plaintiffs would have a strong argument as to the state’s duty to “provide for the protection of the air . . . and other natural resources” of the state from “impairment” or “pollution.”<sup>157</sup>

The second prong of redressability asks whether the requested relief is within the court’s power to award.<sup>158</sup> Were the state to assert, like the Ninth Circuit, that the scope of the relief requested by any comprehensive ATL claim is simply beyond the judicial power to enjoin the other two branches of government, plaintiffs have a few rebuttals. In the absence of clear direction under *Lansing Schools*, potential plaintiffs could point out by analogy to the federal system that wide-ranging policy-oriented injunctions *are and have been* ably managed by courts.<sup>159</sup> In conjunction, the plaintiffs could point to the vague but expansive language of *Lansing Schools*. The *Lansing Schools* court wrote that Michigan courts are not bound by the “Article III case-or-controversy requirement” that gave rise to *Lujan* and that “state courts” hold a “broader power.”<sup>160</sup> Likewise, *Lansing Schools* overturned *Nestle*, which had determined that MEPA violated separation of powers by allowing courts to enforce the law, traditionally an executive function.<sup>161</sup> Plaintiffs could argue that in the same way that MEPA did not violate the separation of powers, neither would an ATL injunction, echoing Justice Weaver’s reminder in *Cleveland Cliffs* that “the three branches of government cannot ‘operate in all respects independently of the

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155. Wash. Env’t Council v. Bellon, 732 F.3d 1131, 1146 (9th Cir. 2013).

156. 549 U.S. at 499.

157. MICH. CONST. art. IV, § 52.

158. See *supra* text accompanying note 61.

159. For example, plaintiffs could point to *Brown v. Board of Education*, 347 U.S. 483 (1954), *Brown v. Plata*, 563 U.S. 493 (2011), or any other case where courts have managed equitable relief beyond ‘traditional’ remedies. See generally Margo Schlanger, *Beyond the Hero Judge: Institutional Reform Litigation as Litigation*, 97 MICH. L. REV. 1994 (1999) (surveying the history of institutional reform litigation).

160. *Lansing Schs. Educ. Ass’n v. Lansing Bd. of Educ.*, 792 N.W.2d 686, 694 (Mich. 2010).

161. *Id.* at 703-704 (Weaver, J., concurring).

others.”<sup>162</sup> Finally, plaintiffs could cite to MEPA’s direction that courts create new environmental standards as an explicit statement of the broad powers of the Michigan courts to direct the other branches of government.<sup>163</sup>

At that point, plaintiffs may run into the last potential problem of an ATL suit under the bare public trust—that MEPA preempts an independent suit under the public trust doctrine. In *Sanders-Reed ex rel. Sanders-Reed v. Martinez*, the New Mexico Court of Appeals acknowledged that the state’s constitution had incorporated the public trust doctrine but held that the government had already discharged its public trust duties by creating environmental agencies.<sup>164</sup> The New Mexico court dismissed plaintiffs’ public trust suit and directed them to pursue rulemaking with those agencies instead.<sup>165</sup> In the Michigan context, the state could similarly try to argue that the legislature has already discharged the public trust duties it holds under Article IV Section Fifty-Two of the state Constitution. In doing so, the legislature could claim that MEPA and the environmental agencies it created leave no room for an independent ATL suit. While Michigan courts have yet to give explicit guidance on the issue of preemption,<sup>166</sup> there is no reason that plaintiffs could not simultaneously proceed under both plain public trust doctrine and MEPA. If the Michigan courts decide that MEPA has subsumed the public trust, at least the MEPA claim still has a chance to survive.

### B. Under MEPA

A MEPA-based attack on Michigan’s contributions to climate change would, like a public trust-based ATL suit, require a new approach in the state. Ordinary MEPA actions attack one permit or project at a time. Comprehensive ATL suits attempt to draw down total state emissions through just one case by alleging that entire regulatory schemes, instead of scattered, single corporate or governmental actions, pose a threat to the natural resources of a state. To succeed, plaintiffs need to claim that a state, in the way that it has regulated and permitted industry, commerce, and even residential housing, has contributed to the accumulation of greenhouse gases and allowed for the destruction of the environment. In Michigan,

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162. 684 N.W.2d 800, 835 (Mich. 2004) (citing *People ex rel. Sutherland v. Governor*, 29 Mich. 320, 325 (1874)).

163. See MICH. COMP. LAWS § 324.1701(1).

164. 350 P.3d 1221, 1222-23 (N.M. Ct. App. 2015).

165. *Id.*

166. *E.g.*, *State Highway Comm’n v. Vanderkloot*, 392 Mich. 159, 179, 184 (1974) (holding that the legislature enacted MEPA to discharge its constitutional duty *and* that MEPA provides a “separate” procedural route for the protection of the environment); *Wayne Cnty. Dep’t of Health v. Olsonite Corp.*, 263 N.W.2d 778, 792 (Mich. Ct. App. 1977) (holding, in a somewhat analogous context, that MEPA superseded the common law of nuisance in environmental questions).

the text of MEPA itself presents no obstacle to this approach nor to ATL's five classic claims. The statute provides that a plaintiff may "maintain an action" against "any person," including the state itself, for "equitable relief" in order to protect the state's natural resources.<sup>167</sup> The only potential issues related to a MEPA suit of this scope would be the novelty of a statewide approach and the judiciary's reluctance to reach so far in granting injunctive relief.

To begin, though, to establish a *prima facie* case under MEPA, plaintiffs will need to prove facts showing that the conduct of the state—its regulatory schemes and permitting decisions—"has or is likely to pollute, impair or destroy the air, water or other natural resources."<sup>168</sup> Plaintiffs' harms need not be "restricted to actual environmental degradation but [may] also encompass[] probable damage to the environment as well."<sup>169</sup> It will not be difficult to show that the state, through its agencies, has allowed significant amounts of carbon into the atmosphere and that it continues to do so.<sup>170</sup> It will likewise not be difficult to show that carbon is having deleterious effects on the state of the atmosphere.<sup>171</sup> Plaintiffs could also point out that, as the Michigan Court of Appeals wrote in *Stevens v. Creek*, climate change is not just threatening natural resources themselves, but "the public trust in those resources."<sup>172</sup> That is, climate change is destroying not only the atmosphere and the climate that supports the biosphere of Michigan but also the traditional and recreational interests in and uses of that biosphere.<sup>173</sup> Were a trial court to inquire into whether Michigan state was a significant or major source of the carbon causing climate change, plaintiffs could take either or both of two approaches: (1) to rely on the logic of *Massachusetts v. EPA*, as in the standing analysis above;<sup>174</sup> or (2) to rely

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167. MICH. COMP. LAWS § 324.1701(1). "Equitable relief" covers declaratory relief: (1) that the atmosphere be declared part of the public trust; (2) that present and future generations be declared beneficiaries of the trust; (3) that the court declare that government has a duty to rectify carbon imbalance; and injunctive relief: (4) that the court enjoin action to enforce the trust obligations; and (5) that the court enjoin the government produce an accounting of carbon emissions and a plan to draw down on carbon by six percent per annum.

168. *Ray v. Mason Cnty. Drain Comm'r*, 224 N.W.2d 883, 889 (Mich. 1975).

169. *Id.*

170. *See supra* note 151.

171. *See, e.g.*, Wallace-Wells, *supra* note 1.

172. *Stevens v. Creek*, 328 N.W.2d 672, 674 (Mich. Ct. App. 1982).

173. For example, the lack of snow hampering winter sports, heavy rain and flooding impairing the use of rivers and the parks they flow through, warming waters in the Great Lakes killing fish and causing algae blooms, flora and fauna extinctions due to a changing climate impairing enjoyment of, *inter alia*, Michigan's state and metroparks. EPA, NO. 430-F-16-024, WHAT CLIMATE CHANGE MEANS FOR MICHIGAN (2016), <https://19january2017snapshot.epa.gov/sites/production/files/2016-09/documents/cli-mate-change-mi.pdf>.

174. *Massachusetts v. EPA*, 549 U.S. 497, 499 (2007).

on the bare text of MEPA and the cases interpreting it, extrapolating out Michigan's carbon output as "encompass[ing] probable damage to the environment."<sup>175</sup>

As for the novel statewide approach, plaintiffs would need to argue that while MEPA has generally been used to target individual actions, the statute's plain text and the cases interpreting it empower courts to interrogate and modify regulatory schemes where they fall short of protecting the state's natural resources and the public trust in the same. MEPA reads that "in granting relief," where there is a standard for pollution "by the state or an instrumentality" thereof, the court may "determine the validity, applicability, and reasonableness of the standard," or "if a court finds a standard to be deficient, direct the adoption of a standard approved and specified by the court."<sup>176</sup> In this case, the plaintiffs would be attacking standards of pollution in a grander sense: the statutory schemes that give rise, overall, to the state's carbon output. In making its determinations under MEPA, the court need not defer to any agency decisions or proceedings.<sup>177</sup> In *Ray v. Mason Cty. Drain Commissioner*, the Michigan Supreme Court confirmed that the Legislature, in granting the courts such sweeping authority over the administration of the state, did not unconstitutionally violate separation of powers.<sup>178</sup> The scope of the requested injunctive relief would likely force the state to renege on contracts and permits granted to carbon-emitters, but the Michigan courts have already sanctioned retractions of the kind, as seen in *Michigan Oil*.<sup>179</sup>

Despite the permissiveness of Michigan law, sweeping injunctive relief will only be granted from a court with a measure of resolve and, in all likelihood, the political inclination to act. Resolve, at least, may be in greater supply as Michigan winters get warmer and its weather weirder.<sup>180</sup> As far as political inclination, that may depend on the outcome of the next few judicial retirements and elections.

## CONCLUSION

The enactment of the MEPA signals a dramatic change from the practice where the important task of environmental law enforcement was left to administrative agencies without the opportunity for participation by individuals or groups of citizens. Not every public agency proved to be a diligent and dedicated

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175. *Ray v. Mason Cnty. Drain Comm'r*, 224 N.W.2d 883, 889 (Mich. 1975).

176. *Id.*

177. *WMEAC*, 275 N.W.2d 538, 542 (Mich. 1979); MICH. COMP. LAWS § 324.1704.

178. *Ray*, 224 N.W.2d at 888.

179. *Mich. Oil Co. v. Nat. Res. Comm'n*, 249 N.W.2d 135, 147 (Mich. Ct. App. 1976); see discussion *supra* Section I.A.

180. See, e.g., EPA, NO. 430-F-16-024, WHAT CLIMATE CHANGE MEANS FOR MICHIGAN (2016), <https://19january2017snapshot.epa.gov/sites/production/files/2016-09/documents/climate-change-mi.pdf>.

defender of the environment. The MEPA has provided a sizable share of the initiative for environmental law enforcement for that segment of society most directly affected—the public.<sup>181</sup>

The public trust doctrine may date back to the time of Justinian or before, but the threat to the environment that governments hold in trust for their people has never been more modern or more pressing. As the Ninth Circuit decided most recently, and as courts across the country have noted, combating climate change with what have traditionally been the limited powers of the third branch is a long shot. But in the face of legislative inaction and executive intransigence, it may be time for courts to put the protection of the environment in the hands of the people.

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181. *Anglers of the AuSable, Inc. v. Dep't of Env't Quality*, 793 N.W.2d 596, 602 (Mich. 2010).