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AFTER *JULIANA*: A PROPOSAL FOR THE NEXT ATMOSPHERIC TRUST LITIGATION STRATEGY

KACIE COUCH*

*[W]hatever measures have a tendency to dissolve the Union, or contribute to violate or lessen the Sovereign Authority, ought to be considered as hostile to the Liberty and Independence of America[.]*¹

INTRODUCTION

The cliffs of California are dissolving.² Glaciers in Colorado and Montana are dissolving.³ Islands in Louisiana and Alaska are dissolving.⁴

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¹ *President George Washington, Circular Letter of Farewell to the Army (June 8, 1783) (emphasis added), quoted in Juliana v. United States, 947 F.3d 1159, 1178 (9th Cir. 2020) (Stanton, J., dissenting).*

² *See Sea Level Rise Could Double Erosion Rates of Southern California Coastal Cliffs*, U.S. GEOLOGICAL SURV. (July 9, 2018), <https://www.usgs.gov/news/sea-level-rise-could-double-erosion-rates-southern-california-coastal-cliffs> [<https://perma.cc/S4SZ-VGHZ>].

³ *See Oliver Milman, US Glacier National Park Losing Its Glaciers with Just 26 of 150 Left*, GUARDIAN (May 11, 2017), <https://www.theguardian.com/environment/2017/may/11/us-glacier-national-park-is-losing-its-glaciers-with-just-26-of-150-left> [<https://perma.cc/K8R6-BVSP>] (“It’s inevitable that we will lose [every glacier in the contiguous U.S.] over the next few decades. . . . The Colorado glaciers started melting before Montana’s and while there are larger glaciers in the Pacific north-west that will hold on longer, the number vanishing will steadily grow until none are left.”).

⁴ *See, e.g., Madeline Stano, Fighting for Home in the Melting Arctic*, 15 VT. J. ENV'TL. 744, 746 (2014) (chronicling the impacts of climate change on the Alaskan Native Village of Kivalina, an island slated to become uninhabitable by 2025); Carol Davenport & Campbell Robertson, *Resettling the First American ‘Climate Refugees’*, N.Y. TIMES (May 2, 2016) (discussing the resettlement of America’s first climate change refugees: the Biloxi-Chitimacha-Choctaw Indians of Isle de Jean Charles, Louisiana), <https://www.nytimes.com/2016/05/03/us/resettling-the-first-american-climate-refugees.html> [<https://perma.cc/7KTR-TEDH>]; *see also*

America as we know it is dissolving; twenty-one youth plaintiffs that face a future with less liberty and independence than generations before them claim that federal government inaction in the face of climate change is to blame.⁵ Those plaintiffs, in the landmark case *Juliana v. United States*, sought judicial declaration of a federal public trust and substantive due process right to a stable climate system.⁶ In proceedings, Judge Anne Aiken of the District Court of Oregon declared a newly recognized fundamental right to a habitable climate and a federal public trust in the atmosphere in favor of the plaintiffs,⁷ but in a recent two-to-one decision the Ninth Circuit reversed and remanded with instructions to dismiss, holding that the plaintiffs lacked standing before the court.⁸

Juliana exemplifies just one of the growing number of Atmospheric Trust Litigation suits that have steadily gained recognition throughout the United States (and throughout the world)⁹ in the past decade.¹⁰ Atmospheric Trust Litigation, or ATL, is a litigation strategy that seeks to utilize the courts to compel the government to more effectively regulate and reduce greenhouse gas emissions.¹¹ Specifically, litigants hope to compel reduction of carbon dioxide (“CO₂”) emissions to atmospheric levels

Suzanne Goldenberg, *America's Climate Refugees: The At Risk List*, GUARDIAN, <https://www.theguardian.com/environment/interactive/2013/may/14/alaska-villages-frontline-global-warming> [<https://perma.cc/QJR3-BMJ2>] (last visited Nov. 2, 2020) (mapping Alaskan native communities at immediate risk of displacement or harm due to climate change).

⁵ See First Amended Complaint for Declaratory & Injunctive Relief at 2–3, *Juliana v. United States*, 217 F. Supp. 3d 1224 (D. Or. 2016), *rev'd*, 947 F.3d 1159 (9th Cir. 2020) [hereinafter *Juliana* Complaint], available at <https://static1.squarespace.com/static/571d109b04426270152febe0/t/57a35ac5ebbd1ac03847eece/1470323398409/YouthAmendedComplaintAgainstUS.pdf> [<https://perma.cc/584W-ZCTN>].

⁶ *Id.* at 99.

⁷ *Juliana v. United States*, 217 F. Supp. 3d 1224, 1250, 1259 (D. Or. 2016), *rev'd*, 947 F.3d 1159 (9th Cir. 2020).

⁸ *Juliana v. United States*, 947 F.3d 1159, 1175 (9th Cir. 2020).

⁹ For an example of one of the many international ATL cases that have emerged or are currently underway, see *La Rose v. Her Majesty the Queen*, in which fifteen Canadian youth plaintiffs claim that Queen Elizabeth and the Canadian government have contributed to an unsustainable climate system, violating the youths' rights under the Charter of Freedom, and seeking remedy in a court order to implement a Climate Recovery Plan. Statement of Claim to the Defendants at 55–60, *La Rose v. Her Majesty the Queen*, No. T-175 0-19 (Oct. 25, 2019) (Can.), available at http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2019/20191025_T-1750-19_complaint.pdf [<https://perma.cc/3CEM-TDKY>].

¹⁰ See MARY CHRISTINA WOOD, NATURE'S TRUST, 226–28 (2014) [hereinafter NATURE'S TRUST]; *State Legal Actions*, OUR CHILDREN'S TRUST, <https://www.ourchildrenstrust.org/state-legal-actions> [<https://perma.cc/B7UQ-XK48>] (last visited Nov. 2, 2020).

¹¹ See NATURE'S TRUST, *supra* note 10, at 221. For more on ATL, see *infra* Section I.B.

under 350 parts per million, which scientists believe could minimize the effects of climate change that will otherwise disproportionately impact future generations.¹²

While the plaintiffs' loss in *Juliana* might seem bitter to those who wholeheartedly believe in ATL's objective, this Note argues that *Juliana*'s loss might more appropriately be described as *bittersweet*. A favorable determination under the plaintiffs' pleadings could conceivably have produced an unwelcome remedy: federal preemption over state public trust doctrines.¹³ Stemming from the Constitution's Supremacy Clause, the doctrine of preemption stands for the principle that federal law supplants any state law or regulation that is "inconsistent" with federal law.¹⁴ Should a federal public trust be found to exist that is at odds with state definitions of the public trust, many issues of preemption could arise. For example, preemption of state authority over the public trust could hinder cooperative environmental federalism and erode principles of state sovereignty by impairing states' abilities to regulate traditional state uses of waterways and other public trust resources.¹⁵ Furthermore, preemption could prevent individuals from advancing certain common law environmental claims in federal court.¹⁶

Therefore, Atmospheric Trust Litigation remains risky if wielded improperly, as *Juliana* arguably did—but that does not preclude ATL's beneficial use in future lawsuits. In consideration of the issues raised in *Juliana*, this Note argues for a revision of the Atmospheric Trust Litigation strategy in federal court. This proposed revision will more effectively protect the common law rights of individuals and preserve state law while simultaneously compelling recognition of a federal substantive due process right to a livable atmosphere through a state special solicitude case.¹⁷

In Part I, this Note discusses the principles behind the public trust doctrine and details the current state of Atmospheric Trust Litigation, ending with an analysis of the *Juliana* decision. Part II argues that the Ninth Circuit ruled correctly in *Juliana*, because recognition of a federal public trust could endanger principles of federalism and put at risk the more fundamental objective that Atmospheric Trust Litigation plaintiffs fight for. This Note then offers potential revisions to federal Atmospheric

¹² *Juliana* Complaint, *supra* note 5, at 2–5.

¹³ See *infra* Section II.A.

¹⁴ *Preemption*, BLACK'S LAW DICTIONARY (11th ed. 2019); see *infra* Section II.A.

¹⁵ See *infra* Section II.C.

¹⁶ See *infra* Section II.B.

¹⁷ See *infra* Part III.

Trust Litigation pleadings that could remedy those issues. Part III lays the foundation for a state special solicitude Atmospheric Trust Litigation case, building on what has been learned from *Juliana* and prior Atmospheric Trust Litigation cases, that would meet the elements of standing after the *Juliana* decision and could pave the path to a cleaner, healthier atmosphere for current and future generations.

I. THE CURRENT STATE OF ATMOSPHERIC TRUST LITIGATION

Atmospheric Trust Litigation cannot be discussed properly without first ensuring readers' sufficient understanding of the public trust doctrine. Therefore, before detailing the current state of ATL, this Note will take a short detour through a discussion of the Roman and American history of the public trust.

A. *The Public Trust Doctrine*

In the United States, the public trust has been defined as a matter of state law.¹⁸ The public trust doctrine limits sovereign power by requiring the state to hold title in trust to submerged lands under navigable waters, to allow for public use of the trust resources in fishing, navigation, and commerce, and to prevent any alienation of the trust resources that might otherwise be a detriment to the public interest.¹⁹

Though the public trust doctrine exists as a basic principal of state law in each of the fifty states, it did not originate in America, nor does it survive here exclusively.²⁰ The doctrine was first introduced to the Americas by English colonists, whose public trust rights were codified in the Magna Carta.²¹ When America became its own nation, the public trust doctrine was subsequently incorporated into American law through the equal footing doctrine.²² It is insufficient, however, to merely examine

¹⁸ PPL Mont., LLC v. Montana, 565 U.S. 576, 603 (2012) (stating in dicta that “the public trust doctrine remains a matter of state law”).

¹⁹ See Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 475–78 (1970) (the most widely recognized authority on the modern public trust doctrine, discussing the nature of the public trust).

²⁰ See Michael C. Blumm & Rachel D. Guthrie, *Internationalizing the Public Trust Doctrine: Natural Law and Constitutional and Statutory Approaches to Fulfilling the Saxion Vision*, 45 U.C. DAVIS L. REV. 741, 741–43 (2012).

²¹ 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. ENV'T L.J. 184, 187 (2019).

²² The equal footing doctrine stands for “[t]he principle that a state admitted to the Union after 1789 enters with the same rights, sovereignty, and jurisdiction within its borders

the public trust's colonial roots in this country, as the doctrine's origin long predates colonialism.²³ The genesis of England's inclusion of the public trust in its Magna Carta derived from legal foundations set forth in the Institutes of Justinian, a Roman treatise written in the sixth century.²⁴ The Institutes of Justinian is often cited as the foundation of the public trust doctrine, but recent scholarship suggests that the doctrine likely originated centuries earlier.²⁵ Thus, not unlike the ancient Romans, the public trust doctrine has had an impressively long and prolific existence, the impact of which continues to influence the law in many countries of Latin or colonial descent nearly two thousand years later.²⁶

The public trust doctrine's longevity is a testament to its inherent flexibility and ability to adapt as societies progress.²⁷ In fact, between the formation of the original public trust and its contemporary American common law interpretation, the doctrine has been adapted and recast by some of the world's most successful western empires "in order to meet [those societies'] contemporary needs."²⁸ The historical malleability of the public trust doctrine suggests that the public trust is best viewed as an ever-evolving (and typically court-led) institution whose function is to maintain and promote *normative sovereignty* over ecological resources.²⁹

Normative sovereignty over ecological resources is likely to look a lot different in the age of environmentalism and climate change than it

as did the original 13 states." *Equal-Footing Doctrine*, BLACK'S LAW DICTIONARY (11th ed. 2019). For the canonical Supreme Court case explaining the incorporation of the public trust in American law through the equal-footing doctrine, see *Shively v. Bowlby*, 152 U.S. 1, 27–28 (1894).

²³ See, e.g., J.B. Ruhl & Thomas McGinn, *The Roman Public Trust Doctrine: What Was It, and Does It Support an Atmospheric Trust?*, 47 *ECOLOGY L.Q.* 1, 1–2 (forthcoming 2020); Kelly, *supra* note 21, at 187.

²⁴ JUSTINIAN, *INSTITUTES* § 2.1.1 (J.B. Moyle trans., Oxford 1911) ("[T]he following things are by natural law common to all—the air, running water, the sea and consequently the seashore").

²⁵ Ruhl & McGinn, *supra* note 23, at 56 ("There is more than one Roman ancestor of the [public trust doctrine]. The tradition is both older and more varied than previously thought").

²⁶ See generally Blumm & Guthrie, *supra* note 20 (outlining approaches to the public trust doctrine taken in India, Pakistan, the Philippines, Uganda, Kenya, Nigeria, South Africa, Brazil, Ecuador, and Canada). To see current international ATL legal actions underway in the United Kingdom, Ukraine, Norway, France and elsewhere that utilize the public trust doctrine, visit *Global Legal Actions*, OUR CHILDREN'S TRUST, <https://www.ourchildrenstrust.org/global-legal-actions> [<https://perma.cc/CYT6-3PLV>] (last visited Nov. 2, 2020).

²⁷ Kelly, *supra* note 21, at 207.

²⁸ Ruhl & McGinn, *supra* note 23, at 35–36 (discussing how post-Roman Venetian jurists and others reframed Roman common law doctrines such as the public trust doctrine in order to enhance individual rights and state sovereignty).

²⁹ See *id.*

did in ancient Rome. In the United States, even two different states might have different interpretations of what constitutes “normative” sovereignty over ecological resources, depending on that state’s sociopolitical history and geography, or perhaps its vulnerability to climate change. To that point, some states today *have* expanded the public trust through constitutional amendment,³⁰ statute,³¹ or, as has traditionally been the case, through common law³² to protect additional public trust resources and uses. Many states have expanded their definition of the public trust to specifically reflect ecological ideals.³³ For example, Pennsylvania’s public trust has been embraced in an amendment to the Pennsylvania Constitution that commands:

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.³⁴

That constitutional expression of Pennsylvania’s enhanced public trust doctrine was put to the test in *Robinson Township v. Commonwealth*, where the Pennsylvania Supreme Court struck down portions of the Pennsylvania Oil and Gas Act that were incompatible with the duties of the state under that constitutional amendment.³⁵ The court then expanded

³⁰ See generally Kacy Manahan, *Comment: The Constitutional Public Trust Doctrine*, 49 ENV'T L. 263 (2019) (analyzing state constitutional provisions and decisions that define and protect the public trust).

³¹ See generally Robin K. Craig, *A Comparative Guide to the Western States’ Public Trust Doctrines: Public Values, Private Rights, and the Evolution Toward an Ecological Public Trust*, 37 ECOLOGY L.Q. 53 (2010) [hereinafter Craig, *Western States’ Public Trust Doctrines*] (compiling state statutes that define the public trust doctrine in nineteen western states); Robin K. Craig, *A Comparative Guide to the Eastern Public Trust Doctrines: Classifications of States, Property Rights, and State Summaries*, 16 PENN. ST. ENV'T L. REV. 1 (2007) [hereinafter Craig, *Eastern States’ Public Trust Doctrines*] (compiling state statutes that define the public trust doctrine in thirty-one eastern states).

³² See generally Robin K. Craig, *Adapting to Climate Change: The Potential Role of State Common-Law Public Trust Doctrines*, 34 VT. L. REV. 781 (2010) (detailing the evolution of the public trust doctrine in the common law of several states and the potential to utilize the public trust doctrine to address climate change).

³³ See generally *id.*; Manahan, *supra* note 30.

³⁴ PA. CONST. art. I § 27 (emphasis added).

³⁵ *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 1000 (Pa. 2013).

Pennsylvania's public trust even further when it held that "the concept of public natural resources [that the state is obligated to protect] includes 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)."³⁶

It is rare for a state's public trust doctrine to be defined as broadly as Pennsylvania's.³⁷ It is also rare that a state should include its definition of the public trust in its constitution.³⁸ Traditionally, the public trust is defined through common law rather than statutory or constitutional law, which offers less protection to public trust assets because common law can be superseded by legislation or an appellate court decision.³⁹ It is worth noting when a state chooses to protect its public trust through constitutional provision, because constitutional supremacy offers significant protection to public trust assets that cannot be superseded by any state law.⁴⁰ Due to differences in approaches across states, the breadth of each state's definition of the public trust and the degree to which it is protected can vary wildly.⁴¹ Therefore, whether a certain resource (such as the atmosphere) may be considered protected under the public trust must be analyzed on a state-by-state basis.

Thus, it has been established that the public trust doctrine currently applies varying levels of natural resource protection at the state level; but what about at the federal level? Is there such a thing as a *federal* public trust? Many have argued that there is.⁴² Nevertheless, federal

³⁶ *Id.* at 954–56.

³⁷ For details on how each state defines its public trust, *see generally* Craig, *Western States' Public Trust Doctrines*, *supra* note 31; Craig, *Eastern States' Public Trust Doctrines*, *supra* note 31.

³⁸ Manahan, *supra* note 30, at 266, 268 (noting that while "[a] number of states [have] recognized the [public trust doctrine] in the language of their constitutions," the doctrine largely remains characterized as a common law doctrine).

³⁹ *Id.*

⁴⁰ For example, in *In re Water Use Permit Applications*, 9 P.3d 409, 445 (Haw. 2000), the Hawaii Supreme Court interpreted its Constitution to include "the air, running water, the sea, and consequently the shores of the sea" in accordance with the definition of the public trust doctrine in the Roman Institutes of Justinian. Having protected its public trust through constitutional law and supreme court interpretation of that law, Hawaii is therefore in a better position to defend its public trust. For more on this, see *infra* Section III.B.

⁴¹ *See generally* Craig, *Western States' Public Trust Doctrines*, *supra* note 31; Craig, *Eastern States' Public Trust Doctrines*, *supra* note 31.

⁴² *See, e.g.*, Michael C. Blumm & Lynn S. Schaffer, *The Federal Public Trust Doctrine: Misinterpreting Justice Kennedy and Illinois Central Railroad*, 45 ENV'T L. 399, 421–30 (2015) (finding evidence for a federal public trust in federal case law and federal statutes); Kelly, *supra* note 21, at 217–18 (arguing that the public trust doctrine's arrival in the United

case law is against the recognition of a federal public trust.⁴³ In the 1892 case of *Illinois Central Railroad Co. v. Illinois*, the United States Supreme Court asserted in dicta that the public trust was strictly a matter of state law.⁴⁴ Based on that statement, the majority of courts today *assume* that the public trust is strictly a matter of state law, while no binding precedent actually exists to affirm that assumption, or alternatively, to support that the state public trust has a federal public trust counterpart.⁴⁵

With so many variables and unknowns, it is no wonder that “the law involving the public trust doctrine has been recognized by [many] courts as having become unnecessarily complex.”⁴⁶

B. Atmospheric Trust Litigation: A “Liberated” Approach to the Public Trust

Atmospheric Trust Litigation is a litigation strategy that is best described as a “liberated” approach to the public trust doctrine.⁴⁷ ATL’s development was motivated by the increasingly popular theory that unencumbered federal agency discretion in environmental regulation has allowed for abuse of that discretion.⁴⁸ Abuse of discretion has subsequently resulted in excessive permitting, decreased societal benefits, narrow approaches to broad ecological problems, and a great lack of agency accountability.⁴⁹ Accordingly, proponents of ATL argue that environmental

States legal system through the equal footing doctrine suggests that a federal public trust exists); Charles F. Wilkinson, *The Headwaters of the Public Trust: Some Thoughts on the Source and Scope of the Traditional Doctrine*, 19 ENV'T L. 425, 458–59 (1989) (suggesting that the public trust might inherently exist in the Constitution).

⁴³ See *Alec L. v. Jackson*, 863 F. Supp. 2d 11, 13 (D.D.C. 2012), *aff'd* 561 Fed. Appx. 7 (D.C. Cir. 2014) (finding that a federal public trust could not exist because the Supreme Court has declared the public trust a doctrine of state law). *But see* Blumm & Schaffer, *supra* note 42, at 399 (arguing that in *Alec L.*, the court based its holding on mere dicta rather than binding precedent and illustrating that the Supreme Court’s history with the public trust doctrine has been consistently misinterpreted by lower courts).

⁴⁴ *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 435 (1892).

⁴⁵ See, e.g., *PPL Mont., LLC v. Montana*, 565 U.S. 576, 603 (2012) (stating in dicta that “the public trust doctrine remains a matter of state law”). *But cf.* *Light v. United States*, 220 U.S. 523, 537 (1911) (finding that federal public lands “are held in trust for the people of the whole country”). See generally Blumm & Schaffer, *supra* note 42 (compiling cases that have followed the *Illinois Central Railroad* court’s dicta as if it were binding precedent).

⁴⁶ *Gwathmey v. State*, 464 S.E.2d 674, 688 (N.C. 1995).

⁴⁷ See generally Joseph L. Sax, *Liberating the Public Trust Doctrine from Its Historical Shackles*, 14 U.C. DAVIS L. REV. 185 (1980) (suggesting the modernization, “liberation”, of the public trust to protect ecological values).

⁴⁸ See generally NATURE’S TRUST, *supra* note 10.

⁴⁹ See generally *id.*

regulation today exists in an “administrative state” which has skewed the balance of separation of powers too far in favor of the executive branch, allowing political and industrial influence over agency decisions with few, if any, legal consequences.⁵⁰

ATL seeks to circumvent the issues inherent in the administrative state, and attempts to force the judiciary to assume its critical role as an institutional check on executive agency discretion while disincentivizing the court’s current trend of utilizing the administrative deference doctrine⁵¹ as a scapegoat.⁵² To do so, ATL utilizes the public trust, as a recognized foundational common law doctrine that the court is obligated to defend, to contend that the federal government has a fiduciary duty to reduce carbon emissions to protect the atmosphere for current and future generations.⁵³ The basic claims of the Atmospheric Trust Litigation strategy are the following:

- (1) the air and atmosphere, along with other vital natural resources, are within the *res* of the public trust, and therefore subject to special sovereign obligations; (2) the legislature and its implementing agencies are public trustees; (3) both present and future generations of the public are beneficiaries of the public trust; (4) the government trustees owe a fiduciary duty of protection against “substantial impairment” of the air, atmosphere, and climate system, which amounts to an affirmative duty to restore its balance; and (5) courts have a duty to enforce these trust obligations.⁵⁴

The use of the public trust doctrine to protect the greater environment is clever to say the least. A trust framework provides citizen beneficiaries with judicially enforceable rights that go beyond citizens’ political rights as general constituents.⁵⁵ Furthermore, the definition of

⁵⁰ See *id.* at 110–12.

⁵¹ See generally *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019); *Auer v. Robbins*, 519 U.S. 452 (1997); *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.* 467 U.S. 837, 840 (1984).

⁵² See NATURE’S TRUST, *supra* note 10, at 108–12.

⁵³ See *id.* at 226–29.

⁵⁴ Michael C. Blumm & Mary C. Wood, “No Ordinary Lawsuit”: *Climate Change, Due Process, and the Public Trust Doctrine*, 67 AM. U. L. REV. 1, 23 (2017).

⁵⁵ See RESTATEMENT (THIRD) OF TRUSTS §§ 76–84 (AM. L. INST. 2012) (detailing specific duties of trusteeship); *id.* at §§ 93–98 (discussing judicial remedies for breach of trust); see also NATURE’S TRUST, *supra* note 10, at 165–87 (discussing the government’s unwavering

“trust beneficiary” extends farther than the rights and interests of current constituents—it also encompasses *future interest holders*, which forces the government to recognize children and future (i.e., unborn) citizens as beneficiary classes.⁵⁶ If ATL’s public trust argument is supported, then the judicial branch is obligated to uphold the effective management of that public trust for citizens today and in consideration of citizens in the future.⁵⁷ Therefore, in effect, ATL’s “liberated approach” to the public trust presents the court with an additional enforcement mechanism to demand agency and legislative accountability outside of both the political and administrative processes and protects the rights and interests of those without political representation.⁵⁸

In recent years, the use of ATL in environmental litigation has been adopted by individuals and non-government organizations (“NGOs”) alike, but none have utilized it so precisely and methodically as Our Children’s Trust.⁵⁹ Our Children’s Trust (“OCT”), a non-profit public interest law firm, works exclusively to secure the legal rights of present and future generations to a healthy atmosphere and stable climate.⁶⁰ Since 2011, OCT has supported youth plaintiffs in ATL actions numbering over sixty state cases and petitions, filed throughout each of the fifty states.⁶¹ After experiencing little success at the state level,⁶² *Alec L. v.*

obligation under the public trust to uphold fiduciary standards of protection and restoration to the public’s inherited wealth of natural resource assets for current and future generations of citizens).

⁵⁶ NATURE’S TRUST, *supra* note 10, at 272–73. An interesting compounded result of this framework considers the fact that corporations, by law, cannot be trust beneficiaries. Therefore, the effects of *Citizens United v. FEC*, 558 U.S. 310 (2010) (which arguably created a “purchased democracy”), could be counterbalanced by the litigative power of the federal public trust; so long as that public trust is democratically maintained through a robust sphere of public control and right to self-determination. *Id.* at 273.

⁵⁷ *See id.* (“Within this trust paradigm, a government’s legal duties also flow to children and future citizens, both recognized as beneficiary classes.”).

⁵⁸ *See id.* at 226–29 (discussing the judicial role in upholding the public trust and protecting trust rights of youth who are currently resorting to the use of ATL in the face of climate change).

⁵⁹ *See generally* OUR CHILDREN’S TRUST, <https://www.ourchildrenstrust.org> [<https://perma.cc/LZ45-ELE9>] (last visited Nov. 2, 2020).

⁶⁰ *Our Mission*, OUR CHILDREN’S TRUST, <https://www.ourchildrenstrust.org/mission-state> [<https://perma.cc/PC6E-XZAA>] (last visited Nov. 2, 2020).

⁶¹ *See State Legal Actions*, *supra* note 10.

⁶² *See, e.g.*, *Kanuk v. State*, 335 P.3d 1088, 1103 (Alaska 2014) *reh’g denied* (Oct. 28, 2014); *Funk v. Wolf*, 144 A.3d 228, 251–52 (Pa. Commw. Ct. 2016), *aff’d* 638 Pa. 726 (2017); *Svitak ex rel. Svitak v. State*, 2013 WL 6632124, at *2–3 (Wash. Ct. App. Dec. 16, 2013).

Jackson (later renamed *Alec L. v. McCarthy*) became the first ATL suit to appear in federal court in 2012.⁶³

In *Alec L.*, five youth plaintiffs, represented by Julia Olsen of OCT, brought a single claim against federal government agencies, seeking declaratory and injunctive relief for the government's failure to reduce greenhouse gas emissions in violation of its fiduciary duty to protect and preserve the atmosphere under the public trust doctrine.⁶⁴ The District Court dismissed the case for lack of subject matter jurisdiction and noted that the plaintiffs "cited no cases, and the Court [was] aware of none, that have expanded the [public trust] doctrine to protect the atmosphere or impose duties on the federal government."⁶⁵ On appeal, the D.C. Circuit affirmed, citing the recent Supreme Court case *PPL Montana, LLC v. Montana*, which the circuit court read to "repeatedly refer[] to 'the' public trust doctrine . . . directly and categorically reject[ing] any federal constitutional foundation for that doctrine, without qualification or reservation."⁶⁶

Learning from *Alec L.*'s mistakes, *Juliana v. United States* became the second lawsuit to take ATL to federal court in 2015.⁶⁷ The youth plaintiffs in *Juliana* sought declaratory relief finding that a federal public trust exists in the atmosphere, inherent in a Fifth Amendment liberty interest, that would protect present and future generations' right to a livable atmosphere.⁶⁸ Additionally, they sought a declaration that the federal government violated its fiduciary obligation under the trust by failing to adequately address climate change and, in so doing, denied present and future generations their due process right to a livable atmosphere.⁶⁹ To force the federal government to meet its alleged fiduciary duty, the *Juliana* plaintiffs specifically asked the court for an injunction in mandamus, ordering the United States to take inventory of Greenhouse Gas Emissions and to come up with a judicially enforceable plan to reduce

⁶³ *Alec L. v. Jackson*, 863 F. Supp. 2d 11, 13 (D.D.C. 2012), *aff'd* 561 Fed. Appx. 7 (D.C. Cir. 2014).

⁶⁴ *Id.* at 12.

⁶⁵ *Id.* at 13.

⁶⁶ *Alec L. v. McCarthy*, 561 Fed. Appx. 7, 8 (D.C. Cir. 2014) (quoting *Montana*, 565 U.S. at 604 ("Under accepted principles of federalism, the States retain residual power to determine the scope of the public trust over waters within their borders, while federal law determines riverbed title under the equal footing doctrine.")).

⁶⁷ See generally *Juliana* Complaint, *supra* note 5.

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

⁶⁹ *Id.*

emissions by six percent each year to meet a target of 350 parts per million of CO₂ by 2050.⁷⁰ Plaintiffs chose 350 parts per million because “best science confirms that 350 ppm is the maximum safe level of atmospheric CO₂ required to restore a stable climate system.”⁷¹ Today, atmospheric CO₂ levels remain constant above 400 ppm.⁷² Time has run out, and according to ATL proponents, “courts now [hold] the last—and only—hope.”⁷³

Juliana's argument was not completely novel—it was built on the backs of *Alec L.* and the state cases that came before it.⁷⁴ Yet, as the District Court of Oregon accurately explained, “[t]his [was] no ordinary lawsuit.”⁷⁵ Though *Juliana* possessed similarities to prior ATL cases both in strategy and requested relief,⁷⁶ *Juliana*'s substantive claims had the potential to result in vastly different (and perhaps unexpected) consequences. While state ATL cases argued for state courts to declare a state public trust in the atmosphere, *Juliana*, like *Alec L.*, advanced an argument for a federal public trust⁷⁷ and requested that the federal court recognize a constitutional due process right to a clean and healthy atmosphere under federal law.⁷⁸ Where *Alec L.* lacked the constitutional hook to allow subject matter jurisdiction in federal court, *Juliana* depended entirely on that hook by substantiating a federal public trust claim within the Fifth Amendment.⁷⁹

⁷⁰ See *id.*; *Juliana* Complaint, *supra* note 5, at 99.

⁷¹ *Juliana* Complaint, *supra* note 5, at 7.

⁷² Rebecca Lindsey, *Climate Change: Atmospheric Carbon Dioxide*, CLIMATE.GOV (Feb. 20, 2020), <https://www.climate.gov/news-features/understanding-climate/climate-change-atmospheric-carbon-dioxide> [<https://perma.cc/84YX-9Q67>].

⁷³ NATURE'S TRUST, *supra* note 10, at 47.

⁷⁴ See *infra* note 76 and accompanying text.

⁷⁵ *Juliana v. United States*, 947 F.3d 1159, 1159 (9th Cir. 2020).

⁷⁶ *Juliana* requested similar remedies to state ATL counterparts, including a writ of mandamus and declaratory relief affirming the existence of a public trust extended to the atmosphere, as well as a substantive due process right to a livable climate for future generations. *Juliana*'s case strategies are also similar to prior cases, which include interpretivist and textualist approaches to constitutional law shaded with appeals to natural law. Compare *Juliana* Complaint, *supra* note 5, at 89, 97–99, with *Alec L. v. Jackson*, 863 F. Supp. 2d 11, 13–14 (D.D.C. 2012), *aff'd* 561 Fed. Appx. 7 (D.C. Cir. 2014); *Kanuk v. State*, 335 P.3d 1088, 1090–91 (Alaska 2014), *reh'g denied* (Oct. 28, 2014); *Funk v. Wolf*, 144 A.3d 228, 232–33 (Pa. Commw. Ct. 2016), *aff'd* 638 Pa. 726 (2017), and *Svitak ex rel. Svitak v. State*, 2013 WL 6632124, at *1 (Wash. Ct. App. Dec. 16, 2013).

⁷⁷ Compare *Juliana* Complaint, *supra* note 5, at 97–99, with *Alec L.*, 863 F. Supp. 2d at 12.

⁷⁸ See *Juliana* Complaint, *supra* note 5, at 89, 99.

⁷⁹ Compare *id.* with *Alec L.*, 863 F. Supp. 2d at 13–14.

Citing *Obergefell v. Hodges*⁸⁰ as evidence of the modern court's ability to declare a new fundamental due process right, alongside *Massachusetts v. EPA*⁸¹ as precedential evidence of the court's recent and necessary activism in forcing the federal government to address climate change, *Juliana* argued that federal courts must hold federal agencies accountable for inadequate environmental protection in the face of climate change—and put forth that declaring a federal public trust, inherent in a newly recognized Fifth Amendment due process right, was the way to do it.⁸² In a landmark decision, the District Court of Oregon's Judge Ann Aiken sided with the plaintiffs and declared a newly recognized fundamental due process right to a habitable climate and federal public trust in the atmosphere.⁸³

Juliana's victory for ATL was short-lived. In January 2020, the Ninth Circuit reversed and remanded *Juliana* with instructions to dismiss for lack of standing.⁸⁴ The court spent very little time affirming injury and causation; it found that the injuries of at least some plaintiffs were clearly concrete and particularized and that the causal chain was sufficiently established, with 50 years of federal policies and direct federal actions that at the very least created a genuine factual dispute as to whether the government's actions were a substantial factor in causing climate change-related injury.⁸⁵

The sole issue was redressability.⁸⁶ The court contrasted *Juliana* from *Massachusetts v. EPA*, stating that standing requirements for state procedural rights (which are relaxed) substantially differ from standing requirements for individual substantive rights (which are not relaxed).⁸⁷ Invoking separation of powers, the court found that ordering, designing, supervising, or implementing any comprehensive scheme to phase out fossil fuel emissions and draw down excess atmospheric CO₂ through injunctive relief went far beyond the authority of the court.⁸⁸ Additionally, the

⁸⁰ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2605 (2015) (“[W]hen the rights of persons are violated, ‘the Constitution requires redress by the courts,’ notwithstanding the more general value of democratic decisionmaking. This holds true even when protecting individual rights affects issues of the utmost importance and sensitivity.”).

⁸¹ *Massachusetts v. EPA*, 549 U.S. 497, 499 (2007).

⁸² See generally *Juliana* Complaint, *supra* note 5.

⁸³ See *Juliana v. United States*, 217 F. Supp. 3d 1224, 1250, 1259 (D. Or. 2016), *rev'd*, 947 F.3d 1159 (9th Cir. 2020).

⁸⁴ *Juliana v. United States*, 947 F.3d 1159, 1175 (9th Cir. 2020).

⁸⁵ *Id.* at 1169.

⁸⁶ *Id.* at 1171–72.

⁸⁷ *Id.* at 1171.

⁸⁸ *Id.* at 1171–73.

court could not award the plaintiff's requested declaration of a constitutional right to a livable climate, because psychic satisfaction alone would not sufficiently redress the injury of climate change.⁸⁹ Without a guiding constitutional directive or legal standard to guide it, the court couldn't exercise its equitable powers.⁹⁰

The *Juliana* decision leaves ATL litigants with two important takeaways. First, the question of whether there exists a constitutional right to a climate system capable of sustaining human life *remains open*. Second, and perhaps more importantly, the court *explicitly refused* to classify the case as involving a political question,⁹¹ which means that *Juliana's* claims remain relevant and potentially justiciable, so long as the bar to standing can be lowered.

II. FORTIFYING FEDERALISM: THE NEED TO REINVENT ATL

While the Ninth Circuit's decision leaves hope for ATL to return to federal court and fight another day, *Juliana's* claims will not give ATL litigants the remedy that they seek, because the federal public trust argument proffered in *Juliana* presents a significant issue: Should future ATL plaintiffs recycle *Juliana's* claims and manage to succeed in their public trust claim but fail in tying that claim to due process, federal preemption might apply to the public trust. Before addressing how best to bring a new ATL suit that will meet the court's standing requirements, ATL proponents must address the issue of preemption and how to avoid it.

A. Preventing Preemption

While many legal scholars have discussed the potential for *displacement* of public trust claims in federal ATL,⁹² none have focused explicitly on the potential for federal *preemption* of state public trusts.

⁸⁹ *Id.* at 1170.

⁹⁰ *Juliana v. United States*, 947 F.3d 1159, 1175 (9th Cir. 2020) (citing *Rucho v. Common Cause*, 139 S. Ct. 2484, 2508 (2019)) (noting that "failure of political will does not justify unconstitutional remedies").

⁹¹ *Id.* at 1175 n.9 (explicitly stating that: "we do not find this to be a political question").

⁹² See, e.g., Lynn S. Schaffer, *Pulled from Thin Air: The (Mis)Application of Statutory Displacement to a Public Trust Claim* in *Alec v. Jackson*, 19 LEWIS & CLARK L. REV. 169, 170 (2015) (arguing that a federal public trust would not be displaced by statutory structures such as the Clean Air Act); Gerald Torres & Nathan Bellinger, *The Public Trust: The Law's DNA*, 4 WAKE FOREST J.L. & POL'Y 281, 300 (2014).

The basis for both displacement and preemption can be found in the Constitution's Supremacy Clause.⁹³ Though the two are commonly conflated, preemption and displacement are doctrinally distinct.⁹⁴

Displacement occurs when federal statutory law speaks directly to an issue previously governed by federal common law.⁹⁵ In that case, the court-made rule is said to be “displaced” by an act of Congress.⁹⁶ The doctrine of displacement primarily exists to maintain separation of powers.⁹⁷ That is, the courts must yield to the decisions of elected officials in Congress and the executive when a law regarding an issue that was formerly governed through court decisions steps in to govern that issue.⁹⁸

Preemption, on the other hand, occurs when a *state* law is “superseded” by federal law.⁹⁹ Its purpose is to maintain federalism, or the relationship and distribution of power between the states and federal government.¹⁰⁰ The Supreme Court has interpreted the Supremacy Clause to allow for multiple types of preemption.¹⁰¹ This Note does not seek to outline the potential for any particular type of preemption that might apply to the public trust as a result of ATL; it only seeks to highlight the inherent danger that preemption may occur.

⁹³ U.S. CONST. art. VI (stating that the Constitution “shall be the supreme law of the land” and that “the judges in every state shall be bound thereby”—referring to displacement—“anything in the Constitution or laws of any state to the contrary notwithstanding”—referring to preemption).

⁹⁴ See John Wood, *Easier Said Than Done: Displacing Public Nuisance When States Sue for Climate Change Damages*, 41 ENV'T L. REP. 10316, 10321–22 (2011) (explaining the differences between displacement and preemption in common law climate claims).

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ See *id.*

⁹⁹ *Id.*

¹⁰⁰ Wood, *supra* note 94, at 10321.

¹⁰¹ See *Hillsborough Cty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985) (“Under the Supremacy Clause, federal law may supersede state law in several different ways. First, when acting within constitutional limits, Congress is empowered to preempt state law by so stating in express terms. In the absence of express pre-emptive language, Congress’ intent to pre-empt all state law in a particular area may be inferred where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress left no room for supplementary state regulation. Preemption of a whole field also will be inferred where the field is one in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. Even where Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent that it actually conflicts with federal law. . . . We have held repeatedly that state laws can be pre-empted by federal regulations as well as by federal statutes.”) (quotations and citations omitted).

Preemption is a doctrine that is highly deferential to the federal government, so much so that “[e]ven where Congress has not completely displaced state regulation in a specific area,” state law can be nullified if “the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.”¹⁰² Climate change is a massive and wicked problem ripe for dominant federal interest. Under a comprehensive scheme or on-point statute meant to combat climate change, such as the Clean Air Act,¹⁰³ a recognized federal public trust at federal common-law that is then displaced could reasonably be read to later preempt a state public trust action in federal court.¹⁰⁴

Scholars and ATL proponents alike have argued that the public trust is protected from displacement (and presumably, preemption) if it is attached to a substantive due process right, as *Juliana* plaintiffs recently argued.¹⁰⁵ However, the current make-up of the Supreme Court renders it unlikely that the Court will acknowledge a new constitutional liberty interest to a life-sustaining climate system.¹⁰⁶ Recognition of a federal public trust without attaching it to the Constitution puts both state public trust and federal public trust (should one be found to exist) in jeopardy of being displaced and preempted by the federal legislative and executive branches.

Without the constitutional hook that would otherwise protect a federal public trust from displacement or preemption, federal environmental statutes could supersede state public trust law, negatively impact state sovereignty, and blur the line between state and federal authority on

¹⁰² *Id.*

¹⁰³ *See* Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 411 (“[T]he plaintiffs [cannot] state a federal common-law claim for curtailment of greenhouse gas emissions because of [defendants] contribution to global warming. Any such claim would be displaced by the federal legislation authorizing EPA to regulate carbon-dioxide emissions.”).

¹⁰⁴ For an overview of three recent state common-law nuisance claims that have attempted to proceed in federal court under state claims without preemption or displacement, see Rachel Rothschild, *State Nuisance Law and the Climate Challenge to Federalism*, 27 N.Y.U. ENV'T. L.J. 412, 422–24 (2019).

¹⁰⁵ *See, e.g.*, Schaffer, *supra* note 92, at 190–95; Torres & Bellinger, *supra* note 92, at 300–01. *See also* *Juliana* Complaint, *supra* note 5, at 99.

¹⁰⁶ *See, e.g.*, Charles Tiefer, *Kavanaugh Threatens to Become a Potent Anti-Environment Justice*, FORBES (Sept. 10, 2018), <https://www.forbes.com/sites/charlestiefer/2018/09/10/kavanaugh-threatens-to-become-a-potent-anti-environment-justice/#6834efbc186f> [<https://perma.cc/UL6G-BFQB>]; John Echeverria, *The Fate of Environmental Law in a Trump-Era Supreme Court*, SCI. AM. BLOGS (Feb. 8, 2017), <https://blogs.scientificamerican.com/guest-blog/the-fate-of-environmental-law-in-a-trump-era-supreme-court/> [<https://perma.cc/5Q3H-W2TZ>].

state property issues.¹⁰⁷ Ultimately, that could impair states' abilities to regulate the use of public trust resources and could eliminate state-specific cultural and historical practices regarding what is recognized or not recognized as part of each state's public trust. In the worst-case scenario (and counter to ATL litigants' objective to secure a cleaner environment) this could result in environmental decision-making that is *desensitized* to enhanced values that states place on natural resources.¹⁰⁸

In times of political impasse on climate change at the federal level, citizens will look to their states to employ the police power and to courts to utilize the common law, to protect our general welfare.¹⁰⁹ Displacement of a state's ability to utilize common law claims under the public trust at the federal level, and preemption of state public trusts could cripple a state's response to the climate crisis.¹¹⁰

It is in ATL plaintiffs' interest to recognize that states should maintain the greatest possible degree of state sovereignty over public trust resources in the current administrative state. Sovereignty over the public trust can only occur under the *state* public trust doctrine and with the added benefits of our existing framework of cooperative federalism. Therefore, the ATL strategy that was put forth in *Juliana* should be reworked to anticipate and guard against the potential consequence of preemption that could otherwise act against ATL plaintiffs' ultimate objective: securing a cleaner environment through functioning democratic processes and the power of the courts.¹¹¹

B. *A Case Study in Nuisance*

In *American Electric Power Company v. Connecticut* ("AEP"), eight states and New York City joined together to sue fossil-fuel-fired power companies under a federal common law claim of public nuisance.¹¹² A

¹⁰⁷ Cf. Schaffer, *supra* note 92, at 191.

¹⁰⁸ See *id.* at 94, 96; cf. Richard O. Brooks, *A Constitutional Right to a Healthful Environment*, 16 VT. L. REV. 1063, 1103–05 (1991) (arguing that states are best suited to define and protect environmental rights and that state judges are more sensitive in weighing the state's environmental values).

¹⁰⁹ Cf. Brooks, *supra* note 108, at 1103–05.

¹¹⁰ Cf. Wood, *supra* note 94, at 10322 (arguing that the doctrines of preemption and displacement, contrary to how they have previously been wielded, "should have the effect of making government work, rather than exacerbating vicious passivity in the face of public danger").

¹¹¹ See, e.g., NATURE'S TRUST, *supra* note 10, at 226–29.

¹¹² *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 415 (2011).

unanimous Supreme Court held that the Clean Air Act displaced the plaintiffs' claims and the suit was subsequently dismissed.¹¹³ In its analysis, the Court differentiated between displacement and preemption. The Court explained that "[l]egislative *displacement* of federal common law does not require the same sort of evidence of a clear and manifest congressional purpose demanded for *preemption* of state law."¹¹⁴ The test for when federal legislation displaces federal common law "is simply whether the statute speaks directly to the question at issue."¹¹⁵ Multiple cases have similarly held that the federal common law of nuisance has been displaced by environmental statutes administered by the EPA.¹¹⁶

In *Alec L.*, the court held 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."¹¹⁷ Going further, the court stressed that the AEP decision mandated that "the Clean Air Act and the EPA actions it authorizes displace *any* federal common law right to seek abatement of carbon dioxide emissions from fossil-fuel fired power plants."¹¹⁸ This illustrates that if federal common law nuisance claims can be displaced by the Clean Air Act in federal court, so too can federal common law public trust claims.

The AEP Court made a point to note that the availability of a suit under state common law depends upon the "preemptive effect" of the federal act.¹¹⁹ That is, if a federal act evidences a clear and manifest congressional purpose for preemption of state law, then all common law suits, both state and federal, are unavailable.¹²⁰ Many environmental

¹¹³ *Id.* at 413, 415 (Eight Justices took part in the unanimous decision; Sotomayor, J., abstained).

¹¹⁴ *Id.* at 423 (emphasis added).

¹¹⁵ *Id.* at 424 (quotations and citations omitted).

¹¹⁶ See, e.g., *Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981) (*Milwaukee II*) (holding that the Clean Water Act preempted the field of federal common law nuisance in suits regarding water pollution); *Native Vill. of Kivalina v. Exxon Mobile Corp.*, 696 F.3d 849, 849 (9th Cir. 2012) (holding that Section 202 of the Clean Air Act preempted federal common law public nuisance claims that request an injunction for interference with the use and enjoyment of one's property caused by global warming); *County of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934, 937 (N.D. Cal. 2018) (noting that "federal common law is displaced by the Clean Air Act not only when plaintiffs seek injunctive relief to curb emissions but also when they seek damages for a defendant's contribution to global warming.").

¹¹⁷ *Alec L. v. Jackson*, 863 F. Supp. 2d 11, 15–16 (D.D.C. 2012), *aff'd* 561 Fed. Appx. 7 (D.C. Cir. 2014).

¹¹⁸ *Id.* (quoting *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 424 (2011)).

¹¹⁹ *Am. Elec. Power Co.*, 564 U.S. at 429.

¹²⁰ *Id.* ("[I]f a case should be resolved by reference to federal common law, state common

statutes can be read to effectively “preempt the field.” For instance, the court in *Alec L.* suggested that the Clean Air Act fully displaces any public trust interest in atmospheric resources.¹²¹

As previously mentioned, many scholars have offered arguments as to why displacement would not occur in the case of a federal public trust.¹²² But to fully comprehend the dangers of preemption and displacement, it is important to consider the order in which preemption and displacement might occur and the effects of that order, which is where the doctrine of preemption enters the frame. For example, if a federal court were to recognize a federal public trust, that could result in preemption of state public trusts in cases brought in federal court. Because statutes such as the Clean Air Act are said to fully preempt the field of federal common law claims, those environmental statutes would likely then displace the federal public trust. Therefore, under this hypothetical, claims that are brought under the state public trust in federal court would be totally preempted by the Clean Air Act. As a result, plaintiffs would have fewer options to sue in federal court. Additionally, plaintiffs might have inadvertently sacrificed the role of state courts and legislatures in cultivating public trusts that are unique to each states’ ecological values. Preemption could effectively bind each state to federal decisions that would have formerly been made by states in their sovereign capacity relating to property, interests in a clean and healthy atmosphere, or other uses and resources under state public trusts. For these reasons, the goals of ATL and the historical purpose of the public trust doctrine would be best achieved if the public trust remains an exclusive issue of state law.

ATL litigants must be aware of the potential consequences of both displacement and preemption and plan to avoid allowing the public trust doctrine to deteriorate in any court of law. Total preemption of state public trust claims in federal court could foreseeably occur if state common law is preempted by federal common law and subsequently displaced by federal statute. If the public trust is meant to serve as a limitation on government action that can be controlled by popular sovereignty, it would be wise not to consolidate the entire power of the public trust in

law is preempted”) (citing *Int’l Paper Co. v. Ouellete*, 479 U.S. 481, 488 (1987) (holding that state common law nuisance is sometimes preempted by federal legislation) (internal citations omitted)).

¹²¹ See Schaffer, *supra* note 92, at 169–70.

¹²² See, e.g., *id.* (arguing that a federal public trust would not be displaced by statutory structures such as the Clean Air Act); Torres & Bellinger, *supra* note 92, at 300.

the federal government when ATL was invented as a solution to combat the federal administrative state in the first place.

C. *Preserving Both ATL and Cooperative Federalism*

Cooperative environmental federalism that allows for state common law approaches to combatting climate-related injuries would be at stake if federal environmental common law is further recognized and preempted by the Clean Air Act or other federal environmental statutes. Because cooperative federalism remains the best available governance strategy to combat climate change,¹²³ any potential hindrance of that governance strategy must be carefully considered.

This begs the question: why do ATL plaintiffs ask for a federal public trust? Theoretically, any litigant who seeks a similar remedy to ATL plaintiffs (a right to a clean and healthy environment and a court order mandating emissions reductions) could simply ask the court to create a Fifth Amendment due process right to a clean and healthy atmosphere.¹²⁴ There is no absolute need to affirm the existence of a federal public trust in order to reach a similar remedy. Furthermore, extensive research provides a myriad of explanations why litigants should *avoid* the federal public trust argument.¹²⁵

As alluded to previously,¹²⁶ ATL proponents likely ask for a federal public trust due to the fiduciary relationship that the public trust

¹²³ William W. Buzbee, *Federalism Hedging, Entrenchment, and the Climate Challenge*, 2017 WIS. L. REV. 1037, 1113 (2017) (“Federal climate preemption and unitary regulatory scheme arguments may make sense in an idealized world of perfect, stable legal commitments, but in a real world pervaded by regulatory failure, reversal risks, and political instability, such unitary preemptive regimes would undercut climate progress. . . . Retaining room for state and local climate regulation and linked clean energy efforts hedges regulatory risks. Such overlapping and potentially intertwined federal and state regulation may . . . be the most effective way to ensure that a future federal climate law or regulation under existing law will actually be implemented and endure despite ongoing political and legal contestation.”).

¹²⁴ See *Juliana v. United States*, 217 F. Supp. 3d 1224, 1250, 1259 (D. Or. 2016).

¹²⁵ See, e.g., 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, 264–69 (2013) (noting many drawbacks to using the public trust to mitigate greenhouse gas emissions); James L. Huffman, *Why Liberating the Public Trust Doctrine Is Bad for the Public*, 45 ENV'T L. 337, 376–77 (2015) (arguing that expansion of the public trust doctrine erodes the rule of law); James L. Huffman, *A Fish Out of Water: The Public Trust Doctrine in a Constitutional Democracy*, 19 ENV'T L. 527, 528 (1989) (claiming that public trust law “infringes upon vested private property rights” and that an expansive public trust may be unconstitutional).

¹²⁶ See discussion of trust relationship *supra* Section I.B.

creates, which is a powerful tool to force government action.¹²⁷ The available remedy in trust law—recognition of a traditional fiduciary relationship between the citizens and government and judicial enforcement of that relationship—is meant to serve as a limitation on government action that can be controlled by popular sovereignty.¹²⁸ That may be true—and if it is, an effective public trust can only exist when the people *maintain* that sovereignty. But the people’s sovereignty can shift in the sands of politics and populism. Climate law must be able to respond quickly to withstand those shifts. Quickly is not a word frequently associated with the federal government, which is one reason that states are in the best position to adapt laws to prepare for a future that is faced with climate change.¹²⁹

The public trust, a doctrine imbibed with great power and flexibility, is best utilized by the states in tandem with ground-floor environmental regulation set by federal agencies, to promote efficient protection of individuals’ and states’ rights to a clean and healthy environment. A federal public trust need not exist to make an impact at the federal level. The federal government remains obligated under multiple doctrines and constitutional provisions, namely the Tenth Amendment,¹³⁰ to not hinder the protection of the state public trust. Underpinnings of Roman and English law that inform the state public trust could support that argument without risking endangerment of state rights and cooperative federalism as a result of federal public trust recognition and state public trust preemption.

¹²⁷ The public trust has been described as that which “weav[es] together two civic strands of power and obligation,” thus embodying both a willful subjugation of individual autonomy and authority through delegation of management from citizens to the federal government, as well as an establishment of a fiduciary relationship between the government and the people, thereby protecting the political process from more powerful interests. NATURE’S TRUST, *supra* note 10, at 129.

¹²⁸ See *supra* Section I.B.

¹²⁹ See, e.g., Craig, *supra* note 32, at 781 (arguing that public trust doctrines at the state level “give willing states a legal vehicle for: (1) acknowledging climate change as a threat to public resources; (2) continually reassessing the cumulative impacts climate change is causing; (3) supporting fledgling adaptive management efforts by state agencies; and, at the extreme, (4) engaging in judicial adaptive management, in the sense of rebalancing private rights and public values in impacted aquatic resources, ecosystems, and ecosystem services”).

¹³⁰ U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

It is true that the public trust is an essential characteristic of a functioning democracy,¹³¹ but a federal public trust would not be useful in actualizing the protections and relationships of a fiduciary and beneficiary, and in America's unique system of cooperative federalism, this role in upholding our functioning democracy belongs to the states. The federal government is simply less equipped to uphold a fiduciary duty under the public trust than the states, who have historically filled that fiduciary role since the *Illinois Central Railroad Co.* decision.¹³²

In conclusion, recognition of a federal public trust runs the risk of preempting state law and could cause more harm to the goals of ATL and historical purpose of the public trust doctrine than good, when alternative mechanisms to achieving the goals of ATL plaintiffs are available using slightly different claims. ATL proponents must consider that preemption and the resulting consolidation of authority in public trust decision making in the federal government would likely result in less protection through the political process than if the public trust remained an issue of state law. In the end, a win for ATL under *Juliana's* pleadings could result in a weaker public trust doctrine overall.

III. A MAP TO MASSACHUSETTS: UTILIZING SPECIAL SOLICITUDE STATE STANDING TO CRAFT A NEW ATL STRATEGY

The future of ATL and the remedy it seeks to gain cannot be secured under *Juliana's* pleadings, but it also cannot be secured by *Juliana's* plaintiffs. That is, due to standing requirements, ATL is unlikely to succeed at the federal level in suits brought by *individuals*. This section argues that the future of ATL is the responsibility of the states. To protect the public trust and secure the remedy sought by ATL plaintiffs, state attorneys general should sue the federal government using a unique ATL strategy: the state should seek to affirm the public trust in the atmosphere as a matter of *state law* while calling upon the Court to declare a substantive due process right to a climate system capable of supporting human life.¹³³ Rather than basing a claim on the failure of the federal government to act in its fiduciary capacity under a *federal* public trust,

¹³¹ NATURE'S TRUST, *supra* note 10, at 125.

¹³² See generally Craig, *Western States' Public Trust Doctrines*, *supra* note 31; Craig, *Eastern States' Public Trust Doctrines*, *supra* note 31.

¹³³ See *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) ("due process is flexible and calls for such procedural protections as the particular situation demands").

the suit should instead be brought in the state's quasi-sovereign capacity under Fifth Amendment due process and the Tenth Amendment. The state should claim that the federal government, in not effectively regulating CO₂, is preventing the *state* from upholding *its* fiduciary duty under the state public trust, especially to protected classes of citizens, such as children.¹³⁴ The state should then ask the federal court for an order in mandamus compelling federal government action to more forcefully combat climate change.

By couching the public trust claim in the context of preserving federalism, the state public trust is protected, and the court maintains its voice in ensuring that states can uphold their quasi-sovereign obligations under existing state public trusts. This strategy would enhance environmental protection, protect the American system of cooperative federalism and would limit neither the state nor federal government's role in protecting the atmosphere.

It is critical that a state be party to this case, because standing in future ATL cases is sure to remain an issue.¹³⁵ The doctrine of special solicitude reduces standing requirements and allows a state to bring forth a suit against the United States government on behalf of that state's citizens and its quasi-sovereign interests that are "independent of and behind the titles of its citizens, in all the earth and air within its domain."¹³⁶ Because the Ninth Circuit explicitly did not dismiss *Juliana* under the political question doctrine,¹³⁷ decreased requirements for standing, which can be met following the Supreme Court's decision involving special solicitude state-standing in *Massachusetts v. EPA*, provides ATL plaintiffs a path forward to meet standing requirements and fight in federal court another day.¹³⁸

¹³⁴ In including the protection of special classes, a claim could also be brought under Equal Protection, similar to another claim in *Juliana*. See *Juliana*, 947 F.3d at 1165.

¹³⁵ See *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907) (allowing states to bring forth claims on behalf of the citizens of the state); *Massachusetts v. EPA*, 549 U.S. 497, 518–20 (2007) (declaring enhanced "special solicitude" standing in cases brought by a state in its quasi-sovereign interest).

¹³⁶ *Massachusetts*, 549 U.S. at 518–19 (quoting *Tenn. Copper Co.*, 206 U.S. at 237). For more on special solicitude in the environmental context, see generally Dorothea Allocca, *Special State Standing Is Environmental: Clarifying Massachusetts v. EPA*, 45 WM. & MARY ENV'T L. & POL'Y REV. 193 (2020), also published in this Issue.

¹³⁷ *Juliana v. United States*, 947 F.3d 1159, 1175 n.9 (9th Cir.) (explicitly stating that: "we do not find this to be a political question").

¹³⁸ See generally *supra* note 136 and accompanying text.

A. *State Standing*

Each plaintiff that brings forth a suit must meet the three requirements of standing: injury in fact, causation, and redressability.¹³⁹ However, standing requirements become more complex in cases that involve a state as a plaintiff.¹⁴⁰ For a state to have standing to bring a suit in federal court, it must prove that it has one of three types of state interests in the litigation: proprietary,¹⁴¹ sovereign,¹⁴² or quasi-sovereign.¹⁴³ Precedent in *Pennsylvania v. New Jersey* informs us that “a State has standing to sue only when its sovereign or quasi-sovereign interests are implicated *and* it is not merely litigating as a volunteer the personal claims of its citizens.”¹⁴⁴ Therefore, a state could not succeed in merely joining an ATL suit that is already underway. The state must bring the suit on its own.

“Quasi-sovereign” is defined in *Georgia v. Tennessee Copper*.¹⁴⁵ That case involved a suit by the state of Georgia against copper companies in a neighboring state.¹⁴⁶ Georgia sought to enjoin the companies from discharging noxious gases that threatened the environment in five Georgia counties.¹⁴⁷ The Supreme Court held that Georgia “ha[d] an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It ha[d] the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air.”¹⁴⁸ This interest, the court held, was within the State’s quasi-sovereign capacity to protect.¹⁴⁹

¹³⁹ *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992).

¹⁴⁰ See Shannon M. Roesler, *State Standing to Challenge Federal Authority in the Modern Administrative State*, 91 WASH. L. REV. 637, 639 (2016) (“federal standing doctrine is notoriously unclear about the extent to which governments, and in particular the states, have constitutional standing to litigate questions of governmental authority in federal courts.”).

¹⁴¹ A proprietary state interest “is analogous to private common law interests (state property and contracts, for example), which have long been recognized as legally justiciable.” *Id.* at 640.

¹⁴² A sovereign interest involves a state’s interest in its ability to govern; in other words, a state’s interest in its jurisdiction, in terms of geographical scope as well as authority. *Id.* at 640, 672.

¹⁴³ A state acts in its quasi-sovereign capacity when it acts to protect the rights of its citizens, as Massachusetts did in *Massachusetts v. EPA*. *Id.* at 676. Sovereign and quasi-sovereign interests are at times difficult to distinguish from one another. *Id.* at 640.

¹⁴⁴ 426 U.S. 660, 665 (1976) (emphasis added).

¹⁴⁵ 206 U.S. at 237.

¹⁴⁶ *Id.* at 236.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 237.

¹⁴⁹ *Id.*

In *Massachusetts v. EPA*, states, local governments, and environmental organizations challenged EPA's decision not to regulate greenhouse gas emissions from new motor vehicles under the Clean Air Act.¹⁵⁰ The Court held that Massachusetts met standing requirements because it held "a special position and interest" as a sovereign state whose physical interest in the land within its borders would be actually and imminently affected by the federal government's inaction.¹⁵¹ Similar to the Ninth Circuit's findings in *Juliana*, the Supreme Court in *Massachusetts* found clear evidence of injury and causation between federal government inaction and climate change, sufficient to meet those requirements of standing.¹⁵² The Court found that Massachusetts had a right to protect its concrete interests and reiterated "the special position and interest of Massachusetts," holding that "[i]t is of considerable relevance that the party seeking review here is a sovereign State."¹⁵³

Thus, the doctrine of special solicitude authorizes special standing for state governments to bring forth a case when the state acts in a quasi-sovereign capacity to directly protect the well-being and best interests of its citizens.¹⁵⁴ As applied to ATL, and similar to in *Massachusetts v. EPA*, a state bringing suit against the federal government for failure to adequately protect the interests of the state and its citizens would be an example of that state acting in a sovereign capacity to protect its own interests under the Tenth Amendment, as well as in a quasi-sovereign capacity to protect the interests of its citizens under the Fifth Amendment.¹⁵⁵ If a state were to bring a federal suit in such capacities, it would qualify for special solicitude and thus a federal court would lower the bar to standing, increasing the likelihood that the ATL suit would be allowed to proceed.¹⁵⁶

B. Hawaii v. United States: A Hypothetical ATL Suit

So far, no state has attempted to bring forth an ATL suit against the United States. As discussed *supra*, public trust assets are likely to receive the greatest degree of protection when codified in a state constitution.¹⁵⁷ Of the state constitutions that include the public trust, few remain airtight;

¹⁵⁰ *Massachusetts*, 549 U.S. at 505.

¹⁵¹ *Id.* at 498.

¹⁵² Compare *id.* at 521, 523, with *Juliana v. United States*, 947 F.3d 1159, 1168–69 (9th Cir. 2020).

¹⁵³ *Massachusetts*, 549 U.S. at 518.

¹⁵⁴ See *id.* at 520.

¹⁵⁵ See *id.*

¹⁵⁶ See *id.*

¹⁵⁷ See *supra* Section I.A.

for example, the Pennsylvania Court that decided *Robinson Township*, discussed *infra*, previously interpreted that state's constitutionally protected public trust in such a way that weakened the Amendment.¹⁵⁸ Other states have similarly faced problems with their own courts diminishing the value of the constitutional protections to be afforded to the trust.¹⁵⁹ The state that brings forth the next ATL suit should be the state that offers the greatest degree of protection to its public trust resources. That will give ATL proponents the strongest argument that the federal government is infringing on that state's reserved Tenth Amendment powers.

Hawaii fits that bill.¹⁶⁰ Hawaii amended its Constitution in 1972 to include the public trust in article XI, section 9:

For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State. All public natural resources are held in trust by the State for the benefit of the people.¹⁶¹

Since the time of its enactment, no court decision in the state of Hawaii has undercut or diminished the value of that Amendment in any way. In fact, the Supreme Court of Hawaii has recently expanded its interpretation of Hawaiian citizens' public trust rights under article XI, section 9 of the Hawaii Constitution even further.¹⁶²

Because of the expansive nature of Hawaii's public trust, it could easily be argued that in Hawaii, a state public trust exists in the atmosphere.¹⁶³ If the state of Hawaii were to bring an ATL suit against the

¹⁵⁸ See *Commonwealth v. Nat'l Gettysburg Battlefield Tower, Inc.*, 311 A.2d 588, 588 (Pa. 1973).

¹⁵⁹ See, e.g., *Svitak ex rel. Svitak v. State*, 178 Wash. App. 1020 (2013) (dismissing an ATD suit for failure to state a claim and lack of subject matter jurisdiction despite the fact that Washington gave enhanced protection to the public trust through nonjudicial means).

¹⁶⁰ See generally Kylie Wha Kyung Wager, *In Common 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. ENV'T L. & POL'Y 55 (2014) (detailing why and how Hawai'i's public trust doctrine is perfectly situated to support ATL).

¹⁶¹ HAW. CONST. art. XI, § 9.

¹⁶² See *id.*; *In re Water Use Permit Applications*, 9 P.3d 409, 443–44 (Haw. 2000).

¹⁶³ See Wager, *supra* note 160, at 83.

federal government to protect Hawaiians' public trust in the atmosphere for future generations, a federal court would be more inclined to declare a substantive due process right to a clean and livable atmosphere. Though a court may be tempted to preempt Hawaiian constitutional law under the Supremacy Clause,¹⁶⁴ the Tenth Amendment offers protection to those reserved powers of the state that protect the interests of its citizens through the state's police power.¹⁶⁵ Hence, Hawaii has a good chance of judicially forcing federal government action while avoiding preemption of the state public trust, thus fulfilling the ultimate goals of ATL without any of the potential disadvantages associated with previous ATL litigation.

Just as previous ATL cases utilize interpretivist and textualist approaches to make their arguments, shaded with appeals to natural law,¹⁶⁶ the same devices can be used here: When the federal government prevents a state such as Hawaii from effectuating its fiduciary duty to enforce a livable climate in Hawaii through the state's Tenth Amendment police power, the federal government infringes upon more than the plain meaning of the state's police power; it infringes upon the ability of the state to effectively function as a sovereign. It is the duty of the state to uphold these fundamental, bedrock principles of law for the protection of its citizens.¹⁶⁷ If Hawaii were to bring a suit against the federal government, it should force the federal government to recognize and appreciate that duty and would protect the sovereignty of both states and citizens while simultaneously providing a remedy for ATL plaintiffs.¹⁶⁸

CONCLUSION

To achieve the long-term goal of ATL litigants, a case should be brought by a state under the doctrine of special solicitude in federal court.

¹⁶⁴ See U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

¹⁶⁵ See U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the states respectively, or to the people.").

¹⁶⁶ See *supra* note 76 and accompanying text (discussing the similarities between arguments used in *Juliana* and prior ATL cases).

¹⁶⁷ See U.S. CONST. amend. X.

¹⁶⁸ Though beyond the scope of this Note, the application of this strategy to current issues in environmental federalism beyond ATL merits further discussion. For more on this, see *generally* Allocca, *supra* note 136.

The state should bring forth claims in its quasi-sovereign capacity, under Fifth Amendment substantive due process, the Tenth Amendment, and the state public trust.¹⁶⁹ The state should ask for a declaration that the public trust exists as an element of state sovereignty under the Tenth Amendment and that a Fifth Amendment right to a livable climate exists in the atmosphere.¹⁷⁰ Further, the state should argue that the federal government is preventing that state from meeting its fiduciary duty to citizens under the trust beneficiary framework and unconstitutionally denying the right to a livable climate to its citizens under the Fifth Amendment.¹⁷¹ The state should then ask the court to order an injunction in mandamus, compelling the federal government to make substantial efforts to reduce CO₂ emissions to atmospheric levels under 350 parts per million, which will decrease future impacts of global climate change that will otherwise disproportionately impact future generations.¹⁷²

This ATL strategy will advance cooperative environmental federalism, protect individual rights to the public trust under state law, and allow for greater regulation of greenhouse gas emissions at both the state and federal level.¹⁷³ By placing our state public trust in the hands of the courts while protecting the trust from becoming consumed by the federal administrative state, we validate the court's role in our system of checks and balances. This strategy is consistent with the malleable historical background of the public trust and aligns with what is known of the public trust's original goals: upholding sovereignty, individual rights, and public autonomy over public resources.¹⁷⁴ While the loss in *Juliana* was bitter-sweet, hope for ATL—and what it stands for—is not lost.

*[T]ake solace that “the arc of the moral universe is long, but it bends towards justice.” The denial of an individual, constitutional right—though grievous and harmful—can be corrected in the future, even if it takes 91 years. And that possibility provides hope for future generations.*¹⁷⁵

¹⁶⁹ See *supra* Parts II–III.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² See *supra* Sections I.B–III.B.

¹⁷³ See *supra* Sections I.B–C.

¹⁷⁴ See *supra* Section I.A.

¹⁷⁵ *Juliana v. United States*, 947 F.3d 1159, 1191 (9th Cir. 2020) (Stanton, J., dissenting) (quoting Dr. Martin Luther King, Jr., Remaining Awake Through a Great Revolution, Address at the National Cathedral, Washington, D.C. (Mar. 31, 1968)).