Atmospheric Trust Litigation in the United States: Pipe Dream or Pipeline to Justice for Future Generations?

*Randall S. Abate**

Introduction

Climate justice litigation in the United States is in transition. It traces its origins to the environmental justice movement that began in the late 1980s.[1] The environmental justice movement was grounded in a growing awareness of the linkage between environmental and human rights problems and the need for law and policy responses to address the disproportionate impacts of envi-

* *The author gratefully acknowledges valuable research assistance from Mackenzie Landa, Esq.*

1. Elizabeth Ann Kronk Warner & Randall S. Abate, *International and Domestic Law Dimensions of Climate Justice for Arctic Indigenous Peoples*, 43 Ottawa L. J. 113, 121 (2013). For a helpful discussion of the legal and historical foundations of the environmental justice movement in the United States, see generally Michael B. Gerrard & Sheila R. Foster eds., The Law of Environmental Justice: Theories and Procedures to Address Disproportionate Risks (2d ed. 2009); Robert D. Bullard, Dumping in Dixie: Race, Class, and Environmental Quality (3d ed. 2000); Luke W. Cole & Sheila R. Foster, From the Ground Up: Environmental Racism and the Rise of the Environmental Justice Movement (2000).

ronmental problems on minority and low-income communities throughout the United States.[2] The implementation of environmental justice measures at the federal[3] and state[4] levels since the 1990s helped provide a foundation for climate justice litigation in the United States. Climate justice litigation in the United States also has drawn some of its inspiration from developments at the international level, where the connection between climate change and human rights became galvanized in response to the Inuit petition before the Inter-American Commission on Human Rights in 2005.[5] Climate justice litigation seeks to provide remedies to marginalized communities that are facing climate change impacts and that lack financial and technological resources to effectively adapt to these changes.[6]

The U.S. climate justice movement began with public nuisance lawsuits that sought injunctive relief or damages for climate change impacts.[7] Paralleling the evolution of the public nuisance line of climate justice lawsuits was the landmark case of *Massachusetts v. EPA*.[8] Massachusetts and several other states sued to compel the U.S. Environmental Protection Agency (EPA) to fulfill its duty to regulate carbon dioxide (CO_2) as a pollutant under the Clean Air Act. The U.S. Supreme Court concluded that the states had standing to bring the suit and that EPA had authority to regulate CO_2 as a pol-

2. The environmental justice movement initially focused on "environmental racism" as manifested by the disproportionate siting of environmentally undesirable land uses in African American communities. The movement subsequently broadened its focus from environmental racism to "environmental justice," which expanded the movement's reach to include other disadvantaged communities, including low-income communities and Native American communities. *See* David H. Getches & David N. Pellow, *Beyond "Traditional" Environmental Justice*, *in* Justice and Resources: Concepts, Strategies, and Applications 5–6, 24–25 (Katherine M. Mutz, Gary C. Bryner & Douglas S. Kenney eds., 2002).
3. *See, e.g.*, Office of Environmental Justice, U.S. Environmental Protection Agency, Plan EJ 2014 (2011), http://nepis.epa.gov/Exe/ZyPDF.cgi/P100DFCQ.PDF?Dockey=P100DFCQ.PDF (providing a roadmap for the U.S. Environmental Protection Agency (EPA) to integrate environmental justice considerations into all of its programs); Federal Actions to Address Environmental Justice in Minority Populations and Low-income Populations, Exec. Order No. 12898, 59 Fed. Reg. 7629 (Feb. 16, 1994) (directing federal agencies to incorporate environmental justice considerations into their decisionmaking processes).
4. *See generally* University of California Hastings College of the Law Public Law Research Institute, Environmental Justice for All: A Fifty State Survey of Legislation, Policies, and Cases (4th ed. 2010), http://gov.uchastings.edu/public-law/docs/ejreport-fourthedition.pdf.
5. *See generally* Hari M. Osofsky, *Complexities of Addressing the Impacts of Climate Change on Indigenous Peoples through International Law Petitions: A Case Study of the Inuit Petition to the Inter-American Commission on Human Rights*, *in* Climate Change and Indigenous Peoples: The Search for Legal Remedies (Randall S. Abate & Elizabeth Ann Kronk Warner eds., 2013).
6. For a valuable and comprehensive discussion of the foundations and evolution of climate justice litigation, see generally International Bar Association, Achieving Justice and Human Rights in an Era of Climate Disruption (2014), http://www.ibanet.org/PresidentialTaskForceClimateChangeJustice2014Report.aspx.
7. *See infra* Part I.
8. Massachusetts v. EPA, 549 U.S. 497 (2007).

lutant under the Act.[9] This successful effort helped launch climate justice as a field in the United States because the case was not merely a citizen suit enforcement action under the Clean Air Act; it was a creative use of the courts to seek injunctive relief for climate change impacts in Massachusetts and elsewhere in response to Congress' and the executive branch's failure to regulate climate change.

Now in its "third wave" in the form of atmospheric trust litigation (ATL), climate justice litigation seeks to merge aspects of the public nuisance line of cases and the *Massachusetts v. Environmental Protection Agency* litigation theories. First, like *Massachusetts v. EPA*, ATL targets the most appropriate defendant—governmental entities—rather than singling out entities in the private sector as in the public nuisance line of cases. Second, like the public nuisance cases, ATL embraces a common law doctrine with a track record of success in environmental litigation—in this instance, the public trust doctrine. The public trust doctrine is even better suited than public nuisance for climate justice litigation because it has already evolved and broadened the focus of its applicability to issues beyond the initial tethering of the theory to the "traditional triad" of public trust uses (i.e., navigation, commerce, and fishing).[10] The extension of the public trust doctrine's applicability to atmospheric resources is a logical next step to include within the government's environmental stewardship responsibilities under the doctrine.

This chapter addresses the evolution of ATL from its public trust doctrine roots and the value of ATL as a tool to promote climate justice. Part I of this chapter examines the climate justice movement in the United States and describes the evolution of the public nuisance line of cases that launched this field. Part II describes the evolution of the public trust doctrine and how it serves as the conceptual foundation for ATL. Part III discusses how the ultimate goal of ATL—to apply this state law theory at the federal level[11]—faced a serious roadblock in *Alec L. v. McCarthy*.[12] Although this decision may have dimmed hopes for the applicability of ATL at the federal level, the success of recent ATL cases at the federal and state levels, and in foreign domestic courts, underscores how ATL will be a valuable tool to promote climate justice in the United States and abroad in the years ahead.

9. *Id*. at 516–26.
10. *See infra* note 31 and accompanying text.
11. For a valuable discussion of the parameters of ATL from the scholar who conceived this theory, and its ultimate goal of applicability to the federal government, see generally Mary Christina Wood, *Atmospheric Trust Litigation*, *in* Adjudicating Climate Change: State, National, and International Approaches (William C.G. Burns & Hari M. Osofsky eds., 2009).
12. Alec L. v. McCarthy, 561 Fed. App'x 7 (D.C. Cir. 2014).

I. The Climate Justice Movement in the United States

Climate justice litigation in the United States would not have evolved as quickly as it did without building on the foundation from the environmental justice movement. Environmental regulation in the 1970s and 1980s was extremely effective in managing pollution of environmental resources such as air, water, land, and endangered species. Despite the success of federal environmental statutes enacted to protect these resources, and litigation to enforce the mandates of these statutes, a growing awareness emerged in the 1980s and 1990s that this environmental management scheme was missing an important component of the ecosystem: humans. The impacts of environmental problems are not limited to the impairment of the environmental resources—there are also serious human dimensions to environmental problems.

The environmental justice movement in the United States evolved to draw attention to the human dimensions of environmental problems by underscoring how minority and low-income communities are disproportionately burdened by these environmental problems. Environmental justice regulation consists largely of procedural mechanisms at the federal and state levels designed to consider and seek to mitigate the adverse environmental impacts of agency decisionmaking on affected communities.[13] This new area of law represented an important shift in thinking that helped climate justice litigation follow as a logical next step in the effort to provide protection to communities that are marginalized by environmental problems.

Building on the foundation of the environmental justice movement, climate justice litigation developed primarily as a response to the failure of the U.S. government to regulate greenhouse gas (GHG) emissions in a comprehensive manner at the federal level. The United States was not a Party to the Kyoto Protocol and did not implement Kyoto-like legislation to regulate climate change in the past two decades. The ultimate goal of climate justice litigation, therefore, was to apply pressure to the federal government to implement a regulatory framework to address this problem and to impose liability on significant emitters of GHGs in the private sector for their contributions to the climate change problem. Climate justice litigation against

13. *See, e.g.*, *supra* notes 3, 4. Federal courts have rejected litigants' efforts to establish a substantive remedy for disparate impacts of environmental problems on minority and low-income communities. *See, e.g.*, Alexander v. Sandoval, 532 U.S. 275 (2001) (holding that Title VI of the Civil Rights Act of 1964 does not authorize a private right of action in lawsuits alleging evidence of disparate impact); South Camden Citizens in Action v. New Jersey Dep't of Envtl. Prot., 274 F.3d 771 (3d Cir. 2001) (holding that Title VI does not authorize a private right of action under EPA's disparate impact regulations in the absence of evidence of intentional discrimination).

private sector entities seeking remedies for certain communities that were disproportionately burdened by the impacts of climate change followed shortly thereafter.

Public nuisance suits served as the foundation for climate justice litigation. These cases build on the foundation of the "federal common law of interstate pollution," which is a narrow doctrine established in air[14] and water[15] pollution cases. Climate change impacts are a form of interstate pollution, which triggered the potential applicability of this doctrine.

The first in this line of public nuisance cases was *American Electric Power (AEP) v. Connecticut*,[16] in which Connecticut and other states sought to integrate a public nuisance action and the federal common law of interstate pollution to obtain injunctive relief against several power plants for their significant collective contribution to climate change. The plaintiff sought injunctive relief against the power companies in requesting that the court issue an order to the companies to reduce their GHG emissions by a certain percentage. The U.S. Supreme Court in *AEP* ultimately concluded that this suit was barred on federal displacement grounds.[17]

The second step in this line of cases involved a shift in litigation strategy. Seeking injunctive relief for climate change issues raised concerns under the political question doctrine as to whether the courts were the proper forum to seek relief for climate change issues because such issues arguably need to be addressed first by either the executive or legislative branches. Therefore, in *California v. General Motors Corp.*,[18] the state of California sued major automakers for these companies' alleged contribution to the public nuisance of global warming and sought damages for the impacts from the current and future harms from global warming. The state voluntarily withdrew its claim, but the case laid an important foundation for future climate justice cases that sought damages under the public nuisance theory.

The litigation theory then adjusted slightly again in the next phase of the evolution of this theory, which involved public nuisance cases that affected

14. *See* Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907) (holding that a state that is affected by air pollution from a neighboring state can seek injunctive relief from an emissions source in the neighboring state that caused the pollution problem).
15. *See* Illinois v. City of Milwaukee, 406 U.S. 91 (1972) (holding that federal district courts have jurisdiction over interstate water pollution disputes that create a public nuisance, even though the federal Clean Water Act was already in place to regulate water pollution issues, and that application of federal common law was consistent with the federal Clean Water Act).
16. American Elec. Power v. Connecticut, 131 S. Ct. 2527 (2011).
17. Federal displacement means that these public nuisance claims based on the federal common law of interstate pollution are nonjusticiable because such federal common law claims are barred when a federal statute—in this case, the Clean Air Act—addresses the subject matter at issue.
18. California v. General Motors Corp., No. C06-05755, 2007 WL 272681 (N.D. Cal. Sept. 17, 2007).

communities (rather than states) filed against private sector entities, including oil, gas, and chemical companies. The key lawsuits in this phase of the evolution were *Comer v. Murphy Oil USA*[19] and *Native Village of Kivalina v. ExxonMobil Corp.*[20] Seeking damages in these cases represented the essence of climate justice litigation under the public nuisance doctrine—affected communities that alleged that they had been disproportionately burdened by climate change impacts and that sought relief from private sector entities that contributed a significant percentage of GHG emissions to the global climate change problem. Unfortunately, the Ninth Circuit embraced the federal displacement reasoning from the *AEP* case in dismissing the Native Village of Kivalina's claim.[21] The U.S. Supreme Court declined review of the *Comer* and *Kivalina* cases, thereby severely limiting the future of public nuisance cases for climate change impacts based on federal common law. Such cases may still be filed if based on a state's common law doctrine of public nuisance, however.[22]

II. The Evolution From the Public Trust Doctrine to Atmospheric Trust Litigation (ATL)

The public trust doctrine refers to the government's obligation to protect and maintain certain natural resources for the benefit of its citizens.[23] The principle originated in ancient Rome and was codified in the *Institutes of Justinian* in the sixth century A.D.[24] The ancient Romans acknowledged "public rights in water and the seashore which were unrestricted and common to all . . . ."[25]

19. Comer v. Murphy Oil USA, 585 F.3d 855 (5th Cir. 2009) (plaintiffs were victims of Hurricane Katrina who alleged that climate change contributed to the increased intensity of the storm that caused them to be displaced from their homes in New Orleans, Louisiana).
20. Native Village of Kivalina v. ExxonMobil Corp., 696 F.3d 849 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 2390 (2013) (plaintiffs were a village of approximately 400 Native Alaskans who alleged that climate change caused coastal erosion that made their community uninhabitable and would require relocation to avoid losing their community due to sea-level rise).
21. *Kivalina*, 696 F.3d at 897. For a discussion of the evolution of public nuisance suits seeking relief for climate change impacts, see generally Randall S. Abate, *Public Nuisance Suits for the Climate Justice Movement: The Right Thing and the Right Time*, 85 Wash. L. Rev. 197 (2010).
22. Tracy D. Hester, *A New Front Blowing in: State Law and the Future of Climate Change Public Nuisance Litigation*, 31 Stan. Envtl. L.J. 49, 52 (2012) (citing American Elec. Power v. Connecticut, 131 S. Ct. 2527 (2011)).
23. Gerald Torres & Nathan Bellinger, *The Public Trust: The Law's DNA*, 4 Wake Forest J.L. & Pol'y 281, 283 (2014).
24. Melissa Kwaterski Scanlan, *The Evolution of the Public Trust Doctrine and the Degradation of Trust Resources: Courts, Trustees, and Political Power in Wisconsin*, 27 Ecology L.Q. 135, 140 n.4 (2004).
25. *Id.* at 140 n.4. *See also* Helen Althaus, Public Trust Rights 23 (1978) ("By the law of nature these things are common to mankind—the air, running water, the sea, and consequently the shores of the sea. No one, therefore, is forbidden to approach the seashore, provided that he respects habitations, monuments, and buildings . . .").

Under English common law, the concept developed into the idea of a public trust, pursuant to which title to navigable waters and "the bed or soil beneath tidal waters" was vested in the British Crown so that the Crown may "control the highways of commerce and navigation for the advantage of the public . . . ."[26] Thus, the British Crown acts as trustee to the citizens of Great Britain over the tidal waters and the submerged grounds beneath.[27] These natural resources are "not held in fee simple, but rather . . . in trust for the people and only for purposes that benefit the public interest."[28]

Following the American Revolution, the properties held in trust by the British Crown within the American colonies shifted to the now-former colonies as newly sovereign states.[29] Thus, the United States' doctrine initially recognized that the tidelands, and the lands beneath tidal and navigable waterways, should be held in trust by the states for the public to promote the interests of the public.[30] According to early public trust judicial opinions, those public interests were to promote navigation, commerce, and fishing.[31] The doctrine itself is a function of sovereignty that "imposes duties on government[,] instills certain inalienable rights in the people[,] and . . . constitutes the sovereign legal obligation that facilitates the reproduction and survival of our society . . . ."[32]

Legal scholars have identified language in the U.S. Constitution to illustrate the vital importance of the public trust concept in American law.[33] For example, the Equal Protection and Due Process Clauses reflect the framers' intentions to protect and reserve certain ideals and rights for future generations.[34] According to Prof. Gerald Torres, the public trust is the slate upon

26. *Id.* at 140.
27. *Id.*
28. Torres & Bellinger, *supra* note 23, at 287.
29. Scanlan, *supra* note 24, at 140. *See also* Martin v. Lessee of Waddell, 41 U.S. 367, 410 (1842) (recognizing that "[w]hen the Revolution took place the people of each State became themselves sovereign, and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use, subject only to the rights since surrendered by the Constitution to the general government.").
30. Barton H. Thompson Jr., *The Public Trust Doctrine: A Conservative Reconstruction & Defense*, 15 Southeastern Envtl. L.J. 47, 67–68 (2006).
31. *Id.* at 68. These three uses came to be known as the "traditional triad" of public trust uses.
32. *Id.* at 289.
33. Torres & Bellinger, *supra* note 23, at 293–94.
34. Torres & Bellinger state:

> The Equal Protection Clause is designed to ensure that all persons are treated equally before the law. Temporal inequality requires a judicial mechanism to ensure the protection of future generations. The Due Process Clause of the Fifth Amendment incorporates unenumerated rights against the federal government. Whether a particular unenumerated right or limitation qualifies depends on "whether the right . . . is fundamental to our scheme of ordered liberty . . . or . . . whether this right is 'deeply rooted in this nation's history and tradition.'"

Id. (internal citation omitted).

which "all constitutions and laws are written."[35] Prof. Mary Christina Wood characterizes the public trust as having a constitutional force based on "the inherent and inalienable rights of citizens as reserved through their social contract with government . . . ."[36] Notwithstanding these compelling theories from leading scholars, the U.S. Supreme Court has held that the public trust doctrine is a state law doctrine.[37] While many state constitutions incorporate elements of the public trust doctrine, most state courts find justification for the doctrine in the common law,[38] whereas some have found it to be a hybrid "of customary law but essentially constitutional in character."[39]

Early American jurisprudence only recognized navigable waterways, the lands beneath navigable waterways, and the seashore between high and low tides as public trust assets.[40] *Carson v. Blazer*, decided in 1810, was the first significant case to raise the public trust issue in the United States.[41] In an attempt to create a private fishery along the Susquehanna River, a riparian landowner claimed that his properties extended through the center of the river.[42] The Pennsylvania court held that "a riparian owner enjoys 'no exclusive right to fish in the river immediately in front of his lands . . . the right to fisheries in that river is vested in the state, and open to all . . . .'"[43] Subsequently, in 1821, the New Jersey Supreme Court ruled that lands below a beach's low water mark belong to the public and, therefore, the shellfish beds below the low mark could not be privately owned.[44] The most famous U.S. public trust case, *Illinois Central R.R. Co. v. Illinois*, was decided in 1892.[45] The U.S. Supreme Court held that the Illinois legislature's allocation of more than 1,000 acres of submerged lands in Lake Michigan, and along the Chicago waterfront, to a private railroad company was beyond the scope of the

35. Mary Christina Wood, Nature's Trust: Environmental Law for a New Ecological Age 129 (2013) (quoting Gerald Torres, Public Trust: The Law's DNA, Keynote Address at the University of Oregon School of Law (Feb. 23, 2012)).
36. Mary Christina Wood, *The Planet on the Docket: Atmospheric Trust Litigation to Protect Earth's Climate System and Habitability*, 9 Fla. A&M L. Rev. 259, 261 (2014).
37. Thompson, *supra* note 30, at 57. *See*, *e.g.*, Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 482 (1988) (relying on Mississippi law to determine the extent of public trust lands); Appleby v. City of New York, 271 U.S. 364, 395 (1926) (relying on New York common law to determine whether a private owner could restrain the city of New York from dredging the land and using the water).
38. S.C. Const. art. XIV, §4 ("All navigable waters shall forever remain public highways free to the citizens of the State."). *See also* Pa. Const. art. IX, §27; Tex. Const. art. XVI, §59; Haw. Const. art. I, §2 & art. XI, §1.
39. *See* Arnold v. Mundy, 6 N.J.L. 1, 16–17 (N.J. 1821); Glass v. Goeckel, 703 N.W.2d 58, 64 (Mich. 2005); In re Water Use Permit Applications, 9 P.3d 409, 425 (Haw. 2000).
40. Torres & Bellinger, *supra* note 23, at 286.
41. Carson v. Blazer, 2 Binn. 475 (Pa. 1810).
42. *Id.* at 486.
43. *Id.* at 495.
44. *Arnold*, 6 N.J.L. at 52.
45. Illinois Cent. R.R. v. Illinois, 146 U.S. 387 (1892).

legislature's authority because the property was held in trust for the public by the state.[46]

As society's perceptions of public resources have evolved, so too has the scope of resources protected by the public trust doctrine.[47] For example, though the commercial importance of waterways and the reliance on private fishing as a food source have declined, tidal areas and navigable waterways are still valuable public resources.[48] Coastal populations have increased, as have the recreational values of coastlines to those populations.[49] As a result, many state courts now safeguard natural resources for "general recreation, environmental protection, and aesthetics."[50] For example, in *Gould v. Greylock Reservation Commission* in 1966, citizens sued as public trust beneficiaries to prevent enforcement of a statute privatizing a large portion of a nature reserve for a ski resort.[51] The Supreme Court of Massachusetts held that the statute was invalid and enjoined the state from granting public lands for a private use.[52] In 1984, the New Jersey Supreme Court expanded the public trust doctrine to dry sand areas of the beach when it ruled that the public had a right to "cross and make reasonable use" of a privately owned, dry sand area of the beach when it "is essential or reasonably necessary for enjoyment of the ocean."[53]

In addition, scientific advances have raised climate change and environmental concerns that have augmented the ecological significance that society places on coastal areas, shorelines, and water resources.[54] As a result, some states now recognize non-navigable tributaries, wetlands, and groundwater as protected assets.[55] In 1971, the California Supreme Court recognized that the public trust is a flexible doctrine capable of adapting to changing public needs.[56] In *Marks v. Whitney*, the court prevented a property owner from developing tidelands because preservation of those

46. *Id.* at 456.
47. Thompson, *supra* note 30, at 67.
48. *Id.* at 67–68.
49. *Id.* at 68.
50. *Id.* at 70 n.12. Opinion of the Justices (Public Use of Coastal Beaches), 649 A.2d 604, 609 (N.H. 1994) (recognizing recreation as one of the purposes of the public trust doctrine); Borough of Neptune City v. Borough of Avon-by-the-Sea, 294 A.2d 47, 54 (N.J. 1972) (finding that public rights extend to "recreational uses, including bathing, swimming and other shore activities"). Not all courts, however, have been willing to expand the public trust purposes. *See, e.g.*, Bell v. Town of Wells, 557 A.2d 168, 173 (Me. 1989) (limiting trust rights to fishing, fowling, and navigation); Opinion of the Justices, 313 N.E.2d 561 (Mass. 1974) (limiting trust rights to fishing and navigation).
51. Gould v. Greylock Reservation Comm'n, 215 N.E.2d 114 (Mass. 1966).
52. *Id.* at 126.
53. Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355, 365–66 (N.J. 1984).
54. Thompson, *supra* note 30, at 53.
55. Torres & Bellinger, *supra* note 23, at 297.
56. Thompson, *supra* note 30, at 52.

tidelands "in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area" is an important objective for the public trust doctrine.[57]

The above cases underscore the public trust doctrine's role as "a legal framework that citizens can use to compel government to fulfill its fiduciary duties to protect natural resources."[58] In response to global climate change, a movement to extend the public trust doctrine to include the earth's atmosphere has led to ATL.[59] ATL proponents perceive the earth's atmosphere "as a single public trust asset in its entirety" over which all sovereigns are co-trustees with mutual responsibilities.[60] ATL attempts to impose a legal duty on governments to protect the atmosphere, and seeks to require governments to execute that duty based on scientific data and implement a policy of shared responsibility with regard to reducing CO_2 emissions.[61]

ATL pioneer and scholar, Professor Wood, sees ATL as a logical extension of the *Illinois Central* opinion. The *Illinois Central* Court announced that "the state can no more abdicate its trust over property in which the whole people are interested . . . than it can abdicate its police powers in the administration of government . . . ."[62] Nevertheless, courts have been reluctant to extend the public trust doctrine to include the atmosphere. ATL has had limited success at the state level to date; however, some recent developments appear promising.[63] An ATL case has not yet succeeded at the federal level. The *Alec L. v. McCarthy* case discussed in Part III presented the opportunity that ATL needed to apply the theory at the federal level, but the case was dismissed.

57. Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971) (concluding that the "public uses to which tidelands are subject are sufficiently flexible to encompass changing public needs," including environmental preservation).
58. Torres & Bellinger, *supra* note 23, at 316–17. *But see* Patrick Redmond, *The Public Trust in Wildlife: Two Steps Forward, Two Steps Back*, 49 Nat. Resources J. 249 (2009) (arguing that the public trust doctrine has expanded in an inconsistent and controversial manner that does not support application to wildlife protection efforts).
59. *See generally* Wood, *supra* note 36 (discussing the need for and viability of atmospheric trust litigation); *see also* Robin Kundis Craig, *Adapting to Climate Change: The Potential Role of State Common Law Public Trust Doctrines*, 34 Vt. L. Rev. 781 (2010) (arguing that the public trust doctrine can provide a legal mechanism for states to implement management-based climate change adaptation regimes).
60. Wood, *supra* note 36, at 270.
61. *Id.* at 271.
62. *Id.* at 261 (quoting Illinois Cent. R.R. v. Illinois, 146 U.S. 387, 453 (1892)).
63. *See infra* Part III.B. for a discussion of ATL state cases.

III. Moving Forward With ATL in the Wake of *Alec L. v. McCarthy*

After reviewing the D.C. Circuit's opinion in *Alec L. v. McCarthy*, and the subsequent pending federal ATL case in *Juliana*, Part III discusses how ATL and ATL-related cases at the state level in the United States and in foreign countries offer some hope for the continued viability of the ATL theory as a tool to secure climate justice in the courts.

A. The Federal Avenue for ATL

In *Alec L. v. Jackson*,[64] the plaintiffs—five youths[65] and two nongovernmental organizations (NGOs)[66]—filed suit in the U.S. District Court for the District of Columbia against Lisa Jackson, then-administrator of EPA, and other federal officials. The complaint alleged that each of the defendants, as agencies and officers of the federal government, "have wasted and failed to preserve and protect the atmosphere Public Trust asset."[67]

The district court held that the plaintiffs lacked standing to sue in federal court. The court determined that the key question is "whether Plaintiffs' public trust claim is a creature of state or federal common law."[68] The plaintiffs argued that the public trust doctrine presents a federal question because it "is not in any way exclusively a state law doctrine."[69] The court rejected this argument, relying on a 2012 Supreme Court decision[70] that stated that "the public trust doctrine remains a matter of state law" and its "contours . . . do not depend upon the Constitution."[71]

The parties disagreed as to whether the Supreme Court's declaration regarding the public trust doctrine is part of the holding or merely dicta.[72] The court determined that this concern is a non-issue because even carefully considered language in dicta generally must be regarded as authoritative.[73] The district court noted that even if the Supreme Court's

64. Alec L. v. Jackson, 863 F. Supp. 2d 11 (D.D.C. 2012).
65. The five youth plaintiffs were Alec L., Madeleine W., Garret & Grant S., and Zoe J.
66. The two NGO plaintiffs were Kids vs. Global Warming and WildEarth Guardians. According to Our Children's Trust (OCT), these plaintiffs partnered with OCT to file the lawsuit.
67. *Alec L. v. Jackson*, 863 F. Supp. 2d at 12.
68. *Id.* at 15.
69. *Id.*
70. PPL Montana v. Montana, 132 S. Ct. 1215 (2012). For a discussion of this case, see *infra* notes 116–22 and accompanying text.
71. *Alec L. v. Jackson,* 863 F. Supp. 2d at 15.
72. *Id.*
73. *Id.*

declaration were not binding, the court would at least regard the declaration as persuasive.[74]

The court also considered the argument of a federal common law public trust doctrine. Relying on the Supreme Court's decision in *AEP*, the court concluded that even if the public trust doctrine had been a federal common law claim at one time, it has subsequently been displaced by federal regulation, specifically the Clean Air Act.[75] In holding that the federal common law cause of action was displaced by the Clean Air Act, the court concluded that federal judges may not set limits on GHG emissions "in the face of a law empowering EPA to set the same limits, subject to judicial review only to ensure against action arbitrary, capricious, . . . or otherwise not in accordance with the law."[76]

The plaintiffs appealed the decision to the D.C. Circuit in *Alec L. v. McCarthy*.[77] In affirming the dismissal of the plaintiffs' complaint, the D.C. Circuit concluded in a two-page opinion that: (1) the plaintiffs failed to rely on any cases that indicate that violations of the public trust doctrine may apply as a federal question, and (2) the Supreme Court had recently reaffirmed that "the public trust doctrine remains a matter of state law."[78]

B. ATL State Law Actions Remain Viable and Important

Despite the setback in the D.C. Circuit's decision in *Alec L. v. McCarthy*, several ATL cases are pending as of this writing in state courts throughout the United States.[79] Some type of climate change-related case has been filed in all 50 states, most of which have been administrative petitions that have realized limited success to date.[80] Several actions have received favorable rulings. For example, in *Bonser-Lain v. Texas*,[81] the Texas Environmental Law Center sued the Texas Commission on Environmental Quality (TCEQ), seeking judicial review of TCEQ's denial of a petition for rulemaking. While the court ultimately determined that the decision was a "reasonable exercise"

74. *Id.*
75. *Id.* at 16.
76. *Id.* at 17.
77. Alec L. v. McCarthy, 561 Fed. App'x 7 (2014).
78. *Id.* at 8.
79. *See* OCT, *State Legal Actions* (listing pending and past claims), http://ourchildrenstrust.org/Legal (last visited Aug. 24, 2016). OCT is an NGO based in Eugene, Oregon, that has undertaken impressive and inspiring work in advancing ATL in the United States and abroad.
80. *Id.* (reporting that the 39 petitions for rulemaking that have been submitted to administrative agencies have been denied).
81. Bonser-Lain v. Texas Comm'n on Envtl. Quality, No. D-1-GN-11-002194 (Tex. Dist. Ct. Aug. 2, 2012), http://www.law.uh.edu/faculty/thester/courses/Climate-Change-2012/BonserLain%20v%20TCEQ.pdf.

of the agency's discretion, the court's opinion was supportive of the use of the public trust doctrine for protection of air and atmosphere.[82] The Texas district court invalidated the TCEQ's determination that the public trust doctrine applied only to water, stating "the public trust doctrine includes all natural resources of the State including the air and atmosphere."[83] The court further held that the federal Clean Air Act is a "floor, not a ceiling, for the protection of air quality," effectively rejecting the defendant's argument that the issue was preempted by the Clean Air Act.[84] This reasoning provides an important distinction from the U.S. Supreme Court decision in *AEP* in which the Court held that the plaintiffs' public nuisance claim was displaced by the Clean Air Act.

Five days after the Texas court decision in July 2012, a district court in New Mexico denied the state's motion to dismiss an ATL lawsuit. In *Sanders-Reed v. Martinez*,[85] the New Mexico governor's office was sued for failure to protect the atmospheric trust from the effects of climate change.[86] The district court denied the state's motion to dismiss and allowed the case to proceed to the merits.[87] Although the court granted the state's motion for summary judgment, this case is important because it is the first ATL case to proceed to the merits. The New Mexico Court of Appeals affirmed the district court's decision on procedural grounds; however, the court noted that the New Mexico Constitution supports the conclusion that the state's public trust encompasses the atmosphere.[88]

Progress on ATL at the state level suffered a setback in 2015 in Oregon. In *Chernaik v. Brown*, the plaintiffs alleged that their personal and economic well-being are "dependent upon the health of the state's natural resources held in trust for the benefit of its citizens, including water resources, sub-

82. *Id*. at 2.
83. *Id*. at 1.
84. *Id*.
85. Sanders-Reed v. Martinez, 42 ELR 20159, No. D-101-CV-2011-01514 (N.M. Dist. Ct. July 14, 2012).
86. *See* OCT, *New Mexico*, http://www.ourchildrenstrust.org/new-mexico (last visited Aug. 24, 2016).
87. Sanders-Reed v. Martinez, 42 ELR 20159, No. D-101-CV-2011-01514 (N.M. Dist. Ct. July 14, 2012), *order issued* (N.M. Dist. Ct. July 14, 2012).
88. *See* Sanders-Reed v. Martinez, 350 P.3d 1221 (N.M. Ct. App. 2015). Additional support for ATL can be found in the concurring opinion in an Iowa Court of Appeals case, *Filippone ex rel. Filippone v. Iowa Dep't of Natural Resources*, 829 N.W.2d 589 (Iowa Ct. App. 2013). In this case, the plaintiff petitioned the Iowa Department of Natural Resources to adopt new rules regarding the emission of GHGs. Although the court declined to expand the public trust doctrine to include the atmosphere, Judge Doyle's concurring opinion noted that "there is a sound public policy basis" to extend the public trust doctrine to include the atmosphere. Later in 2013, the Iowa Supreme Court upheld the dismissal of the case. *See* Press Release, Our Children's Trust et al., Iowa Supreme Court Declines to Review Climate Case, (May 10, 2013), http://ourchildrenstrust.org/sites/default/files/13.05.09-IowaSC-Decision_0.pdf.

merged and submersible lands, coastal lands, forests, and wildlife," all of which are threatened by climate change.[89] The plaintiffs contended that they will be "adversely and irreparable injured" by defendants' failure to limit GHG emissions.[90] The plaintiffs sought: (1) a declaration that the atmosphere, waters, shores, coastal areas, and wildlife are declared trust resources, that Oregon has an obligation to protect them, and that Oregon has failed in this obligation; (2) an order that Oregon develop an accurate accounting of its current GHG emissions and a plan to reduce those emissions that will protect public trust assets; and (3) a declaration that requires "carbon dioxide emissions to peak in 2012 and to be reduced by six percent each year until at least 2050."[91]

In 2007, Oregon's legislature enacted House Bill 3543, which found that climate change is a threat to Oregon's economy, public health, natural resources, and environment; adopted GHG reduction goals; and created the Oregon Global Warming Commission, whose responsibility is to create goals and methods for local and state governments, businesses, residents, and nonprofit organizations to decrease GHG emissions. Plaintiffs allege that the GHG emissions goals established in House Bill 3545 are inadequate and, even if they are adequate, Oregon has failed to meet these goals. The state filed a motion to dismiss for lack of subject matter jurisdiction and the court granted the motion. The court of appeals reversed and remanded and instructed the lower court to determine whether the natural resources identified by plaintiffs are trust resources and whether "'the State of Oregon, as trustee, has a fiduciary obligation to protect . . . from the impacts of climate change.'"[92]

In discussing the public trust doctrine, the court stated that "the States retain residual power to determine the scope of the public trust over navigable waters. . . . Therefore, the public trust doctrine is a matter of state law, subject to the federal power to regulate navigation under the Commerce Clause and the admiralty power."[93]

The court agreed with the state's position that the public trust doctrine includes only submerged and submersible lands. Regarding whether the atmosphere is encompassed by the public trust doctrine, the "Court first questions whether the atmosphere is a 'natural resource' at all, much less one to which the public trust doctrine applies."[94] The court ultimately decided

89. Chernaik v. Brown, No. 16-11-09273, slip op. at 2 (Or. Cir. Ct. May 11, 2015).
90. *Id.*
91. *Id.* at 2–3.
92. *Id.* at 5.
93. *Id.* at 8.
94. *Id.* at 10–11.

that the atmosphere does not legally fall under Oregon's public trust doctrine. It explained that the state does not hold title to the atmosphere. "[T]he public trust doctrine originated when title to the lands beneath navigable waters transferred to the State. Unlike submerged and submersible lands . . . the State has not been granted title to the atmosphere."[95] To further support its decision, the court stated the atmosphere is not "exhaustible and irreplaceable" and that, although it can be polluted, it is not a "resource that 'can only be spent once.'"[96]

The court further held that the state has no fiduciary obligation to protect resources encompassed in the public trust doctrine. The court reasoned that the state's obligation toward resources protected by the public trust doctrine is to prevent the state from alienating these resources, but that there is no affirmative fiduciary obligation to protect them. The court also held that the relief that the plaintiffs seek violates the separation of powers because asking the court to order defendants to develop a carbon reduction plan is to ask the "Court to substitute its judgment for that of the legislature."[97] The court reasoned that if it were to grant plaintiffs' request, it would strike down current legislation and impose a more stringent standard for GHG emission reductions, thereby replacing the goals established by the legislature.[98] The plaintiffs filed an appeal in July 2015, which is pending as of this writing.

This recent line of ATL cases at the state level reveals two important trends. First, several state courts have embraced the concept of ATL as a potential strategy to address climate change regulation in the courts, and it is rapidly gaining support. Second, even if the ATL theory does not succeed in its own right in the courts, it has already prompted valuable consideration or rethinking of how to most effectively goad state governmental entities to address climate change regulation initiatives to more effectively safeguard the rights of future generations to a safe and healthy environment. For example, following up on ATL litigation in the state of Washington that did not proceed to the merits, a petition for rulemaking was filed with the Washington Department of Ecology for climate change regulations. Although the Department denied the petition with a detailed response in 2014,[99] one year later a Washington trial court in *Foster v. Washington Department of Ecology* ordered the Department of Ecology to reconsider its denial of the plaintiffs'

95. *Id.* at 11.
96. *Id.* at 12.
97. *Id.* at 15–16.
98. *Id.* at 16.
99. Letter from State of Washington Department of Ecology, responding to Andrea Rogers Harris' Petition for Rule Making (Aug. 14, 2014), http://static1.squarespace.com/static/571d109b04426270152febe0/t/576081a01d07c05bf208e7c7/1465942439363/WA.EcologyDecision.pdf.

petition for rulemaking based on the Department's December 2014 report detailing imminent threats to the state from climate change impacts.[100] This case is an encouraging development that helps bring ATL closer to compelling climate change regulation as in *Massachusetts v. EPA*.

C. *Building on ATL and ATL-related Cases in the United States and Other Countries*

Outside the United States, several lawsuits also have been filed in foreign domestic courts applying ATL litigation reasoning. For example, an ATL case was filed in 2011 in Ukraine seeking to compel the government to address its inactivity in implementing climate protection policies. The court ordered the Cabinet to prepare an assessment of the country's progress toward realizing the goals of the Kyoto Protocol, which secured an important victory for the plaintiffs.[101] Similarly, in Uganda, an environmental NGO filed an ATL case against the government invoking a public trust duty under the Uganda Constitution to protect the country's atmospheric resources from climate change.[102] Finally, in the Netherlands, 886 citizens served a summons to hold the government responsible for failing to take measures to prevent climate change. The summons requested the court to compel the government to fulfill its obligations under Dutch law, the United Nations Framework Convention on Climate Change, and the European Convention on Human Rights.[103] The citizens prevailed and the case is on appeal as of this writing.[104]

100. Foster v. Washington Dep't of Ecology, No. 14-2-25295-1 SEA (King County Sup. Ct., June 23, 2015), http://ourchildrenstrust.org/sites/default/files/Order_Fosterv.Ecology.pdf. *See also* Press Release, Our Children's Trust et al., Washington State Youth Win Unprecedented Decision in Their Climate Change Lawsuit (June 24, 2014), http://ourchildrenstrust.org/sites/default/files/15.06.24WADecisionPR.pdf.
101. *See* Our Children's Trust, *Global Legal Actions (Ukraine)*, http://www.ourchildrenstrust.org/ukraine.
102. *Id.* The case is in mediation as of this writing.
103. *See* RB-Den Haag [Hague District Court] 24 Juni 2015, ECLI:NL:RBDHA:2015:7196 (Stichting Urgenda/Nederlanden) [Urgenda Found. v. Netherlands], http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2015:7145 (last visited Aug. 23, 2016), *translated at* http://www.urgenda.nl/documents/VerdictDistrictCourt-UrgendavStaat-24.06.2015.pdf.
104. For a full analysis of the *Urgenda* case, see Chapter 21 in this volume. Under a similar "protection of future generations" climate justice theory, a lawsuit is being prepared as of this writing against Norwegian authorities regarding recently opened blocks of oil and gas exploration acreage in Arctic waters. Atle Staalesen, *Lawyers Sue State Over Arctic Oil Drilling*, The Indep. Barents Observer, Jan. 18, 2016, http://thebarentsobserver.com/ecology/2016/01/lawyers-sue-state-over-arctic-oil-drilling; Aleksander Melli et al., *Norway's Rush to Extract Arctic Oil Contradicts Its Constitution*, Truthout, Oct. 24, 2015, http://www.truth-out.org/news/item/33324-norway-s-rush-to-extract-arctic-oil-contradicts-its-constitution. If the government leases these blocks to oil and gas developers, a suit will be filed to prevent Arctic drilling under the Norwegian Constitution. Emily J. Gertz, *Shell May Be Leaving the Arctic, but Norway's High North Is Open for Business*, TakePart, Oct. 6, 2015. Article 112 of the Norwegian Constitution requires the government to impose policies that guarantee Norwegian citizens

The climate justice and intergenerational equity principles underlying ATL litigation also remain viable in ATL-related environmental human rights litigation in the United States and abroad. For example, the Supreme Court of Pennsylvania in *Robinson Township v. Commonwealth*[105] addressed key provisions of a Pennsylvania statute, Act 13, which authorized hydraulic fracturing ("fracking") operations to proceed with virtually no restrictions, even in residential areas. In striking down these provisions of Act 13, the court relied on the Environmental Rights Amendment in the Pennsylvania statute,[106] which mandates the conservation and maintenance of the environment in Pennsylvania.

The court focused on the environmental rights and public trust angle of the issue in resolving the case. The court reasoned that:

> [T]his dispute centers upon an asserted vindication of citizens' rights to quality of life on their properties and in their hometowns, insofar as Act 13 threatens degradation of air and water, and of natural, scenic, and esthetic values of the environment, with attendant effects on health, safety, and the owners' continued enjoyment of their private property. The citizens' interests, as a result, implicate primarily rights and obligations under the Environmental Rights Amendment—Article I, Section 27.[107]

In its analysis of the Environmental Rights Amendment, the court noted that §27 establishes two separate rights in the people of the commonwealth. The first is the declared "right of citizens to clean air and pure water, and to the preservation of natural, scenic, historic and aesthetic values of the environment."[108] Section 27 also separately requires the preservation of "natural, scenic, historic and esthetic values of the environment."[109] By calling for the "preservation" of these broad environmental values, the Constitution again protects the people from governmental action that unreasonably

and their descendants the right to a secure climate. Melli et al., *supra*. The lawyers preparing to bring suit assert that in drilling for oil in the Arctic, the government is violating the nation's constitutional requirement to avoid harming the planet for future generations. Hannah Hoag, *Executive Summary for January 19*, Arctic Deeply, Jan. 19, 2016, http://www.arcticdeeply.org/articles/2016/01/8334/arctic-deeply-executive-summary-january-19/.

105. Robinson Township v. Commonwealth, 623 Pa. 564 (Pa. 2013).

106. As stated in *Robinson Township v. Commonwealth*:

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

Id. at 584–85.

107. *Id*. at 631.

108. *Id*. at 646.

109. *Id*. at 642.

causes actual or likely deterioration of these features.[110] Therefore, any regulation is "subordinate to the enjoyment of the right . . . [and] must be regulation purely, not destruction"; laws of the commonwealth that unreasonably impair the right are unconstitutional.[111]

The court further observed that the second right that §27 protects is the common ownership of the people, including future generations, of Pennsylvania's public natural resources.[112] The court defined "natural resources" as including not only state-owned lands, waterways, and mineral reserves, but also resources that implicate the public interest, such as ambient air, surface and groundwater, wild flora, and fauna (including fish) that are outside the scope of purely private property.[113]

The court determined that the third clause of §27 establishes the commonwealth's duties with respect to Pennsylvania's commonly owned public natural resources.[114] It noted that "the Public Trust is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust."[115] As trustee of the public trust, the commonwealth has two responsibilities: (1) to refrain from performing its trustee duties respecting the environment unreasonably, including via legislative enactments or executive action,[116] and (2) to act affirmatively to protect the environment, via legislative action.[117] Although not an ATL decision, the court's powerful reasoning in *Robinson Township* fully embraces the extension of the public trust doctrine to contexts beyond the traditional scope of the doctrine's coverage, including atmospheric resources.

Similarly, the intergenerational equity principles inherent in ATL are evident in a recent case in the Philippines. A petition was filed in the Supreme Court in Manila on behalf of youth and the 98% of the population without cars.[118] The petition is in the form of a legal instrument known as a Writ of Kalikasan, which provides a remedy for citizens whose environmental rights

110. *Id.*
111. *Id.* at 646.
112. *Id.* at 651.
113. *Id.* at 651–52.
114. *Id.* at 653.
115. *Id.* at 654.
116. *Id.* at 656.
117. *Id.* at 657.
118. Elyse Wynn Go, *Share the Road: Citizens' Group Seeks Writ of Kalikasan for Clean Air, Equitable Road Space*, InterAksyon, Feb. 14, 2014, http://www.interaksyon.com/article/80765/share-the-road--citizens-group-seeks-writ-of-kalikasan-for-clean-air-equitable-road-space.

have been violated.[119] The petition demands that one-half of the roads be set aside for citizens who do not drive.[120] Like the *Robinson Township* case, the theory in this case also offers support for the reasoning underlying ATL litigation in seeking to compel the government to manage resources beyond the traditional scope of the public trust doctrine for the benefit of future generations.

D. Prospects for the Future of ATL Litigation

Within the past five years, ATL has been a primary focus of climate justice litigation and it has made significant progress in advancing its theory in U.S. and foreign domestic courts. This progress notwithstanding, ATL has faced significant resistance in state and federal courts in the United States, culminating in the D.C. Circuit's recent decision in *Alec L. v. McCarthy*.[121] This section of the analysis discusses reasons for hope and concern based on recent developments and the status of ATL as a tool to promote climate justice.

First, the cursory and rigid reasoning in the D.C. Circuit's opinion in *Alec L. v. McCarthy* is rooted in the tenuous foundation of the court's reliance on *PPL Montana v. Montana*.[122] The court relied on this case for the proposition that the public trust doctrine is a state law doctrine; however, *PPL Montana v. Montana* was not primarily a public trust doctrine analysis. The issue in this case was whether, under the equal footing doctrine, segments of rivers in Montana are non-navigable to determine if the state of Montana acquired title to the rivers.[123] The state alleged that it had acquired title to the disputed rivers under the equal footing doctrine on the basis that the rivers are navigable.[124] Consequently, the state sought rent from the plaintiff, a power company, for its use of the riverbeds for hydroelectric production of power.[125]

119. *Id.*
120. *Id.* In January 2016, the Congress of the Philippines allocated more than 85 million pesos to the Metropolitan Manila Development Authority "for transport and traffic management services particularly for road-sharing activities." *See* Joyce Ilias, *Road-sharing Scheme Along Major Roads in 2016*, CNN Philippines, Jan. 12, 2016, http://cnnphilippines.com/videos/2016/01/12/Road-sharing-scheme-along-major-roads-in-2016.html.
121. In addition, some recent scholarly writings have been critical of ATL. *See, e.g.*, Andrew Ballentine, *Full of Hot Air: Why the Atmospheric Trust Litigation Theory Is an Unworkable Attempt to Expand the Public Trust Doctrine Beyond Its Common Law Foundations*, 12 Dartmouth L.J. 98 (2014); 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 (2013).
122. PPL Montana v. Montana, 132 S. Ct. 1215 (2012).
123. *Id.* at 1222.
124. *Id.*
125. *Id.*

The U.S. Supreme Court reversed the judgment in favor of the state for three reasons: (1) the trial court's failure to carefully consider the issue of navigability and required overland portage; (2) the reliance on recreational use to determine the navigability of the Madison River; and (3) the liberal interpretation of the navigability test.[126] The public trust doctrine only entered into the Court's analysis in a peripheral manner. The state alleged that denying title would undermine the public trust doctrine.[127] The Court simply made the distinction that the equal footing doctrine is based on federal constitutional foundations and the public trust doctrine is a matter of state law.[128] Thus, under the equal footing doctrine, federal law determines title to the riverbeds, but states retain the power to define the scope of the public trust of those waters.[129]

It is unfortunate that such an important legal question regarding whether ATL can be applied at the federal level was summarily dismissed through the D.C. Circuit's reliance on *PPL Montana v. Montana*. This case merely states a truism regarding the public trust doctrine, does not involve meaningful public trust doctrine analysis, and is not responsive to the legal question presented in the *Alec L.* case. It is certainly true, as a general principle, that the public trust doctrine has been considered a matter of state law. But the D.C. Circuit merely relied on that general principle without analysis of the question presented in *Alec L.*, which was whether this state law doctrine can be applied at the federal level under the appropriate circumstances. The D.C. Circuit's unresponsive evasion of the core question in the case is unlike previous public trust cases where state courts, presented with the question of whether the public trust doctrine can be extended to apply beyond its traditional water-based uses, did not respond merely by stating that the public trust doctrine had been tied to the traditional triad of uses and providing no further analysis. Unlike the D.C. Circuit's stunted analysis in *Alec L.*, state courts in the past fortunately were responsive to questions regarding the scope of the public trust doctrine's applicability and, for that reason, the doctrine now is understood to extend beyond the traditional triad of uses. Climate change is such a politicized issue in the United States that the D.C. Circuit simply may have been looking for a way to justify keeping climate change claims out of the court system. A related factual context that does not involve climate change could easily have yielded a different result in

126. *Id.* at 1226.
127. *Id.* at 1234.
128. *Id.* at 1235.
129. *Id.*

Alec L., or at least a result that would have generated more significant legal reasoning.[130]

The door to federal ATL relief appeared to be completely shut after the D.C. Circuit's decision in *Alec L.* and the subsequent denial of writ of certiorari in the case.[131] However, that door appears to have cracked open in a subsequent federal ATL case, which is pending before the U.S. District Court for the District of Oregon as of this writing. In *Juliana v. United States*, the plaintiffs asserted a claim based on ATL theory applicable to the federal government coupled with an alleged constitutional law duty regarding due process concerns of youth and future generations.[132] The court characterized the plaintiffs' creative claims as based on "a novel theory somewhere between a civil rights action and [National Environmental Policy Act]/Clean Air Act/Clean Water Act suit to force the government to take action to reduce harmful pollution."[133] In concluding that the plaintiffs' claims survived the federal government's motion to dismiss, the court offered compelling reasoning on standing, the political question doctrine, and the scope of the public trust doctrine that bodes well for the future of ATL litigation.

Regarding standing, the court concluded that the injury element was met. Although the personal harms alleged are a consequence of broader harms, the court determined "that does not discount the concrete harms already suffered by individual plaintiffs or likely to be suffered by these plaintiffs."[134] Furthermore, "[g]iven the allegations of direct or threatened direct harm, albeit shared by most of the population or future population, the court should be loath to decline standing to persons suffering an alleged concrete injury of

130. Two cases outside of the climate change context are relevant to support the plaintiffs' argument. The first case, *In re Steuart Transp. Co.*, 495 F. Supp. 38 (E.D. Va. 1980), involved claims filed by both the commonwealth of Virginia and the U.S. government against the defendant for damage to migratory waterfowl, statutory penalties, and cleanup costs arising from an oil spill in the Chesapeake Bay. Approximately 30,000 migratory birds allegedly were destroyed as a result of the oil spill. The sole issue before the court was whether the commonwealth and/or the federal government had a right to sue for the loss of migratory waterfowl. The court concluded that under the public trust doctrine, the state of Virginia, and the United States have the right and the duty to protect and preserve the public's interest in natural wildlife resources. *Id.* at 40. Similarly, the court in *United States v. Burlington N. R.R.,* 710 F. Supp. 1286 (D. Neb. 1989), noted that the public trust doctrine has been applied to the federal government. The court reasoned that although the public trust doctrine traditionally applied to tidal waters and the land submerged beneath them, the concept of the United States holding its land in trust for the general population is well established in U.S. jurisprudence. *Id.* at 1287.

131. Alec L. v. McCarthy, 135 S. Ct. 774 (2014).

132. Juliana v. United States, No. 6:15-cv-1517-TC, slip op. at 3 (D. Or. Apr. 8, 2016), http://www.lawandenvironment.com/wp-content/uploads/sites/5/2016/04/5456019-0-10918.pdf. On September 13, 2016, Judge Aiken heard arguments on the federal government's motion to overturn U.S. Magistrate Judge Coffin's April 8, 2016, order denying the federal government's motion to dismiss the case. A decision is expected in November 2016 to determine whether the *Juliana* case can proceed to trial.

133. *Id.*

134. *Id.* at 6.

a constitutional magnitude."[135] The court also concluded that there was sufficient causation between the defendants' actions and the plaintiffs' harms to allow the case to go forward[136] because "the failure to regulate the emissions has resulted in a danger of constitutional proportions to the public health."[137] Finally, the court determined that the plaintiffs' claim is redressable. The plaintiffs allege that a court order requiring the government to take action to reduce GHG emissions will have an impact on the constitutional harms they will suffer if the court does nothing.[138] The court held that there is a need for expert opinion and therefore the issue is better addressed at a later stage and will therefore not be a basis for dismissal.[139] The court relied on the *Urgenda* decision in the Netherlands to support its position on redressability.[140]

The *Juliana* court also provided powerful reasoning under the political question doctrine and the public trust doctrine to support ATL theory. On the political question doctrine, the court concluded that although "courts cannot intervene to assert 'better' policy . . . they can address constitutional violations by government agencies and provide equitable relief."[141] The plaintiffs allege that government action and inaction violates the Constitution, which is an issue that is within the courts' capacity to adjudicate.[142] While the court may not have the power to dictate regulations, it can "direct the EPA to adopt standards that prevent the alleged constitutional harms to youth and future generation plaintiffs."[143]

Regarding the scope of the public trust doctrine, the court determined that this case is distinguishable from *PPL Montana v. Montana*. The issue of whether the United States "has public trust obligations for waters over which it alone has sovereignty" was not presented or decided by the Court in *PPL Montana*.[144] This case, conversely, "does not at all implicate the equal footing doctrine or public trust obligations in the State of Oregon."[145] Here, the public trust doctrine is directed against the United States and its sovereign interests over the oceans and atmosphere of the nation.[146] The court stated that *PPL Montana* does not foreclose the "argument that the public

135. *Id.* at 7.
136. *Id.* at 9–10.
137. *Id.* at 10.
138. *Id.* at 12.
139. *Id.* at 12.
140. *Id.* at 11.
141. *Id.* at 13.
142. *Id.* at 14.
143. *Id.* at 14.
144. *Id.* at 18–20.
145. *Id.* at 20.
146. *Id.*

trust doctrine applies to the federal government" and that coastal seawaters could not "be privatized without implicating the principles that reflect core values of our Constitution and the very essence of the purpose of our nation's government."[147] EPA has a duty to protect the public health from pollutants in the atmosphere and the government's public trust duties are "deeply ingrained in this country's history" and therefore, the allegations in the complaint state a substantive due process claim.[148] The court concluded that it "cannot say that the public trust doctrine does not provide at least some substantive due process protections for some plaintiffs within the navigable water areas of Oregon."[149]

Additional support for the proposition that public trust doctrine principles apply to the federal government can be found in jurisprudence from other nations. For example, courts in the Philippines and India have concluded that the federal government has a trust responsibility to protect resources for the benefit of all of the people. In *Oposa v. Factoran*,[150] a group of Filipino minors represented by their parents sued the secretary of the Department of Environment and Natural Resources (DENR) for contracting to have large portions of the country's forested area logged. The court concluded that the right of the plaintiffs (and all those they represent) to a balanced and healthful ecology was as clear as the defendant's duty to protect and advance this right, and the denial or violation of that right gives rise to a cause of action.[151] Similarly, in *M.C. Mehta v. Kamal Nath*, the Supreme Court of India held that the public trust doctrine is embedded in the nation's jurisprudence.[152] The Court determined that "the State is a trustee of all natural resources, which are by nature meant for public use and enjoyment."[153] It further stated that the public at large is the beneficiary for these natural resources and the State owes a legal duty to the public to protect the natural resources.[154]

147. *Id*. at 23.
148. *Id*.
149. *Id*.
150. Oposa v. Factoran, G.R. No. 101083, 224 S.C.R.A. 792 (1993).
151. *See id*.
152. M.C. Mehta v. Kamal Nath & Ors, (1997) 1 S.C.C. 388, para. 39 (1996).
153. *Id*. para. 34.
154. *Id*. Another initiative to help protect future generations from the effects of climate change was adopted in Wales in 2015. The first law of its kind in the world, the Well-being of Future Generations Act requires public bodies in Wales to consider sustainable development in all of their decisions to ensure that the needs of present and future generations will be met. *See* Jessica Shankleman, *Government Passes "Groundbreaking" Law to Protect Future Generations From Climate Change*, BusinessGreen, Mar. 18, 2015, http://www.businessgreen.com/bg/news/2400206/wales-passes-groundbreaking-law-to-protect-future-generations-from-climate-change. The law requires Public Services Boards to prepare a local well-being plan setting out local objectives and steps it proposes to take to meet those objectives, including a report containing an assessment of the risks for the United Kingdom of the current and predicted impacts of climate change under the Climate Change Act 2008. *See* Act para.

The success of ATL should be gauged not by how many victories are achieved in state and federal courts under this theory. Rather, ATL's success ultimately should be judged on the basis of the role it played in facilitating state and federal government actors in the United States and abroad to establish and enforce rights and remedies for climate justice. One only needs to look back a few decades to observe similar successes secured through the environmental common law in the United States. Such efforts ultimately achieved effective federal legislative responses and significant damage awards in the contexts of tobacco, lead paint, and asbestos litigation.[155] Climate justice litigation in the United States is currently in the trenches of that struggle, but similar success in this context is on the horizon.

In addition, paralleling the evolution of ATL, scholars and leading NGOs have been active in international and foreign domestic arenas in seeking to promote climate justice from a variety of perspectives. Many of these approaches seek to advance the core goal of ATL and focus on how to leverage the rights of future generations in shaping a future climate justice regime. Some scholarly proposals offer solutions that would need to be crafted within the existing international climate change treaty system,[156] while others find more hope for climate justice outside of that system.[157] Regardless of the method ultimately employed to secure these goals, what is most important is that there is active dialogue and political will throughout the international community to promote climate justice as soon and as effectively as possible. These developments will help move ATL forward.[158]

24. The law also establishes the Future Generations Commissioner for Wales "to act as a guardian for the interests of future generations in Wales, and to support the public bodies listed in the Act to work towards achieving the well-being goals of the Act." Department for Natural Resources of the Welsh Government, Well-being of Future Generations (Wales) Act of 2015: The Essentials 9 (2015), http://gov.wales/docs/dsjlg/publications/150623-guide-to-the-fg-act-en.pdf.

155. Similar to the ATL context, the use of the environmental common law to seek relief in these contexts also has been criticized by scholars. *See, e.g.*, Richard O. Faulk & S. John Gray, *Getting the Lead Out? The Misuse of Public Nuisance Litigation by Public Authorities and Private Counsel*, 21 Toxics L. Rep. 1172, 1176 (2006).

156. *See generally* Peter Lawrence, Justice for Future Generations: Climate Change and International Law (2014) (evaluating why and how climate justice principles should be incorporated into international climate change treaty law rules).

157. *See generally* Teresa M. Thorp, Climate Justice: A Voice for the Future (2014) (proposing to constitutionalize universally applicable principles and legal norms of international climate change law by drawing on a coalition of public, private, and civil society leadership).

158. A burgeoning body of ATL scholarship has emerged within the past few years, which has helped advance the theory as it progresses through the courts and legislatures in the United States and abroad. *See generally* Ken Coghill & Tim Smith eds., Fiduciary Duty and the Atmospheric Trust (2013); Richard J. Lazarus, *Judicial Missteps, Legislative Dysfunction, and the Public Trust Doctrine: Can Two Wrongs Make It Right?*, 45 Envtl. L. 1139 (2015); Tim Kline, *Alec L. and Federal Atmospheric Trust Litigation: Conceptual and Political Gains Amidst Legal Defeat?*, 42 Ecology L.Q. 549 (2015); Kassandra Castillo, *Climate Change & The Public Trust Doctrine: An Analysis of Atmospheric Trust Litigation*, 6 San Diego J. Climate & Energy L. 221 (2015); Kylie Wha Kyung Wager, *In Common*

The growth of ATL is due in part to the helpful synergy it enjoys with the climate change and human rights movement at the international level that began in the wake of the Inuit petition one decade ago and has gained significant momentum since that time. Within the past several years, numerous international conferences, studies, and reports have continued to address the interplay between climate change and human rights. The United Nations Human Rights Council also has weighed in on the issue.[159] A recent example of the international attention that climate change and human rights has received is a major report prepared by the International Bar Association Task Force on Climate Change Justice and Human Rights.[160] Released on September 22, 2014, the 240-page report proposes more than 50 recommendations to promote climate justice responses to protect environmental and human rights. Among the recommendations are proposed legal recognition for a new universal human right to a safe, clean, healthy, and sustainable environment and establishment of a new international dispute resolution framework for climate change issues, including a new International Court on the Environment.[161] Increasing international recognition of the need to engage dispute resolution frameworks to promote climate justice will help ATL achieve its objectives.

Within the U.S. court system, a promising development is unfolding at the state level in the wake of the federal displacement holdings in *AEP* and *Kivalina*. The Clean Air Act federal displacement rationale only applies to *federal* common law claims—the Court in *AEP* expressly left the door open for state common law claims seeking damages.[162] A 2014 decision by the Iowa Supreme Court[163] upheld plaintiffs' rights to seek damages from air pollution in a state common law tort action. Relying on savings clause analysis rooted in the U.S. Supreme Court's preemption analysis in *International Paper Co. v. Ouelette*,[164] the Iowa Supreme Court "rejected the defendants' arguments that the [Clean Air Act] displaced or otherwise preempted state common law nuisance, trespass, and other tort claims for property damage

Law We Trust: How Hawai'i's Public Trust Doctrine Can Support Atmospheric Trust Litigation to Address Climate Change, 20 Hastings W.-N.W. J. Envtl. L. & Pol'y 55 (2014); Jordan M. Ellis, *The Sky's the Limit: Applying the Public Trust Doctrine to the Atmosphere*, 86 Temp. L. Rev. 807 (2014).

159. *See, e.g.*, *Human Rights and Climate Change*, U.N. Human Rights Council, Res. 7/23 (2008), http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_7_23.pdf.

160. International Bar Association, Achieving Justice and Human Rights in an Era of Climate Disruption, *supra* note 6.

161. *Id.*

162. *See* Hester, *supra* note 22, at 52 (citing American Elec. Power v. Connecticut, 131 S. Ct. 2527, 2540 (2011)).

163. Freeman v. Grain Processing Corp., No. 13-0723 (Iowa June 13, 2014).

164. International Paper Co. v. Ouelette, 479 U.S. 481 (1987).

and harms to human health" caused by air pollution.[165] Similarly encouraging, the Court relied on the Second Circuit's reasoning in *AEP* to underscore that "courts have successfully adjudicated complex common law public nuisance claims for more than a century"[166] and rejected the defendant's effort to dismiss as nonjusticiable under the political question doctrine a common law tort claim for air pollution damages. Therefore, this case (and ones that are likely to follow in the near future) that supports the capacity of state courts to adjudicate damage claims for air pollution will provide a helpful foundation for future ATL efforts. As state courts continue to depart from the principle that "damages from atmospheric sources are beyond the courts' capacity to address because the Clean Air Act addresses them," a door will remain open to enhance the opportunity for ATL claims to be successfully adjudicated at the state court level.

Conclusion

Although courts are not the best avenue to pursue effective and comprehensive regulation of climate change, the common law can be a powerful mechanism to goad proper regulatory responses to climate change impacts. The climate justice movement in the United States recently has shifted its jurisprudential reliance to another effective common law tool, atmospheric trust litigation. ATL involves a creative expansion of the public trust doctrine in suits primarily against state governments alleging that the state has a duty to manage its atmospheric resources to protect the interests of future generations.

Although extending the public trust doctrine to the federal government is supported by U.S. and foreign domestic jurisprudence, it is nonetheless possible that ATL plaintiffs may not be able to secure an opportunity to be heard before the U.S. Supreme Court and prevail on the merits of their claim to compel the federal government to regulate climate change. Notwithstanding this potential roadblock for ATL litigation, some recent ATL and non-ATL decisions in the United States and abroad offer hope that this common law theory will help promote climate justice within and outside the court system. Moreover, the growth of dialogue and responses in the international community and in foreign domestic arenas regarding climate change and human rights will enhance the receptivity of the judicial audience in evaluating ATL claims in the years ahead.

165. Howard A. Learner, *Emerging Clarity on Climate Change Law: EPA Empowered and State Common Law Remedies Enabled*, 44 ELR 10744, 10749 (2015).
166. *Freeman*, No. 13-0723, at 62.

The ultimate goal of ATL is to ensure that the federal government will regulate climate change, which, in turn, will help protect current and future victims of climate change impacts. The slow progression toward regulating climate change is already underway in the United States. Moreover, thanks to the power of the environmental common law as reflected in the climate justice litigation in the past decade, there will be significant progress toward this goal in the years ahead as ATL cases continue to achieve success in communicating the urgency of this need for federal regulation.