

NOTES & COMMENTS

PULLED FROM THIN AIR: THE (MIS)APPLICATION OF STATUTORY DISPLACEMENT TO A PUBLIC TRUST CLAIM IN *ALEC L. V. JACKSON*

by
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In the spring of 2012, a group of young citizens brought a lawsuit alleging that the federal government had breached its fiduciary obligations under the public trust doctrine by failing to protect the atmosphere from catastrophic climate change. Alec L. v. Jackson, 863 F. Supp. 2d 11 (D.D.C. 2012). The D.C. Circuit Court affirmed the district court's dismissal of the youths' case in an unpublished memorandum opinion, holding that the federal courts have no jurisdiction to hear public trust claims because they fail to present a question arising under federal law. Alec L. v. McCarthy, 561 F. Appx. 7 (2014). Although not reviewed on appeal, a secondary basis for the district court's dismissal warrants careful analysis in light of the disagreement among legal scholars about the existence of a federal public trust and conflicting judicial decisions. The district court in Alec L. held alternatively that even if a federal public trust doctrine existed, federal statutes and regulations have displaced the public trust. With respect to the atmosphere, the Alec L. court concluded that the Clean Air

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Act has displaced entirely any public trust in atmospheric resources. This Article examines the application of displacement in the public trust context and argues that the application is entirely improper. The D.C. District Court's decision in Alec L. adopts the principles of displacement with no careful judicial analysis of the public trust cause of action, the applicable precedent in the federal context, or the Clean Air Act itself. Despite the fact that the court's secondary holding was not addressed on review by the circuit court, the decision in Alec L. has the potential to reach property and natural-resource issues far beyond the context of this case. The decision does not answer whether the Clean Air Act precludes public trust claims related to any resources damaged by climate change, such as oceans or farmlands, or only those claims that seek action to protect the atmosphere directly by demanding reductions in greenhouse-gas emissions. The decision fails to address whether other federal statutes similarly displace public trust protections over the resources regulated by those statutes. Finally, the decision does not speak to whether statutory preclusion in the federal context impacts state public trust protections and, if so, to what extent. The Alec L. decision opens these questions for argument and it will likely spur litigation throughout the states and in the federal courts. Such uncertainty is wholly unnecessary in view of the existing federal case law on the public trust and the failure of the district court to engage in any in-depth displacement analysis. This Article argues that statutory displacement of the public trust in any context is inconsistent with the origins of the trust and entirely incompatible with its purposes.

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INTRODUCTION

In *Alec L.*, five young citizens brought suit under the public trust doctrine against agencies of the United States government alleging a breach of their fiduciary responsibility to preserve and protect the atmosphere as a commonly shared public trust resource.¹ The children sought declaratory and injunctive relief, asserting that the government had failed to reduce greenhouse-gas emissions in the face of catastrophic climate change.² The United States District Court for the District of Columbia dismissed the case, holding that the public trust doctrine created only a question of state law under *PPL Montana*.³ In a two-page memorandum affirming the district court's dismissal of the case, the D.C. Circuit determined that the public trust doctrine did not present a federal question that would allow Article III courts to hear the case,⁴ and the Supreme Court subsequently denied certiorari.⁵ However, scholars have long debated the question of whether a federal public trust doctrine exists,⁶ and the decision in *Alec L.* has not settled the matter.⁷

¹ *Alec L. v. Jackson*, 863 F. Supp. 2d 11 (D.D.C. 2012), *aff'd sub nom. Alec L. ex rel. Loorz v. McCarthy (Alec L. II)*, 561 F. App'x 7 (D.C. Cir. 2014), *cert denied*, 135 S. Ct. 774 (2014). The federal action was originally filed in the Northern District Court of California, but that court granted the defendants' motion to transfer venue to the District of Columbia. *Alec L. v. Jackson*, No. C-11-2203 EMC, 2011 WL 8583134, at *1 (N.D. Cal. Dec. 6, 2011). *Alec L.* was part of a "hatch" of atmospheric-trust litigation brought by youth plaintiffs in May of 2011. The campaign, supported by a non-profit organization called Our Children's Trust in Eugene, Oregon, included a host of actions across the country along with the action before the federal court. *E.g.*, *Peshlakai ex rel. Butler v. Brewer*, No. 1 CA-CV 12-0347, 2013 WL 1091209 (Ariz. App. Mar. 14, 2013); *Bonser-Lain ex rel. TVH v. Tex. Comm'n on Env'tl. Quality*, No. D-1-GN-11-002194, 2012 WL 3164561 (Tex. Dist. Ct. Aug. 2, 2012), *vacated on other grounds*, No. 03-12-00555-CV, 2014 WL 3702446 (Tex. App. 2014); *Svitak ex rel. Svitak v. Washington*, No. 69710-2-I, 2013 WL 6632124 (Wash. Ct. App. Dec. 16, 2013); *see also* Lawrence Hurley, *The Mother Behind Kids' Long-Shot Legal Crusade*, GREENWIRE (Dec. 19, 2012), <http://www.eenews.net/stories/1059974030>.

² *Alec L.*, 863 F. Supp. 2d at 12.

³ *PPL Mont., LLC v. Montana*, 132 S. Ct. 1215 (2012).

⁴ *Alec L. II*, 561 F. App'x at 7. Plaintiffs invoked the federal-question statute, 28 U.S.C. § 1331, as the basis for subject-matter jurisdiction.

⁵ *Alec L. ex rel. Loorz v. McCarthy*, 135 S. Ct. 774 (2014).

⁶ *See, e.g.*, Gerald Torres & Nathan Bellinger, *The Public Trust: The Law's DNA*, 4 WAKE FOREST J.L. & POL'Y 281, 295–96 (2014); Robin Kundis Craig, *Adapting to Climate Change: The Potential Role of State Common-Law Public Trust Doctrines*, 34 VT. L. REV. 781, 804 (2010) ("The legal basis—federal common law, federal constitutional law, or state law—for some aspects of the Court's pronouncements regarding the public trust doctrine, such as the alienability of public trust lands, is questionable."); James L. Huffman, *Speaking of Inconvenient Truths—A History of the Public Trust Doctrine*, 18 DUKE ENVTL. L. & POL'Y F. 1, 93–103 (2007) (rejecting any expansive interpretation or flexibility embedded in the doctrine's historic roots); Alexandra B. Klass, *Modern Public Trust Principles: Recognizing Rights and Integrating Standards*, 82 NOTRE DAME L. REV. 699, 701–02 (2006) (proposing a consolidated framework to integrate public trust principles through the common law, statutes, and constitutions of individual states); Joseph D. Kearney & Thomas W. Merrill, *The Origins of the*

American Public Trust Doctrine: What Really Happened in Illinois Central, 71 U. CHI. L. REV. 799, 929 (2004) (tracing the factual history of *Illinois Central* and suggesting that it might justify a federal rule of decision—or at least that “the possibility is not frivolous”); J. Wallace Malley, Jr. & Jeffrey M. Silverstein, *The Public Trust Doctrine and Federal Condemnation: A Call for Recognition of a Federal Common Law*, 15 VT. L. REV. 501, 503 (1991) (calling for courts to formally adopt a federal public trust common law to force federal management of state public trust property obtained through condemnation); Mary Turnipseed et al., *The Silver Anniversary of the United States’ Exclusive Economic Zone: Twenty-Five Years of Ocean Use and Abuse, and the Possibility of a Blue Water Public Trust Doctrine*, 36 ECOLOGY L.Q. 1, 8 (2009) (observing that public trust duties and principles appear throughout federal environmental statutory language, agency mission statements, and national policy recommendations, but courts have not explicitly established a federal common-law doctrine and Congress has not explicitly created a statutory federal-trust duty); Charles F. Wilkinson, *The Headwaters of the Public Trust: Some Thoughts on the Source and Scope of the Traditional Doctrine*, 19 ENVTL. L. 425, 459–62 (1989) (concluding that, although the question remains unresolved, both state and federal law provide the most satisfactory definition of the substantive standards for administering the trust).

⁷ The D.C. Circuit concluded that *PPL Montana* reflected a categorical rejection of any federal constitutional foundation for the public trust doctrine. “The Supreme Court in *PPL Montana* . . . repeatedly referred to ‘the’ public trust doctrine and directly and categorically rejected any federal constitutional foundation for that doctrine, without qualification or reservation.” *Alec L. II*, 561 F. App’x at 8. However, a long line of both federal and state cases—none of which were discussed or cited by either the district court or the D.C. Circuit—have explicitly recognized a federal-trust responsibility as the basis for the federal government’s authority to protect the public domain. *E.g.*, *Light v. United States*, 220 U.S. 523, 537 (1911) (“All the public lands of the nation are held in trust for the people of the whole country.” (paraphrasing *United States v. Trinidad Coal & Coking Co.*, 137 U.S. 160 (1890)); *United States v. Beebe*, 127 U.S. 338, 342 (1888) (“The public domain is held by the Government as part of its trust. The Government is charged with the duty and clothed with the power to protect it from trespass and unlawful appropriation”); *United States v. CB & I Constructors, Inc.*, 685 F.3d 827, 836 (9th Cir. 2012) (“In the public lands context, the federal government is more akin to a trustee that holds natural resources for the benefit of present and future generations.”); *Germania Iron Co. v. United States*, 58 F. 334, 336 (8th Cir. 1893) (“As has been frequently declared, in substance, the government is clothed with a trust in respect to the public domain.”), *aff’d*, 165 U.S. 379 (1897); *Conner v. U.S. Dep’t of the Interior*, 73 F. Supp. 2d 1215, 1219 (D. Nev. 1999) (“The United States holds public lands in trust and has the right and obligation to protect those lands from trespass.”); *United States v. Burlington N. R.R.*, 710 F. Supp. 1286, 1287 (D. Neb. 1989) (“Although the public trust doctrine traditionally applied to tidalwaters and the land submerged beneath them, the concept of the United States holding its land in trust for the general population has been extant for quite some time.”); *In re Steuart Transp. Co.*, 495 F. Supp. 38, 40 (E.D. Va. 1980) (“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.”); *Mendiola v. Graham*, 10 P.2d 911, 914 (Or. 1932); *Sw. Wash. Prod. Credit Ass’n v. Fender*, 150 P.2d 983, 986 (Wash. 1944); *see also* *Petition for a Writ of Certiorari, Alec L. ex rel. Loorz v. McCarthy*, 2014 U.S. S. Ct. Briefs LEXIS 3549 (No. 14-405); *Amicus Curiae Brief of Law Professors in Support of Granting Writ of Certiorari, Alec L. ex rel. Loorz v. McCarthy*, 2014 U.S. S. Ct. Briefs LEXIS 3897 (No. 14-405).

Although the basis of the district court's dismissal rested primarily on the question of federal jurisdiction,⁸ a secondary line of reasoning merits careful consideration in light of the disagreement among legal scholars about the existence of a federal public trust and conflicting judicial decisions.⁹ The *Alec L.* court held alternatively that even if a federal public trust doctrine existed, federal statutes and regulations have displaced the public trust.¹⁰ With respect to the atmosphere, the *Alec L.* court concluded that the Clean Air Act has displaced entirely any public trust in atmospheric resources.¹¹

Notably, the district court declined to definitively answer the question of whether the atmosphere constitutes a public trust resource. Thus far, the question of whether the air or atmosphere falls under the protections of the public trust doctrine has been determined piecemeal by the states.¹² An analysis of whether public trust questions do or should apply to the atmosphere is beyond the scope of this Article. For purposes of analyzing whether statutes should displace the public trust doctrine, however, this Article assumes that the atmosphere—like running water,

⁸ The D.C. Circuit affirmed the lower court's dismissal entirely on jurisdictional grounds in an unpublished two-page memorandum in *Alec L. II*, 561 F. App'x at 7. As such, the opinion appears on its face as a summary approval of the district court's reasoning supporting dismissal of the case. The remainder of the Article therefore focuses on the district court's analysis and the basis for its holdings.

⁹ See *supra* notes 6–7.

¹⁰ *Alec L. v. Jackson*, 863 F. Supp. 2d 11, 15–16 (D.D.C. 2012), *aff'd*, *Alec L. II*, 561 F. App'x 7.

¹¹ Clean Air Act, 42 U.S.C. §§ 7401–7671q (2012); *Alec L.*, 863 F. Supp. 2d at 17.

¹² See, e.g., *Peshlakai ex rel. Butler v. Brewer*, No. 1 CA-CV 12-0347, 2013 WL 1091209, at *3 (Ariz. App. Mar. 14, 2013) (declining to address whether the air is part of the trust res and instead holding that plaintiffs failed to state a justiciable claim); *Nat'l Audubon Soc'y v. Superior Court*, 658 P.2d 709, 719 (Cal. 1983) (recognizing the “purity of the air” among the public trust's purposes); *Filippone ex rel. Filippone v. Iowa Dep't of Natural Res.*, No. 2-1005, 2013 WL 988627, at *1 (Iowa Ct. App. Mar. 13, 2013) (adopting the government's view of public trust as not extending to the atmosphere); *Robinson Twp. v. Pennsylvania*, 83 A.3d 901, 955 (Pa. 2013) (plurality opinion) (“At present, the concept of public natural resources includes not only state-owned lands, waterways, and mineral reserves, but also resources that implicate the public interest, such as ambient air, surface and ground water, wild flora, and fauna”); *Bonser-Lain ex rel. TVH v. Tex. Comm'n on Env'tl. Quality*, No. D-1-GN-11-002194, 2012 WL 3164561 (Tex. Dist. Ct. Aug. 2, 2012), *vacated on other grounds*, No. 03-12-00555-CV, 2014 WL 3702446 (Tex. App. 2014) (holding that the public trust doctrine includes all resources of the state including the air and atmosphere); *Svitak ex rel. Svitak v. Washington*, No. 69710-2-I, 2013 WL 6632124, at *2 (Wash. Ct. App. Dec. 16, 2013); see also HAW. CONST. art. XI, § 1 (“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”); PA. CONST. art. I, § 27 (“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.”); R.I. CONST. art. I, § 17 (“[I]t shall be the duty of the general assembly to provide for the conservation of the air, land, water, plant, animal, mineral and other natural resources of the state”).

the sea, and the shores of the sea—are part of the trust res and common to mankind.¹³

In applying statutory displacement in the public trust context, however, the *Alec L.* court did not address the broader implications of its conclusion. For example, the decision did not indicate whether the Clean Air Act precludes all public trust claims related to resources damaged by climate change, or only those claims that seek action to protect the atmosphere directly by demanding reductions in greenhouse-gas emissions. Additionally, the decision fails to address whether other federal statutes similarly displace public trust protections over the resources regulated by those statutes. The decision does not speak to whether statutory preclusion in the federal context impacts state public trust protections and, if so, to what extent.

This Article examines the application of the principle of statutory displacement in the context of the public trust.¹⁴ In Part I, this Article explores examples of statutory displacement of the trust in state settings and whether such displacement has occurred as the result of legislative intent or through judicial interpretation. Part II outlines the reasoning of the *Alec L.* court in its application of statutory displacement in the federal context. In Part III, this Article argues that statutory displacement of the

¹³ J. INST. 2.1.1 (“These things are, by the Law of Nature, common to all mankind—air, running water, the sea, and consequently the shores of the sea.”). For arguments in support of the application of the public trust doctrine to atmospheric resources, see MARY CHRISTINA WOOD, NATURE’S TRUST: ENVIRONMENTAL LAW FOR A NEW ECOLOGICAL AGE 160 (2014); Gerald Torres, *Who Owns the Sky?*, 18 PACE ENVTL. L. REV. 227, 229 (2001); Mary Christina Wood, *Advancing the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations (Part I): Ecological Realism and the Need for a Paradigm Shift*, 39 ENVTL. L. 43, 78–81 (2009); see also Brief of Law Professors as Amici Curiae in Support of Plaintiffs-Appellants Seeking Reversal at 20, *Alec L. II*, 561 F. App’x 7 (No. 13-5192) [hereinafter Brief of Law Professors].

¹⁴ This Article will not trace the origins or background of the trust; sufficient and superior scholarly work exists on the subject. See Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 475–91 (1970); THE PUBLIC TRUST DOCTRINE IN 45 STATES (Michael Blumm ed., 2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2235329; Robin Kundis Craig, *A Comparative Guide to the Western States’ Public Trust Doctrines: Public Values, Private Rights, and the Evolution Toward an Ecological Public Trust*, 37 ECOLOGY L.Q. 53, 59–61 (2010) [hereinafter Craig, *Comparative Guide to the Western Public Trust Doctrines*]; Robin Kundis Craig, *A Comparative Guide to the Eastern Public Trust Doctrines: Classifications of States, Property Rights, and State Summaries*, 16 PENN ST. ENVTL. L. REV. 1, 5–6 (2007) [hereinafter Craig, *Comparative Guide to the Eastern Public Trust Doctrines*]; Wilkinson, *supra* note 6, at 453–64; David Takacs, Student Essay, *The Public Trust Doctrine, Environmental Human Rights, and the Future of Private Property*, 16 N.Y.U. ENVTL. L.J. 711, 713–15 (2008). Remarkably, since the seminal work of Joseph Sax was published, the “public trust doctrine” has appeared in at least 707 state court cases, 146 federal court cases, and more than 2,700 scholarly works. (Westlaw search on August 16, 2014 in all databases for the phrase “public trust doctrine.”). The work has also been cited outside of the United States. See, e.g., *Mehta v. Nath*, (1997) 1 S.C.C. 388 (1996) (India).

public trust in any context is legally inconsistent with its origins and incompatible with its purposes. Part IV explores why public trust disputes place the judiciary in a role distinct from mere common-law claims and argues that the judiciary has an absolute obligation not only to review public trust claims on their merits, but to embrace comprehensive remedies that provide meaningful protection to the public's trust assets. While statutes may properly *embody* the trust, allowing sovereign bodies to effectively and efficiently carry out their duties to protect the trust res, those same statutes—the expression of a single political generation and the product of political compromise—cannot *displace* the fiduciary trust over the resources held in trust for present and future generations.

I. STATUTORY DISPLACEMENT IN THE STATE CONTEXT

Statutory displacement as a mechanism to alter (or attempt to alter) the contours of public trust governance has occurred at the state level.¹⁵ This discussion will not attempt a comprehensive analysis of the role displacement has played in the individual public trust doctrines of the fifty states. Instead, this Part of the Article will explore several key examples of statutory displacement of public trust protections by statute in the state context. Statutory displacement of the public trust has tended to weaken its protections rather than strengthen them. To explore countervailing contexts in which the state has attempted to enhance trust protections for present and future generations, this Part will separately describe settings in which states have instead chosen to embody trust protections in constitutional and statutory language.

A. *Statutory Displacement at the State Level*

Statutory displacement may become manifest through explicit legislative language expressing a clear intent to displace the trust. For example, in 1983, the Idaho Supreme Court issued an opinion endorsing the application of the public trust doctrine to water rights in *Kootenai Environmental Alliance v. Panhandle Yacht Club*.¹⁶ The Idaho legislature, howev-

¹⁵ Displacement analysis generally involves a judicial recognition that the legislature, through statutory law, has supplanted common law by “filling the field” formerly occupied by that common law. *See, e.g.*, *Am. Elec. Power Co. v. Connecticut (AEP)*, 131 S. Ct. 2527, 2537 (2011); *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 856 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 2390 (2013); *Michigan v. U.S. Army Corps of Eng'rs*, 667 F.3d 765, 800 (7th Cir. 2011).

¹⁶ 671 P.2d 1085, 1088 (Idaho 1983). This decision followed shortly on the heels of the California Supreme Court's now-famous decision in the Mono Lake case, which held that the state had an affirmative duty to protect trust resources and that trust protections extended to the Lake's feeder streams. *Nat'l Audubon Soc'y*, 658 P.2d at 719. The Mono Lake court recognized an expanded set of resources to which the trust can apply: “The principal values plaintiffs seek to protect, however, are recreational and ecological—the scenic views of the lake and its shore, the purity of

er, subsequently passed a statute that (at least on its face) purports to halt the application of the doctrine to water rights.¹⁷ The statute reads, “[t]he public trust doctrine as it is applied in the state of Idaho is solely a limitation on the power of the state to alienate or encumber the title to the beds of navigable waters as defined in this chapter.”¹⁸ The legislature essentially sought to weaken—indeed, eliminate—the protections of the public trust recognized by the judicial branch by legislative fiat.

Although some scholars have questioned the validity of the state’s actions,¹⁹ no one has yet challenged Idaho’s statute. Nonetheless, a subsequent case in the United States Supreme Court calls the state’s actions into question. In *Idaho v. Coeur d’Alene Tribe*,²⁰ the Tribe sought to prevent state officials from interfering with the Tribe’s asserted ownership over submerged lands. The Court held that sovereign immunity barred the Tribe’s claim under the Eleventh Amendment.²¹ In its reasoning, the Court characterized submerged lands as sovereign territory, “with a unique status in the law and infused with a public trust the State itself is bound to respect.”²² The Court recognized state ownership of those lands as an essential attribute of sovereignty, arising from the Constitution itself.²³

The Idaho example suggests that despite legislative attempts to displace trust protections by statute, the public trust doctrine—at least in this setting—will override statutes that weaken basic trust protections. According to the Supreme Court’s interpretation in *Coeur d’Alene Tribe*, even when the intent to displace the public trust is clearly expressed by a legislature, certain sovereign resources are infused with a unique legal status that should allow the judiciary to protect them from that displacement for future generations and future legislatures.

While the Idaho statute limiting public trust protections to exclude water rights has not been directly challenged, the Arizona courts have at least once roundly rejected a similar statutory scheme. Arizona provides a particularly fascinating example of statutory-displacement disputes in the context of the public trust. In at least one setting, Arizona’s courts have refused to permit the statutory destruction of the public trust’s constitutional limits on the state’s authority, finding expression of the trust in the state’s constitutional gift clause.

the air, and the use of the lake for nesting and feeding by birds. . . . [I]t is clear that protection of these values is among the purposes of the public trust.” *Id.*

¹⁷ IDAHO CODE ANN. § 58-1203 (2012).

¹⁸ *Id.*

¹⁹ See Michael C. Blumm et al., *Renouncing the Public Trust Doctrine: An Assessment of the Validity of Idaho House Bill 794*, 24 *ECOLOGY L.Q.* 461, 463 (1997) (arguing that the legislation impermissibly conveyed public rights in violation of the state’s sovereign responsibilities, the equal footing doctrine, and the Idaho constitution).

²⁰ 521 U.S. 261 (1997).

²¹ *Id.* at 281.

²² *Id.* at 283.

²³ *Id.*

In *San Carlos Apache Tribe v. Superior Court*,²⁴ the Arizona Supreme Court reviewed a statute that excluded public trust considerations from water-rights adjudications. As noted by one set of scholars, “the Supreme Court of Arizona would have none of it.”²⁵ The statute at issue expressly barred the consideration of public trust values as part of its water-rights adjudication process:

The public trust is not an element of a water right in an adjudication proceeding held pursuant to this article. In adjudicating the attributes of water rights pursuant to this article, the court shall not make a determination as to whether public trust values are associated with any or all of the river system or source.²⁶

In rejecting the Legislature’s prohibition against considering the public trust doctrine, the Supreme Court declared that the public trust inhered in the Constitution. “The public trust doctrine is a constitutional limitation on legislative power to give away resources held by the state in trust for its people.”²⁷ The court went on to explain that a statute cannot render the public trust doctrine inapplicable to any proceeding:

The Legislature cannot order the courts to make the doctrine inapplicable to these or any proceedings. While the issue has been raised before the master, we do not yet know if the doctrine applies to all, some, or none of the claims. That determination depends on the facts before a judge, not on a statute. It is for the courts to decide whether the public trust doctrine is applicable to the facts. *The Legislature cannot by legislation destroy the constitutional limits on its authority.*²⁸

In response to the Legislature’s attempts to displace the public trust by statute, then, the judiciary in Arizona chose to protect the public trust rights of the people and hold the sovereign to its fiduciary responsibility not to abrogate trust resources.

The court in *San Carlos* relied extensively on a prior state decision in *Arizona Center for Law in the Public Interest v. Hassell*,²⁹ where organizations and individuals brought action against the state challenging the validity of a statute substantially relinquishing the state’s interest in riverbed lands. The Arizona Court of Appeals held that the statute constituted a gift to riparian landowners without adequate consideration.³⁰ Although the statute sought to serve a valid public purpose (i.e., to uncloud title to the state’s riverbeds and avoid costly and cumbersome litigation), the public purpose alone did not render the state’s action valid under the

²⁴ 972 P.2d 179 (Ariz. 1999).

²⁵ MICHAEL C. BLUMM & MARY CHRISTINA WOOD, *THE PUBLIC TRUST DOCTRINE IN ENVIRONMENTAL AND NATURAL RESOURCES LAW* 165 (2013).

²⁶ *San Carlos*, 972 P.2d at 199.

²⁷ *Id.*

²⁸ *Id.* (emphasis added).

²⁹ 837 P.2d 158 (Ariz. Ct. App. 1991).

³⁰ *Id.* at 172.

gift clause unless the state received adequate consideration.³¹ Reading both of these cases in conjunction, it appears that—at least in Arizona—the Legislature may exercise discretion and convey trust property for a valid public purpose and just consideration, but it may not use statutes to displace the constitutional protections of the public trust.

In stark contrast, however, the recent Arizona atmospheric-trust case recognized at least the possibility that the doctrine of statutory displacement could apply in trust settings, utilizing language similar to that of the federal court's holding in *Alec L. In Peshlakai ex rel. Butler v. Brewer*,³² a youth plaintiff brought suit against Arizona and the Arizona Department of Environmental Quality seeking, in part, a declaration that the atmosphere is a part of the public trust and injunctive relief mandating the state to take action to curb carbon-dioxide emissions as part of its fiduciary duty to preserve the atmospheric trust.³³ The Arizona Superior Court dismissed the plaintiff's case in *Butler*, concluding she had raised only non-justiciable political questions; *Butler* appealed.³⁴ The defendants raised several arguments on appeal, asserting that the public trust did not include the atmosphere, that *Butler* lacked standing, that the complaint raised non-justiciable political questions, and that the state's Comprehensive Air Quality Act ("CAQA") displaced the doctrine with respect to air-quality regulation.³⁵

The Arizona Court of Appeals in *Butler* affirmed the Superior Court's dismissal of the case, concluding that because the plaintiff failed to point to a specific state action or constitutional provision violated by the state, the court could not grant relief.³⁶ The court stated, "Butler does not give us any basis to determine that the State's inaction violates any specific constitutional provision on which relief can be granted."³⁷ Importantly, the *Butler* court did not reach the question of statutory displacement raised by the defendants—and the merits of the decision relied entirely on justiciability grounds. However, in its analysis, the court explicitly recognized that statutory displacement in Arizona law could apply to ques-

³¹ *Id.* at 171; *see also* *Defenders of Wildlife v. Hull*, 18 P.3d 722, 738–39 (Ariz. Ct. App. 2001) (holding that a statute disclaiming the state's interest in waterbeds based on preempted standards for determining navigability violated Arizona's gift clause).

³² No. 1 CA-CV 12-0347, 2013 WL 1091209 (Ariz. App. Mar. 14, 2013).

³³ *Id.* at *1; *see supra* note 29.

³⁴ *Peshlakai*, 2013 WL 1091209, at *2.

³⁵ *Id.*

³⁶ *Id.* at *7–8.

³⁷ *Id.* at *7. This language closely resembles the language in the Washington Supreme Court's decision in *Svitak* and the D.C. District Court's decision in *Alec L. See Alec L. v. Jackson*, 863 F. Supp. 2d 11, 12 (D.D.C. 2012) ("Plaintiffs' one-count complaint does not allege that the defendants violated any specific federal law or constitutional provision, but instead alleges violations of the federal public trust doctrine."), *aff'd Alec L. II*, 561 F. App'x 7 (D.C. Cir. 2014); *Svitak ex rel. Svitak v. Washington*, No. 69710-2-I, 2013 WL 6632124, at *2 (Wash. Ct. App. Dec. 16, 2013) ("[T]he State's inaction does not violate any specific constitutional provision or other law on which relief can be granted.").

tions of the public trust. “[T]his Court has once determined that public trust claims can be displaced by a comprehensive statutory scheme, but it does not necessarily follow that in the absence of such a scheme the Doctrine is inapplicable.”³⁸

In concluding that comprehensive statutory schemes could displace public trust claims, the Arizona Court of Appeals looked to *Seven Springs Ranch, Inc. v. State ex rel. Arizona Dep’t of Water Resources*, a 1987 case involving a groundwater-rights dispute over the state’s 1980 Groundwater Management Act.³⁹ The ranchers in *Seven Springs Ranch* argued that the state failed to consider the public trust application in its designation of groundwater basins and sub-basins under the Act.⁴⁰ Although the statute itself contained no language related to the public trust,⁴¹ the Court of Appeals in *Seven Springs Ranch* adopted the trial court’s conclusion, holding that:

the 1980 Arizona Groundwater Management Act specifies the factors to be considered when drawing basin and sub-basin boundaries; that such factors are exclusive in nature in that no other factors should be considered under the auspices of the Public Trust Doctrine; and that the Department of Water Resources was therefore correct in not considering any factors under such doctrine.⁴²

Thus, despite the absence of any explicit legislative statement of intent to displace the trust,⁴³ the Arizona Court of Appeals interpreted the Comprehensive Groundwater Management Act as displacing the public trust.

³⁸ *Peshlakai*, 2013 WL 1091209, at *6 n.4.

³⁹ 753 P.2d 161 (Ariz. Ct. App. 1987).

⁴⁰ *Id.* at 165.

⁴¹ See ARIZ. REV. STAT. ANN. § 45-544 (2012).

⁴² *Seven Springs Ranch*, 753 P.2d at 165–66.

⁴³ Although the statement of legislative purpose in the 1980 Groundwater Management Act contains broad language related to the general welfare of the people of Arizona and authorizes the “comprehensive management and regulation” of groundwater, it does not reference the public trust. ARIZ. REV. STAT. ANN. § 45-401. “The legislature finds that the people of Arizona are dependent in whole or in part upon groundwater basins for their water supply and . . . withdrawal of groundwater . . . is threatening to destroy the economy of certain areas of this state and is threatening to do substantial injury to the general economy and welfare of this state and its citizens. The legislature further finds that it is in the best interest of the general economy and welfare of this state and its citizens that the legislature evoke its police power to prescribe which uses of groundwater are most beneficial and economically effective. . . . It is therefore declared to be the public policy of this state that in the interest of protecting and stabilizing the general economy and welfare of this state and its citizens it is necessary to conserve, protect and allocate the use of groundwater resources of the state and to provide a framework for the comprehensive management and regulation of the withdrawal, transportation, use, conservation and conveyance of rights to use the groundwater in this state.” *Id.*

The *San Carlos* court relied on the state constitution's gift clause in rejecting the statutory elimination of the public trust.⁴⁴ At least on the surface, then, that holding can be reconciled with the statements related to trust displacement in *Butler* because the plaintiff in *Butler* did not allege a violation of the gift clause.⁴⁵ However, the *Butler* court failed to address the inconsistency between *San Carlos*'s sweeping condemnation of legislative abrogations of trust protections and the summary acceptance of statutory displacement in *Seven Springs Ranch*. At best, then, the *Butler* analysis on displacement is incomplete, and the more thorough analysis of trust principles in *San Carlos* suggests that—just as in Idaho—even the deliberate attempts to eviscerate trust protections must fall beneath the strength of state constitutional protections of the public trust where the court conducts a proper and in-depth review of the doctrine.⁴⁶

In *Svitak v. Washington*,⁴⁷ the Washington Court of Appeals had the opportunity to review the claims of youth plaintiffs who, just like the plaintiffs in *Alec L.* and *Butler*, sought declaratory and injunctive relief alleging that the atmosphere is a public trust and that the state had an affirmative duty to preserve and protect the atmosphere for present and future generations.⁴⁸ The lower court dismissed the case for failure to state a justiciable claim and lack of subject-matter jurisdiction, and the Court of Appeals affirmed the dismissal.⁴⁹ Just as in *Alec L.* and *Butler*, the

⁴⁴ *San Carlos Apache Tribe v. Superior Court*, 972 P.2d 179, 199 (Ariz. 1999).

⁴⁵ See Peshlakai *ex rel.* *Butler v. Brewer*, No. 1 CA-CV 12-0347, 2013 WL 1091209 (Ariz. App. Mar. 14, 2013).

⁴⁶ The discussion of trust displacement in *Butler* and the application of displacement in *Seven Springs Ranch* can also be distinguished from *San Carlos* because the statute at issue in *San Carlos* explicitly abrogated the trust. *San Carlos*, 972 P.2d at 199. In *Seven Springs Ranch*, the court concluded that the statute at issue presented a comprehensive management and regulatory scheme and thereby displaced the resource. *Seven Springs Ranch*, 753 P.2d at 165–66. As discussed more fully below in Parts III and IV, however, the mere enactment of even a comprehensive management scheme should not displace trust protections. Whether intentional or not, a statutory scheme that displaces the trust would bind all future legislative bodies, in violation of both the reserved-powers doctrine and the purposes of the trust itself. See *Ill. Cent. R.R. v. Illinois*, 146 U.S. 387, 460 (1892) (“The legislature could not give away nor sell the discretion of its successors in respect to matters, the government of which, from the very nature of things, must vary with varying circumstances. . . . Every legislature must, at the time of its existence, exercise the power of the State in the execution of the trust devolved upon it.”); Brief of Law Professors, *supra* note 13, at 5 (“The reserved powers doctrine recognizes that one legislature may not legitimately infringe upon the equal sovereignty of later legislatures. The principle prevents one legislature from binding a later legislature by enacting an irrepealable law, for example.”); Torres & Bellinger, *supra* note 6, at 291–92 (arguing that the government’s trustee duties are an essential attribute of sovereignty protected by the reserved-powers doctrine).

⁴⁷ *Svitak ex rel. Svitak v. Washington*, No. 69710-2-I, 2013 WL 6632124 (Wash. Ct. App. Dec. 16, 2013); see *supra* note 37.

⁴⁸ *Svitak*, 2013 WL 6632124, at *1.

⁴⁹ *Id.* at *1–3.

lower court dismissed plaintiffs' complaint without making any findings of fact.

The Court of Appeals reasoned that dismissal of the case properly rested on the plaintiffs' asserted failure to point to any statutory or constitutional provision under which they might obtain a remedy.⁵⁰ The court characterized the plaintiffs' challenge as "essentially a challenge to state inaction."⁵¹ The court determined that the relief sought by plaintiffs would demand a novel cause of action and ask the courts to craft policy, thereby invading the role of the legislature in violation of the separation-of-powers doctrine.⁵² The court ultimately concluded that "[t]he legislature has already acted in this area" and that granting the plaintiffs' demands would require the judiciary to rewrite the state statutes that addressed greenhouse-gas emissions.⁵³ The court never explicitly recognized the statutory displacement of plaintiffs' public trust claims, but its holding in fact results in displacement. The existence of a legislative scheme addressing greenhouse-gas emissions required the plaintiffs to bring claims under those statutes, and the court concluded that no cause of action existed to allow plaintiffs to challenge the government's violation of its fiduciary duty.⁵⁴

The Washington court's analysis closely mirrors the federal court's analysis under *Alec L.* Unsurprisingly, then, the errors in the court's analysis can also be explored through *Alec L.* The Washington court incorrectly assumed without discussion that the plaintiffs' claims lacked a constitutional underpinning; at a more basic level, the court failed to conduct any substantive analysis of whether the state statute actually "filled the field" of public trust questions.⁵⁵ As discussed more fully below, this conclusory acceptance of statutory displacement fails under careful analysis. At best, Washington's statute represents a mere embodiment of the state's trust-management scheme, but statutory displacement of the public trust—in Washington and elsewhere—is far from an automatic conclusion.

II. THE (MIS)APPLICATION OF STATUTORY DISPLACEMENT IN *ALEC L.*

*Alec L. v. Jackson*⁵⁶ represents the first clear assertion by the federal courts that statutory displacement applies in the public trust context.⁵⁷ In

⁵⁰ *Id.* at *1–2.

⁵¹ *Id.* at *2.

⁵² *Id.*

⁵³ *Id.*; see WASH. REV. CODE §§ 70.235.005–70.235.070 (2012); see also *id.* §§ 70.120A.010, 80.80.040.

⁵⁴ *Svitak*, 2013 WL 6632124 at *2.

⁵⁵ See *infra* notes 88–90 and accompanying text.

⁵⁶ 863 F. Supp. 2d 11 (D.D.C. 2012), *aff'd Alec L. II*, 561 F. App'x 7 (D.C. Cir. 2014).

Alec L., five youth plaintiffs led a group of citizens and environmental organizations to challenge the failure of federal agencies to reduce greenhouse-gas emissions, alleging violations of the federal government's fiduciary duty to protect the atmosphere under the public trust doctrine.⁵⁸ The defendants moved to dismiss the complaint, and in a seven-page opinion the district court granted the defendants' motion.⁵⁹ The court based its dismissal on two alternative lines of reasoning. First, the court held that the public trust doctrine was exclusively a creature of state law.⁶⁰ Alternatively, the court concluded that, even if a federal public trust doctrine had existed historically, federal statutes—in particular the Clean Air Act—"displace[d] any federal common law right" to challenge federal agencies' failure to protect the atmosphere from damage due to greenhouse-gas emissions.⁶¹ The district court based its reasoning on three key federal cases: *PPL Montana, LLC v. Montana*,⁶² *District of Columbia v. Air Florida, Inc.*,⁶³ and *American Electric Power Co. v. Connecticut*.⁶⁴

The district court relied on *PPL Montana* to conclude that the plaintiffs had failed to raise a federal question or cause of action,⁶⁵ and the D.C. Circuit affirmed that holding in its memorandum decision.⁶⁶ The question of whether causes of action based in public trust doctrine arise strictly as a matter of state law, or whether they can arise under both state and federal law remains an open one, despite the Supreme Court's deci-

⁵⁷ An earlier case before the District Court of Appeals, *District of Columbia v. Air Florida, Inc.*, discussed the concern that Congress had "preempted some or all of the field which a federal common-law public trust doctrine would occupy" when it declined to address a claim that the District had a public trust responsibility over the Potomac River. 750 F.2d 1077, 1085 (D.C. Cir. 1984). The plaintiff had failed to raise public trust claims at the trial level and the Court of Appeals concluded that the complexity of the issue "deserves to be considered in a case where the parties have had a full opportunity to present testimony and arguments, and the District Court has had occasion to pass on, the question." *Id.* at 1086.

⁵⁸ *Alec L.*, 863 F. Supp. 2d at 12.

⁵⁹ *Id.* at 17.

⁶⁰ *Id.* at 15.

⁶¹ *Id.* at 15–16 (quoting *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2537 (2012)) (internal quotation marks omitted).

⁶² 132 S. Ct. 1215 (2012).

⁶³ 750 F.2d 1077 (D.C. Cir. 1984).

⁶⁴ 131 S. Ct. 2527.

⁶⁵ The district court in *Alec L.* relied on two key phrases from Justice Kennedy's decision in *PPL Montana* to support its dismissal of the complaint: (1) "the public trust doctrine remains a matter of state law," and (2) "its contours . . . do not depend upon the Constitution." *Alec L.*, 863 F. Supp. 2d at 15 (quoting *PPL Montana*, 132 S. Ct. at 1235) (alteration in original) (emphasis and internal quotation marks omitted). The *Alec L.* court declined to assert whether, in its opinion, this language constituted the holding of *PPL Montana* or dicta, asserting the language was binding under either designation, and that even if the language was not binding, it was persuasive. *Id.* The D.C. Circuit affirmed the dismissal of the case based on language from *PPL Montana* as well. *See supra* note 7.

⁶⁶ *Alec L. II*, 561 Fed. App'x 7 (2014); *see supra* note 7.

sion in *PPL Montana*.⁶⁷ An analysis of whether public trust duties and obligations extend to the federal government “to begin with” lies beyond the scope of this Article.⁶⁸ In order to more closely examine the second alternative holding of *Alec L.*, however, the remainder of the discussion assumes the existence of a federal public trust.

As an alternative basis for dismissal of the plaintiffs’ complaint, the district court held that even if a federal public trust had existed at one time, federal statutes had displaced that trust. “Alternatively, 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.”⁶⁹ The district court, however, relied on cases which fail to provide direct support for its alternative holding: *Air Florida*, a D.C. Court of Appeals decision from 1984, and *AEP*, a 2011 Supreme Court decision.⁷⁰ An examination of the facts and holding of these two cases demonstrates two key weaknesses in the court’s analysis. First, the facts of these cases must be stretched substantially to apply credibly to the facts at issue in *Alec L.* Second, the district court has misapplied the holdings of the cases, construing binding precedent on issues that were not directly addressed by the courts.

A. District of Columbia v. Air Florida, Inc.

The *Alec L.* court looked to the D.C. Circuit Court’s decision in *Air Florida* primarily to support its conclusions that the public trust doctrine has historically developed “almost exclusively as a matter of state law” and “functioned as a constraint on states’ ability to alienate public trust lands.”⁷¹ In quoting this language from *Air Florida* in support of its decision, however, the *Alec L.* court explicitly recognized that the language did not reflect the holding of *Air Florida*, and instead characterized the language as dicta.⁷² The district court then tacked onto the end of its *Air*

⁶⁷ BLUMM & WOOD, *supra* note 25, at 246–47, 361 (observing that Justice Kennedy’s passing statement in *PPL Montana* that “[t]he public trust remains a matter of state law” contained no analysis and that there was no federal public trust issue in the case (alteration in original) (internal quotation marks omitted)); *see also* Brief of Law Professors, *supra* note 13, at 5 (“In fact, the Court has frequently announced a federal public trust in national resources. In short, the *PPL Montana dicta* does not apply to this case.” (citing *Light v. United States*, 220 U.S. 523, 537 (1911), and *United States v. Trinidad Coal & Coking Co.*, 137 U.S. 160, 170 (1890))).

⁶⁸ *See supra* notes 6–7.

⁶⁹ *Alec L.*, 863 F. Supp. 2d at 15–16.

⁷⁰ *District of Columbia v. Air Fla., Inc.*, 750 F.2d 1077 (D.C. Cir. 1984); *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527 (2011).

⁷¹ *Alec L.*, 863 F. Supp. 2d at 15 (quoting *Air Fla.*, 750 F.2d at 1082).

⁷² “The D.C. Circuit has had occasion to state, albeit in dictum, that ‘[i]n this country the public trust doctrine has developed *almost exclusively as a matter of state law*’ and that ‘the doctrine has functioned as a constraint on states’ ability to alienate public trust lands.’” *Alec L.*, 863 F. Supp. 2d at 15 (alteration in original) (quoting *Air Fla.*, 750 F.2d at 1082) (internal quotation marks omitted).

Florida discussion additional dicta addressing statutory displacement.⁷³ The district court observed that the *Air Florida* court “expressed its concerns that a *federal* common-law public trust doctrine would possibly be displaced by federal statutes.”⁷⁴ The district court limited its discussion of *Air Florida*’s reasoning with respect to statutory displacement to this single reference, and the case appeared to play no further role in its analysis.

Although the *Alec L.* decision appears to rely only tangentially on *Air Florida*’s expression of “concern” with respect to statutory displacement, the *Air Florida* case represents the only prior federal case to suggest that federal statutes *might* preempt any federal common-law public trust doctrine. “[W]e think that there is an issue whether Congress has preempted some or all of the field which a *federal* common-law public trust doctrine would occupy.”⁷⁵ For that reason—combined with the superficial analysis of the case by the *Alec L.* court on the issue—an examination of the facts and holding of *Air Florida* provides insight into the validity of the application of statutory displacement in *Alec L.*

In *Air Florida*, the District of Columbia brought a negligence action against an airline to recover the costs of emergency and cleanup services provided by the District following a plane crash on the Potomac River.⁷⁶ The lower court dismissed the case for failure to state a claim, and the D.C. Circuit affirmed that dismissal.⁷⁷ The District of Columbia argued on appeal that the public trust applied to the federal waters of the Potomac, and that the District had an obligation “to keep the river free from impediments to navigation and from impurities” as surrogate trustee.⁷⁸ The District asserted that the trust obligations provided a basis to seek damages in its negligence claim. The District raised its public trust argument on appeal, however, and not at the trial level.⁷⁹ The Court of Appeals declined to consider the District’s public trust claim:

We . . . regard the District’s public trust argument as a new theory advanced for the first time on appeal. Although appellate courts retain the discretion to entertain new theories, the usual rule is that such theories will not be heard except in exceptional cases. We find no circumstances in this case justifying departure from the normal rule. Our decision not to consider the District’s public trust claim is reinforced by our belief that the argument that public trust duties pertain to federal navigable waters, such as the section of the Potomac River at issue here, raises a number of very difficult issues concerning the rights and obligations of the United States (which is not a party here), the creation of federal common law, and the delegation of trust duties to the District. We would prefer to have the ben-

⁷³ *Id.*

⁷⁴ *Id.* (citing *Air Fla.*, 750 F.2d at 1085 n.43).

⁷⁵ *Air Fla.*, 750 F.2d at 1085.

⁷⁶ *Id.* at 1079.

⁷⁷ *Id.* at 1078.

⁷⁸ *Id.* at 1080–81.

⁷⁹ *Id.* at 1078, 1080–81.

efit of a complete trial record, including the District Court's thinking on these questions, before reaching such novel issues on appeal; we therefore leave the resolution of these issues to another day and another case.⁸⁰

The language in *Air Florida* with respect to statutory displacement of public trust claims, then, clearly did not constitute binding precedent.

The District Court in *Alec L.* failed entirely to address the fact that *Air Florida* declined to hear the plaintiff's public trust claim at all. Moreover, the discussion of the public trust doctrine by the court, when viewed in its entirety, constitutes a robust justification for declining to hear the issues related to the public trust because the case posed at least three novel legal questions and had the potential to alter the duties and obligations of the federal government absent its full participation.⁸¹ The D.C. Circuit recognized that a judicial application of federal statutory preemption or displacement of the public trust would have broad implications. Specifically, the *Air Florida* court noted that Congress "has legislated extensively with regard to many of the interests which the public trust doctrine protects" including navigation, fishing, and recreational uses of waters.⁸² Indeed, Title 16 of the United States Code alone covers dozens of natural-resource interests.⁸³ Even if the court's language amounted to persuasive dicta, then, the application of such a novel set of facts to the case in *Alec L.* deserved at least a minimal level of analysis.

Instead, the *Alec L.* court merely made note of the Court of Appeals's "concerns" in *Air Florida* that any federal public trust "would possibly be displaced by federal statutes."⁸⁴ The circuit court conducted no analysis on the question, however, because it merely thought there was an issue as to whether Congress had "preempted some or all of the field which a federal common-law public trust doctrine would occupy."⁸⁵ The circuit court emphasized that preemption would depend on whether a congressional scheme spoke directly to a question otherwise answered by federal com-

⁸⁰ *Id.* at 1078–79.

⁸¹ The *Air Florida* court noted that any analysis of the public trust in the case before it would involve determining: (1) whether the federal government had a duty under the public trust doctrine, (2) whether the federal government implicitly delegated trust responsibilities over the submerged lands and/or waters of the Potomac to the District as a non-state entity, and (3) whether the public trust provided a remedy in negligence to recover the demanded damages. *Air Fla.*, 750 F.2d at 1084.

⁸² *Id.* at 1085–86.

⁸³ Resources implicated as public trust resources or potential trust resources under Title 16 of the United States Code include: parks, monuments, seashores, historic sites, antiquities, archaeological and paleontological sites, national forests, soil and water, wildlife (including marine mammals and wild horses), fisheries, the Great Lakes, coral reefs, estuarine areas, wetlands, national recreational trails, and the oceans. *See* 16 U.S.C. §§ 1-7304 (2012).

⁸⁴ *Alec L. v. Jackson*, 863 F. Supp. 2d 11, 15 (D.D.C. 2012) (emphasis added), *aff'd Alec L. II*, 561 F. App'x 7 (D.C. Cir. 2014).

⁸⁵ *Air Fla.*, 750 F.2d at 1085 (first emphasis added).

mon law.⁸⁶ The court then listed, by way of example, several statutes enacted by Congress that relate to the interests the public trust doctrine protects, including navigation, fishing, and the recreational use of waters.⁸⁷ The court sought to demonstrate the sheer complexity of the question of statutory displacement:

Whether such broad statutes addressing public trust concerns expand to fill the field, thus preempting any alleged federal common-law duties, is a *complex question which deserves to be considered in a case where the parties have had a full opportunity to present testimony and arguments*, and the District Court has had occasion to pass on, the question.⁸⁸

The plain language of *Air Florida* suggests that the district court improperly dismissed the plaintiffs' complaint in *Alec L*. The *Alec L*. court purportedly found the language of *Air Florida* persuasive, and thus it should have given the parties *Air Florida's* "full opportunity to present testimony" on the issue of statutory preemption of federal-trust claims before pronouncing a holding on such a complex issue.

Even setting aside the District Court's failure to give the parties a full opportunity to present testimony in *Alec L.*, the court's decision also failed to conduct any kind of analysis addressing the complex question as to whether the Clean Air Act (or any other federal statute) expanded to "fill the field." In fact, even where multiple statutes directly address regulation of a given resource, displacement of federal common law does not result automatically.⁸⁹ The D.C. Circuit in *Air Florida*, in contrast to *Alec*

⁸⁶ The court's assumption that public trust claims would arise entirely as a matter of common law does not reflect any consensus among scholars as to the origins of the public trust doctrine; indeed, much of the scholarship related to the public trust argues that the doctrine inheres in the basic relationship between citizen and sovereign. See generally BLUMM & WOOD, *supra* note 25. The doctrine also has constitutional force. Torres & Bellinger, *supra* note 6, at 303-04 (arguing that the public trust doctrine is a fundamental attribute of sovereignty memorialized in constitutions, but continuing to exist even if not written down). Finally, some scholars and courts have expounded on the public trust's grounding in natural law. *E.g.*, Mehta v. Nath, (1997) 1 S.C.C. 388 (1996) (India) ("An understanding of the laws of nature must therefore inform all of our social institutions."); Oposa *ex rel.* Oposa v. Factoran, G.R. No. 101083 (S.C., July 30, 1993) (Phil.) ("[T]he right to a balanced and healthful ecology . . . belongs to a different category of rights altogether for it concerns nothing less than self-preservation and self-perpetuation . . . the advancement of which may even be said to predate all governments and constitutions."); WOOD, *supra* note 13, at 125-260; see also BLUMM & WOOD, *supra* note 25, at 305 ("India and the Philippines . . . have located the source of the public trust doctrine in natural law, meaning that ensuing codifications in constitutions and statutes merely reflected pre-existing law.").

⁸⁷ *Air Fla.*, 750 F.2d at 1086.

⁸⁸ *Id.* (emphasis added).

⁸⁹ Under the federal government's statutory universe regulating Asian Carp (an invasive species), the Seventh Circuit found that the multiple statutes at issue in *Michigan v. U.S. Army Corps of Engineers* failed to provide the level of detail necessary to occupy the field: "The narrow delegation that has taken place bears little

L., fully acknowledged the complexity of the question as to whether federal statutes “expand to fill the field” to preempt or displace federal public trust responsibilities.⁹⁰ In fact, the *Air Florida* court found the question complicated enough to warrant setting aside the question altogether. The *Alec L.* court, however, simply leapt from *Air Florida*’s reasoning—declining to address public trust claims and the complex question of displacement—to conflate public trust claims with nuisance actions and dismiss them with a sweeping assertion that all such claims had been displaced under the reasoning and holding of *AEP v. Connecticut*.

B. American Electric Power Co. v. Connecticut

The bulk of the district court’s statutory-displacement analysis in *Alec L.* relied on the 2011 Supreme Court case of *AEP v. Connecticut*.⁹¹ The *Alec L.* court concluded that under the Supreme Court’s holding in *AEP*, the Clean Air Act and regulations under the Act by the Environmental Protection Agency (“EPA”) displaced “any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel-fired power plants.”⁹² The District Court reasoned that the holding in *AEP* applied to all types of common-law claims that sought to address greenhouse-gas emissions and atmospheric carbon-dioxide levels, and not merely those cases involving specific abatement demands directed at specific fossil-fuel-fired power plants.⁹³ *AEP* involved markedly different facts than *Alec L.*, however. A close look at *AEP*’s specific holding illustrates that the District Court improperly applied the case in its dismissal of *Alec L.*

To begin with, *AEP* did not involve a public trust claim, but instead addressed a set of federal public-nuisance claims brought by a group of plaintiffs against four private electric-power corporations and the Tennessee Valley Authority, asserting that the power plants’ ongoing contri-

resemblance to the regulatory power that the EPA wields under the Clean Air Act. Tellingly, Congress has not provided any enforcement mechanism or recourse for any entity or party negatively affected by the carp, and there is certainly no recourse to the courts under the minimal scheme that has been established.” 667 F.3d 765, 780 (7th Cir. 2011). Although *Michigan* contrasted the Asian Carp statutes with the Clean Air Act, it is notable that under the Supreme Court’s and Ninth Circuit’s more recent holdings in *AEP* and *Kivalina*, citizens negatively affected by emissions appear to have no recourse under the Clean Air Act (either for injunction or damages). *Am. Elec. Power Co. v. Connecticut* (*AEP*), 131 S. Ct. 2527 (2011); *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 2390 (2013). Given the statute’s failure to provide recourse, then, the Clean Air Act should not be deemed to have displaced public trust claims as well. *See Torres & Bellinger, supra* note 6, at 305–10 (arguing in part that because the Clean Air Act fails to provide a federal remedy for citizens, displacement should not apply to public trust claims).

⁹⁰ *Air Fla.*, 750 F.2d at 1086.

⁹¹ *AEP*, 131 S. Ct. 2527.

⁹² *Alec L. v. Jackson*, 863 F. Supp. 2d 11, 16 (D.D.C. 2012) (quoting *AEP*, 131 S. Ct. at 2537) (internal quotation marks omitted), *aff’d*, *Alec L. II*, 561 F. App’x 7 (D.C. Cir. 2014).

⁹³ *Id.* at 16–17.

butions to global warming constituted a public nuisance.⁹⁴ The district court dismissed the suits for presenting only non-justiciable political questions.⁹⁵ In reversing the district court, the Second Circuit Court of Appeals held that the political-question doctrine did not bar plaintiffs' suits. The Second Circuit Court held, as to the merits of the case, first, that the plaintiffs properly stated a claim under the federal common law of nuisance, and second, that the Clean Air Act did not displace the federal common-law right of action in the case.⁹⁶

In reversing the Second Circuit, the Supreme Court held "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."⁹⁷ The Supreme Court outlined the test for whether congressional legislation displaces federal common law as whether the statute speaks directly to the question at issue.⁹⁸ The Court reasoned that because carbon dioxide clearly qualified as air pollution subject to regulation under the Clean Air Act,⁹⁹ and because the Act authorized regulation of stationary sources, the Act "spoke directly" to emissions of carbon dioxide from the defendants' power plants.¹⁰⁰

The *Alec L.* court mistakenly construed the *AEP* holding broadly to apply to any federal claim with respect to atmospheric carbon-dioxide levels. First, the plain language of *AEP*'s holding clearly specified that the statute displaced federal common-law rights "to seek abatement of *carbon-dioxide emissions from fossil-fuel fired power plants.*"¹⁰¹ The remedy sought by the plaintiffs in *Alec L.* did not seek abatement from any *particular* source, let alone a stationary power plant. Second, the plaintiffs' claim in *Alec L.* did not seek relief *from* the source of the carbon dioxide as in *AEP*'s nuisance claim. Instead, plaintiffs sought injunctive and declaratory relief against the federal government as a fiduciary trustee, asserting a collective property interest over the atmospheric res. Although the *Alec L.* and *AEP* plaintiffs may have appeared to have parallel goals (i.e., an atmos-

⁹⁴ *AEP*, 131 S. Ct. at 2533–34.

⁹⁵ *Id.* at 2534.

⁹⁶ *Id.*; see also Torres & Bellinger, *supra* note 6, at 305–10 (arguing that displacement of the trust under the Clean Air Act is improper because the statute does not speak directly to the question at issue, the statute fails to provide a federal remedy to claimants, and supplementing the statute with the public trust doctrine does not render the statute meaningless).

⁹⁷ *AEP*, 131 S. Ct. at 2537.

⁹⁸ *Id.* (quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978)); see also *City of Milwaukee v. Illinois*, 451 U.S. 304, 312–13 (1981); *New Jersey v. New York*, 283 U.S. 336, 348 (1931).

⁹⁹ See *Massachusetts v. EPA*, 549 U.S. 497, 528–29 (2007) (holding that the Clean Air Act unambiguously authorized the EPA to regulate greenhouse-gas emissions from new motor vehicles as "air pollutants" under 42 U.S.C. § 7602(g) (2006)).

¹⁰⁰ *AEP*, 131 S. Ct. at 2537.

¹⁰¹ *Alec L. v. Jackson*, 863 F. Supp. 2d 11, 16 (D.D.C. 2012) (emphasis added) (quoting *AEP*, 131 S. Ct. at 2537) (internal quotation marks omitted), *aff'd Alec L. II*, 561 F. App'x 7 (D.C. Cir. 2014).

pheric carbon level that does not result in catastrophic climate change), the legal claims brought by the parties differed substantially. The *Alec L.* court conflated *AEP*'s public-nuisance claim for damages against stationary power plants with a public trust claim alleging the government's breach of fiduciary duty. Even if the court in *Alec L.* ultimately still held that the Clean Air Act displaced federal public trust claims, it should have conducted a separate analysis addressing the distinctions between common-law nuisance doctrine and governmental obligations under the public trust.

The Supreme Court's statutory-displacement test in *AEP* demonstrates the significance of the distinction between public-nuisance claims against polluters and claims against the government for breach of fiduciary responsibilities. In applying the test in *AEP*, the Supreme Court looked to the statutory authorization under the Clean Air Act. The Court determined that the Clean Air Act spoke directly to the question at issue: both the emissions that plaintiffs sought to abate and the sources at which plaintiffs sought to abate them fell under the authorized regulatory jurisdiction of the Clean Air Act and the EPA.¹⁰² The Clean Air Act addresses both emission categories and stationary sources, leading the court to conclude that the statute spoke directly to the questions raised by the plaintiffs in *AEP*.¹⁰³

In contrast, the Clean Air Act does not outline the contours of the government's fiduciary responsibility to the nation's air resources under the public trust. Nor does the Act provide any remedy to address a breach of trust duties by the government.¹⁰⁴ The *Alec L.* court failed to

¹⁰² Justice Ginsburg focused careful attention in *AEP* on the procedural and enforcement mechanisms of the Clean Air Act and the authority given to the EPA in concluding that the statute "spoke directly" to the question at issue in the public-nuisance claim. "Section 111 of the Act directs the EPA Administrator to list 'categories of stationary sources' that 'in [her] judgment . . . caus[e], or contribut[e] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare.' Once EPA lists a category, the agency must establish standards of performance for emission of pollutants from new or modified sources within that category. And, most relevant here, § 7411(d) then requires regulation of existing sources within the same category. For existing sources, EPA issues emissions guidelines; in compliance with those guidelines and subject to federal oversight, the states then issue performance standards for stationary sources within their jurisdiction." *AEP*, 131 S. Ct. at 2537–38 (alterations in original) (footnote omitted) (quoting and citing 42 U.S.C. § 7411).

¹⁰³ *Alec L.*, 863 F. Supp. 2d at 16–17.

¹⁰⁴ The purpose of the Clean Air Act, as declared by Congress, is "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population . . ." 42 U.S.C. § 7401(b)(1) (2012). This Congressional emphasis on protecting the Nation's air resources for the promotion of public health and welfare could arguably represent an embodiment of trust principles. As noted above, however, the statute's substantive provisions fail to provide remedies for any breach of fiduciary duty, thus limiting the power of Congress's statement of purpose in the public trust context. *See also supra* note 89.

even apply the *AEP* test to properly determine whether the Clean Air Act spoke directly to the questions raised in plaintiffs' public trust claims. In summarily applying the Supreme Court's *AEP* holding to support a dismissal of the plaintiffs' public trust claims, the court incorrectly applied its statutory-displacement analysis in *Alec L.*¹⁰⁵

III. STATUTORY DISPLACEMENT OF THE PUBLIC TRUST IN ANY CONTEXT IS LEGALLY INCONSISTENT WITH ITS ORIGINS AND INCOMPATIBLE WITH ITS PURPOSES

Regardless of the mode of analysis used, any application of statutory-displacement principles in public trust cases is wholly inconsistent with the purposes of the trust and the origins of the doctrine. Notwithstanding the recognition of statutory displacement of the public trust by the D.C. District Court in *Alec L.* and in the state-level examples discussed in Part I, the idea that any one legislature can eviscerate the obligations of the sovereign to protect resources held in trust for the present and future generations of *all* citizens flies in the face of the trust's constitutional origins.¹⁰⁶ This notion also contradicts persuasive legal precedent dating back hundreds of years.¹⁰⁷

The fiduciary obligations of the sovereign—whether at the state or national level—demand that trust assets are protected for posterity. Moreover, the public trust doctrine originally sought to protect the interests of the majority against minority interests and monopoly control.¹⁰⁸

¹⁰⁵ In fact, by holding first that no federal public trust existed, and second that the Clean Air Act preempted the public trust, the district court entered into a logical impossibility: In order for the Clean Air Act to displace or preempt a federal public trust, Congress would necessarily have had to first recognize a federal public trust. A court cannot engage in a proper displacement analysis relating to something that does not exist in the first place.

¹⁰⁶ Brief of Law Professors, *supra* note 13, at 2 (“The constitutional reserved powers doctrine in conjunction with the public trust prevents any one legislature from depriving a future legislature of the natural resources necessary to provide for the well-being and survival of its citizens.”); *see also id.* at 5–9 (tracing the constitutional underpinning of the public trust doctrine found in the reserved-powers doctrine). *But see* Torres & Bellinger, *supra* note 6, at 288 (arguing that the Constitution is rooted in the public trust doctrine); *Robinson Twp. v. Pennsylvania*, 83 A.3d 901, 948 n. 36 (Pa. 2013) (observing that “the concept that certain rights are inherent to mankind, and thus are secured rather than bestowed by the Constitution, has a long pedigree in Pennsylvania that goes back at least to the founding of the Republic.” (quoting *Driscoll v. Corbett*, 69 A.3d 197, 208 (Pa. 2013)) (internal quotation marks omitted)).

¹⁰⁷ *See infra* notes 115–16 and accompanying text.

¹⁰⁸ *See, e.g., Sax, supra* note 14, at 560 (“[I]n public trust cases . . . a diffuse majority is made subject to the will of a concerted minority. For self-interested and powerful minorities often have an undue influence on the public resource decisions of legislative and administrative bodies and cause those bodies to ignore broadly based public interests.”); Takacs, *supra* note 14, at 733 (describing the public trust doctrine as protective of fundamental environmental human rights requiring

Indeed, these are the most basic purposes of the trust. The sovereign may opt to manage trust property through statutory and regulatory schemes, and thereby *embody* trust principles and protections in operative laws. Such embodiment, however, should remain subject to a “floor” of protection—the assurance that public trust resources will not be destroyed or wasted and that they will remain useful and accessible for future generations and future legislatures.

The public trust, then, should survive in conjunction with—or in spite of—legislative action. As discussed more fully below in Part IV, the judiciary has an obligation to provide meaningful review of the operative laws of the sovereign to provide this assurance to both present and future generations. Judicial review should encompass an understanding, however, that the displacement of trust obligations either through express statutory language or judicial interpretation of statutory provisions weakens public trust protections, allows the sovereign to avoid facing responsibility for failing to fulfill fiduciary trust obligations, and violates the reserved-powers doctrine of the Constitution—to the detriment of future generations.

A. *Statutory Displacement Is Inconsistent with Precedent and the Original Understanding of the Trust*

The public trust inheres in the sovereign body and cannot be abrogated. The understanding of the trust’s origins among the states varies; some states root their public trust doctrine in state constitutions, for example, Arizona, Pennsylvania, and Nevada.¹⁰⁹ Other states base their understanding of the trust entirely within the common law.¹¹⁰ Still others codify their state’s public trust doctrine in statutory law.¹¹¹ Whether rooted in the constitution or the sovereign itself, however, the trust has historically been understood “as an inherent attribute of sovereign authority.”¹¹² While the trust imbues the sovereign with fiduciary obligations to

“greater legislative and executive impetus to protect and advance these rights, and heightened judicial scrutiny” over violations).

¹⁰⁹ See Richard M. Frank, *The Public Trust Doctrine: Assessing Its Recent Past & Charting Its Future*, 45 U.C. DAVIS L. REV. 665, 685 (2012) (citing *Lawrence v. Clark Cnty.*, 254 P.3d 606, 612 (Nev. 2011) and *Payne v. Kassab*, 361 A.2d 263, 272 (Pa. 1976)); see also *supra* notes 24–46 and accompanying text (describing Arizona’s interpretation of its public trust under the gift clause of the state constitution).

¹¹⁰ See Craig, *Comparative Guide to the Western Public Trust Doctrines*, *supra* note 14, at 58; Wilkinson, *supra* note 6, at 455–56; Craig, *Comparative Guide to the Eastern Public Trust Doctrines*, *supra* note 14, at 5; see also Emily Stein, *The Public Trust Doctrine in Alaska*, in *THE PUBLIC TRUST DOCTRINE IN 45 STATES*, *supra* note 14, at 20.

¹¹¹ *Supra* note 110.

¹¹² *In re Water Use Permit Applications*, 9 P.3d 409, 443 (Haw. 2000) (citing *Ill. Cent. R.R. v. Illinois*, 146 U.S. 387, 455 (1892) (“[S]uch property is held by the State, by virtue of its sovereignty, in trust for the public.” (alteration in original) (internal quotation marks omitted))).

manage the trust, it simultaneously places limits on that same governing body.¹¹³

The limits placed on the sovereign body represent the true power of the trust, especially when the government violates fiduciary duties to protect trust property from impairment, damage, or waste. Such is the case when the design or implementation of a statute weakens trust protections: the trust promises to limit the extent to which a legislative body can dispose of or use up the resources that ultimately belong to the public. This basic understanding of the trust dates back to earliest iterations of the doctrine. Joseph Sax, in his groundbreaking scholarship exploring the public trust doctrine, described how:

[T]he Court [in *Illinois Central*] articulated a principle that has become the central substantive thought in public trust litigation. When a state holds a resource which is available for the free use of the general public, a court will look with considerable skepticism upon *any* governmental conduct which is calculated *either* to reallocate that resource to more restricted uses *or* to subject public uses to the self-interest of private parties.¹¹⁴

Lord Hale, in scholarship well before the time of Sax, expressed the limitation this way:

[T]hough the king is the owner of this great wast, and as a consequent of his propriety hath the primary right of fishing . . . yet the common people of England have regularly a liberty of fishing in the sea or creeks or arms thereof, as a publick common of piscary, and may not without injury to their right be restrained of it . . .¹¹⁵

Early cases in the United States embraced this limitation placed on the sovereign under the public trust doctrine as well.¹¹⁶ By 1892, the Supreme Court spoke on the issue in the case widely interpreted as the pillar of public trust law in the United States, *Illinois Central Railroad v. Illinois*.¹¹⁷ The Court in *Illinois Central* addressed the granting of “nearly the whole of the submerged lands” of its harbor to a private company, and

¹¹³ See, e.g., Karl S. Coplan, *Public Trust Limits on Greenhouse Gas Trading Schemes: A Sustainable Middle Ground?*, 35 COLUM. J. ENVTL. L. 287, 311 (2010) (“The idea that public trust limits and powers inhere in the very nature of sovereignty is one consistent thread in public trust cases.”); Wood, *supra* note 13, at 71 (“The trust attribute of sovereignty . . . is fundamentally one of limitation, not power . . .”).

¹¹⁴ Sax, *supra* note 14, at 490.

¹¹⁵ Lord Hale, *De Jure Maris*, in STUART A. MOORE, A HISTORY OF THE FORESHORE 370, 377 (Wm. W. Gaunt & Sons 3d ed. 1993) (1888); see also *Shively v. Bowlby*, 152 U.S. 1, 11–12 (1894); *Martin v. Lessee of Waddell*, 41 U.S. (16 Pet.) 367, 412 (1842); *Arnold v. Mundy*, 6 N.J.L. 1, 74 (1821).

¹¹⁶ *Shively*, 152 U.S. at 11 (“The great authority in the [public trust] law of England . . . is Lord Chief Justice Hale, whose authorship of the treatise *De Jure Maris*, sometimes questioned, has been put beyond doubt by recent researches.”); *Arnold*, 6 N.J.L. at 12 (criticizing the ancient breakdown of trust protections in England and the usurpation of public rights by the kings and powerful barons as “tortious”).

¹¹⁷ 146 U.S. 387 (1892).

held that the grant violated the public trust.¹¹⁸ The Court reasoned that although states could grant public parcels of trust lands for purposes of navigation and fishing, “abdication of the general control of the State over [trust property] . . . is not consistent with the exercise of that trust which requires the government of the State to preserve such waters for the use of the public.”¹¹⁹ With only limited exceptions,¹²⁰ the Supreme Court held that grants of the public trust were “necessarily revocable, and that the exercise of the trust . . . [could] be resumed [by the sovereign] at any time.”¹²¹

Although the Supreme Court in *Illinois Central* addressed the conveyance of shoreline to the private control of a railroad company, the principles transfer to the context of statutory displacement of sovereign trust protections. The statutory scheme of the Clean Air Act in particular lends itself to such a comparison. The management and control of the atmosphere under the Clean Air Act is shifted first to an executive agency, and then to those granted emissions permits.¹²² Such permits are for the permittees’ “own profit generally.”¹²³ The scheme transfers the management of the atmospheric trust to executive agencies.¹²⁴ While in theory those agencies remain subject to public trust obligations, the text of the Act is silent as to the trust, and in reality agencies bow to the influence of powerful special interests, essentially permitting the use, waste, and degradation of the trust property for the benefit of the permittees and the detriment of the public.¹²⁵ Moreover, the transfer of trust-management authority may occur without express legislative intent, contrary to the earliest descriptions of the doctrine’s limits.¹²⁶ If the Clean Air Act displaces

¹¹⁸ *Id.* at 451, 460.

¹¹⁹ *Id.* at 452–53.

¹²⁰ The “*Illinois Central* exceptions” included the granting of limited parcels used in “promoting the interests of the public therein, or . . . [those that could] be disposed of without any substantial impairment of the public interest” in the property remaining. *Id.* at 453.

¹²¹ *Id.* at 455.

¹²² 42 U.S.C. §§ 7661b–7661c (2012).

¹²³ *Ill. Cent.*, 146 U.S. at 451. Any argument that the trust property is damaged to the benefit of the public lacks logical footing; the impairment to the res (greenhouse-gas emissions) occurs for the sake of profit alone—to reduce costs for the corporations producing power, for example. Although the power itself may be purchased by the public, the nexus between use and impairment of trust property does not support an “*Illinois Central* exception” that would justify statutory displacement under the Clean Air Act.

¹²⁴ 42 U.S.C. §§ 7661b–7661c.

¹²⁵ WOOD, *supra* note 13, at 9 (“While undoubtedly some agencies remain loyal guardians of the public’s natural assets, the bureaucratic mindset of most agencies today aligns all too closely with the industries they regulate.”); Torres & Bellinger, *supra* note 6, at 311 (calling the undue influence of minorities over the executive and legislative branches to the detriment of the public “patently undemocratic”).

¹²⁶ Professor Joseph Sax has argued that the public trust doctrine prevents the diversion of certain types of resources to private use or ownership without *express legislative authorization*. Sax, *supra* note 14, at 495–96; *see also* Shively v. Bowlby, 152

the trust, the basic public trust principles vanish—principles that would otherwise limit the authority of the government either to transfer trust property or to abdicate control over the trust.

In contrast to the basic understanding of the limits of government under the trust, statutory displacement allows the legislature—a sovereign body whose power the trust ought to limit—to erase the trust. In the case of *Alec L.*, these trust principles should provide recourse to citizens seeking to enforce the government’s fiduciary obligations to protect the atmospheric trust from catastrophic impairment. Instead of looking closely at the government’s action with respect to the trust, however, the court characterized the allegations as political in nature, concluding that the legislature was in the best position to determine whether the legislature was properly protecting the trust.¹²⁷ The plaintiffs in *Alec L.* argued that they did not seek a political remedy,¹²⁸ and indeed, a remedial policy could ultimately take any number of forms—including implementation through the Clean Air Act. The Clean Air Act, however, must be recognized as a mere embodiment of the trust. While the Act provides the government with regulatory tools to protect the res, it does not provide the people with recourse against the government. Interpreting the Clean Air Act to displace public trust protections, as the *Alec L.* court did, cannot be reconciled with the commonly understood limitations the trust imparts.

B. Displacing the Trust with Statutes Eviscerates Its Primary Purpose: Protection of Trust Resources for Present and Future Generations

The most basic purpose of the trust involves the protection of trust property, such that it might be accessed and enjoyed by present and future generations. These protections exist, in part, to protect the interests of the many (the majority) from the exploitation and monopolization of public resources by the few (commercial or special interests, and insular minorities).¹²⁹ Joseph Sax viewed *Illinois Central* to be an expression of the court’s “recognition of the potential for abuse which exists whenever power over public lands is given to a body which is not directly responsive to the electorate.”¹³⁰ The public trust doctrine also exists to protect the natural resources necessary for the public health and welfare for posterity—for the enjoyment of future generations.

U.S. 1, 13 (1894) (presuming the existence of public rights in submerged lands unless the granting document clearly expressed an intention to sever or eliminate those rights); *Martin v. Lessee of Waddell*, 41 U.S. (16 Pet.) 367, 411 (1842) (same).

¹²⁷ *Alec L. v. Jackson*, 863 F. Supp. 2d 11, 16–17 (D.D.C. 2012), *aff’d Alec L. II*, 561 F. App’x 7 (D.C. Cir. 2014).

¹²⁸ Reply Brief for Youth Appellants at 18–21, *Alec L.*, 863 F. Supp. 2d 11 (No. 13-5192).

¹²⁹ See, e.g., Sax, *supra* note 14, at 495–96 (discussing *Gould v. Greylock Reservation Comm’n*, 215 N.E.2d 114 (Mass. 1966)).

¹³⁰ *Id.* at 491–92.

The recognition of statutory displacement in lieu of trust protections, at both the state and national levels, violates the government's fiduciary obligations in two ways. First, statutes may fail to protect the majority from the interests of a very few. For example, under the Clean Air Act, a very small group of corporate entities are permitted to emit massive amounts of greenhouse gases to the detriment of the majority.¹³¹ Moreover, statutes are the creations of elected bodies, and future generations have no recourse when they cannot exercise the vote because they are too young or as yet remain unborn! Second, statutes purporting to protect natural resources frequently fall below the "floor" of protection under the trust, amounting to protections that fail to protect and regulatory schemes that ultimately impair trust resources. The impairment of trust resources—such as the impairment of the atmosphere despite the Clean Air Act—amounts to a violation of the trust because of the resulting failure to protect the property itself for future generations to use and enjoy. The trust could provide recourse and remedy for these failures, but statutory displacement compounds the violations of the government's fiduciary obligations. Where statutes displace the public trust doctrine, the sovereign becomes free to continue to violate its fiduciary duty to protect trust resources with no accountability and the public's rights to enforce the trust are eviscerated. In lieu of statutory displacement, then, the judiciary should embrace its role as final arbiter and enforcer of the trust—the social contract between the government as trustee over essential natural resources and its people as beneficiaries of that trust.

IV. "WHAT COURAGE, GOODWILL AND WISDOM MIGHT ALLOW TO BE DISCOVERED": THE JUDICIARY'S OBLIGATION TO PROTECT THE PUBLIC TRUST FOR PRESENT AND FUTURE GENERATIONS

The power of central governments to control and dispose of public resources remains subject to the constitutional limits of the public trust doctrine, in spite of the passage of statutes and regulations—and in spite of judicial interpretations of statutory displacement of trust protections. "The [public trust doctrine] concerns the fundamental relationship between government and its citizens: the basic expectation, central to the

¹³¹ See *AEP*, 131 S. Ct. 2527, 2534, 2540 (2011); *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 853–54, 858 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 2390 (2013). Although one could argue—convincingly—that the public benefits from the electricity and power provided by permittees, the *impairment* to trust property is not a necessary component of the public's use of those services; instead, corporations enhance their own profits by failing to internalize the costs of protecting trust property, to the detriment of the majority. See *supra* note 123. Moreover, even if the public benefits from power production in some form, conveying a consumer benefit does not fulfill the primary role of government in the lives of its people. "The fundamental obligation of government is not to us as consumers, but to us as citizens." Torres & Bellinger, *supra* note 6, at 285.

purpose of organized government, that natural resources essential to survival remain abundant, justly distributed, and bequeathed to future generations.”¹³² Where courts decline to exercise their power of review over public trust claims in favor of statutory displacement, they essentially hand that review power over to the legislative and executive branches in disdain of this fundamental relationship between sovereign and citizen. Courts applying either an explicit statutory-displacement analysis or an alternative “political-question” analysis to public trust claims have sought justification for their reasoning through the separation-of-powers doctrine—suggesting that once a legislature directly speaks to an issue, the issue becomes a political question and cannot be properly answered by the judiciary.¹³³ This type of language was employed in the alternative holding of *Alec L.*, and as part of the justification for affirming the dismissal in *Svitak*.¹³⁴ Instead of separating the powers, however, such an approach weakens the role of the judiciary and shifts the balance of power to the legislature and executive agencies.¹³⁵ Judicial enforcement of fiduciary obligations simply does not amount to a political question; instead, it puts to use the most basic purpose of the judiciary in protecting the rights of the people against executive or legislative abuses of power.¹³⁶

¹³² Brief of Law Professors, *supra* note 13, at 1.

¹³³ See *Svitak ex rel. Svitak v. Washington*, No. 69710-2-I, 2013 WL 6632124, at *2 (Wash. Ct. App. Dec. 16, 2013) (“[I]t is up to the legislature, not the judiciary, to decide whether to act as a matter of public policy. This is particularly true here, where the legislature has already acted. Court[s] will not grant relief when a complainant seeks to rewrite a statute.”).

¹³⁴ *Alec L. v. Jackson*, 863 F. Supp. 2d 11, 17 (D.D.C. 2012) (“Plaintiffs are effectively seeking to have the Court mandate that federal agencies undertake specific regulatory activity, even if such regulatory activity is not required by any statute enacted by Congress. . . . These are determinations that are best left to the federal agencies that are better equipped, and that have a Congressional mandate. . . .”), *aff’d Alec L. II*, 561 F. App’x 7 (D.C. Cir. 2014); *Svitak*, 2013 WL 6632124, at *2 (“To create and impose this new duty, would necessarily involve resolution of complex social, economic, and environmental issues. Courts have recognized that creation of such programs under the common law is inappropriate because it invades the prerogatives of the legislative branch, thereby violating the separation of powers doctrine.”); *cf. Peshlakai ex rel. Butler v. Brewer*, No. 1 CA-CV 12-0347, 2013 WL 1091209, at *5 (Ariz. App. Mar. 14, 2013) (“Not only is it within the power of the judiciary to determine the threshold question of whether a particular resource is a part of the public trust subject to the Doctrine, but the courts must also determine whether based on the facts there has been a breach of the trust.”).

¹³⁵ The legal justification for this power shift—a presumption that agencies make their decisions for the good of the public and should thereby receive broad discretion—has become less credible in modern society. See, e.g., WOOD, *supra* note 13, at 7 (“Such discretion rests on a presumption that agencies remain expert bodies that unfailingly exercise their judgment objectively, for the good of the public, and in accordance with protective statutory goals. That presumption now collides with reality.”).

¹³⁶ Brief of Law Professors, *supra* note 13, at 27 (“Requiring the other branches of government to fulfill their fiduciary duty to protect inalienable public rights in

This shift in the balance of power also dramatically changes the rights of the public and effectively closes off challenges to any legislative attempts to abrogate trust resources. The result is a violation of basic trust principles and government obligations. As expressed by Joseph Sax in reference to judicial oversight of legislative authority:

There must be some means by which a court can keep a check on legislative grants of public lands while ensuring that historical uses may be modified to accommodate contemporary public needs and that the power to make such modifications resides in a branch of government which is responsive to public demands. *Similarly, . . . there ought to be available some mechanism by which corrupt legislative acts can be remedied . . .*¹³⁷

The check against such legislative acts resides absolutely in the judiciary.

The impairment of rights is particularly concerning if one acknowledges the theory that the public trust has constitutional limitations.¹³⁸ Scholar Richard Frank has observed that identifying the ultimate legal source of the trust is “no mere intellectual exercise.”¹³⁹ He observes that legislative action can entirely nullify the public trust or limit the role of the judiciary in its enforcement.¹⁴⁰ In recognizing the basic role of judicial review in any trust setting, law professors writing as *amici* in support of the plaintiffs in *Alec L.* elaborated on the call for judicial enforcement:

For any trust to function effectively, judicial enforcement is essential. This principle applies to sovereign resource trusts just as it does to private trusts. Courts are being called upon here as they have always been in public trust cases—not to exercise direct management over the *res* of the trust, but to ensure that the political branches fulfill their trust obligation to avoid destruction or irreparable harm to an asset that must sustain future generations.¹⁴¹

sovereign trust property has never been declared a ‘political question’ inappropriate for a judicial remedy.”).

¹³⁷ Sax, *supra* note 14, at 495 (emphasis added).

¹³⁸ Brief of Law Professors, *supra* note 13, at 8 (“*Illinois Central [Railroad v. Illinois]*, 146 U.S. 387, 460–62 (1892)] made clear that alienating or destroying essential resources would amount to relinquishing sovereign powers in violation of the Constitution’s reserved powers doctrine.”).

¹³⁹ Richard Frank asks, what is the “ultimate legal source” of the public trust doctrine? “This inquiry represents no mere intellectual exercise. To the contrary, the answer to that question plays an enormous role in determining the ultimate influence and scope of the public trust doctrine. If the public trust is simply a creature of state common law, it may be circumscribed by judicial decisions and nullified altogether by state legislative action. Similarly, if trust principles can only be enunciated in the form of statutes enacted by state legislatures, the role of the courts is greatly constrained.” Frank, *supra* note 109, at 685; see also *supra* notes 106, 109–13 and accompanying text.

¹⁴⁰ Frank, *supra* note 109, at 685.

¹⁴¹ Brief of Law Professors, *supra* note 13, at 26 (citation omitted); see also *Ariz. Ctr. for Law v. Hassell*, 837 P.2d 158, 169 (Ariz. Ct. App. 1991) (“Just as private trustees are judicially accountable to their beneficiaries for dispositions of the *res*, so

Despite the need for effective judicial intervention in public trust cases, however, the *Alec L.* court deflected the merits of the question in favor of statutory displacement as though enforcement of the public trust between sovereign and citizen equates to mere nuisance abatement or other simple common-law claims.

As expressed by the District Court in the *Alec L.* decision, judicial reluctance to substantively review government mismanagement of public trust assets is manifest:

Throughout history, the federal courts have served a role both essential and consequential in our form of government by resolving disputes that individual citizens and their elected representatives could not resolve without intervention. And in doing so, federal courts have occasionally been called upon to craft remedies that were seen by some as drastic to redress those seemingly insoluble disputes. But that reality does not mean that every dispute is one for the federal courts to resolve, nor does it mean that a sweeping court-imposed remedy is the appropriate medicine for every intractable problem.¹⁴²

The court's plain language suggests that a primary reason for this reluctance lies in the extremity of the necessary remedy. In essence, the court's decision to apply the political-question doctrine reflects this concern. By imposing a sweeping judicial remedy, the court fears a breakdown of an established separation of powers under which the legislative body and executive agencies have made the detailed decisions to manage the use of the nation's natural resources. Instead, however, enforcement of the trust strengthens the separation of powers. Despite their initial reluctance to venture into claims of the sovereign's failure to fulfill its fiduciary obligations to protect an atmospheric trust, the court may feel free to fashion a remedy that, while leaving detailed decisions to the "political" entities designated by the sovereign, provides the ultimate "floor" of protection that protects trust property from substantial impairment.

The role of the judiciary is unique in trust contexts. The nature of relationship between the government (the trustees) and the public (the beneficiaries) raises unique notions of justice because the trustee has an affirmative obligation to protect the res of the trust. The beneficiaries may not even have access to courts or political bodies as would the aggrieved party under any alternative set of circumstances. In many cases, the very establishment of the trust takes place because the beneficiary cannot act to protect the trust property. Such is the case when the bene-

the legislative and executive branches are judicially accountable for their dispositions of the public trust. . . . The check and balance of judicial review provides a level of protection against improvident dissipation of an irreplaceable res." (citation omitted)).

¹⁴² *Alec L. v. Jackson*, 863 F. Supp. 2d 11, 17 (D.D.C. 2012), *aff'd Alec L. II*, 561 F. App'x 7 (D.C. Cir. 2014).

ficiaries are posterity and future generations, as under the public trust.¹⁴³ Under such situations, the judiciary's obligation to enforce the trust—to watch over the legislature charged with the duty of oversight—becomes a necessary and vital check against the power of the legislature. Enforcement of the trust acts to separate the powers of the government's branches, then, and does not represent any judicial usurpation of political power.

Additionally, the judiciary can incorporate unique tools for enforcement of the public trust unavailable in many other circumstances, justified by the trust's unique relationship. For example, where the federal government has a fiduciary obligation pursuant to a trust, federal courts have fashioned unique remedies when those obligations were not fulfilled. Those remedies have included comprehensive injunctions, mandated progress reports, and direct oversight. In at least one set of cases, the federal government has resorted to holding a federal agency in contempt of court to force agency action in the face of trust violations.¹⁴⁴ For example, in *Sierra Club v. Department of the Interior*¹⁴⁵ the United States District Court for the Northern District of California sought to force agency action to protect the trust property of Redwood National Park in a series of three cases.¹⁴⁶ The court relied on both general trust obliga-

¹⁴³ Brief of Law Professors, *supra* note 13, at 27 (“[M]inors and future generations have no effective voting option; they cannot pursue their goals through the normal, majoritarian political process as the political question doctrine assumes. It is for this reason that the [public trust doctrine] treats these citizens as trust beneficiaries and requires government, as trustee, to protect their interests.”).

¹⁴⁴ The D.C. District Court traced the contempt measures utilized by the federal courts in a very lengthy litigation to force the proper accounting of Indian trust funds. *Cobell v. Salazar*, 573 F.3d 808, 810 (D.C. Cir. 2009) (holding that beneficiaries were statutorily entitled to an accounting, and the district court had an obligation to exercise its equitable powers to ensure an equitable accounting). Those measures included a years-long shutdown of the Department of Interior's internet capability and website. *Cobell v. Kempthorne*, 532 F. Supp. 2d 37, 72 (D.D.C. 2008); *see also* BLUMM & WOOD, *supra* note 25, at 254.

¹⁴⁵ *Sierra Club v. Dep't of the Interior (Sierra Club I)*, 376 F. Supp. 90 (N.D. Cal. 1974); *Sierra Club v. Dep't of the Interior (Sierra Club II)*, 398 F. Supp. 284 (N.D. Cal. 1975); *Sierra Club v. Dep't of the Interior*, 424 F. Supp. 172 (N.D. Cal. 1976).

¹⁴⁶ Congress amended the National Park Service Organic Act, Pub. L. No. 64-235, 39 Stat. 535 (codified as amended in scattered sections of 16 U.S.C.), in response to the *Sierra Club* holdings, as described in *Sierra Club v. Andrus*, 487 F. Supp. 443, 447–49 (D.D.C. 1980). The district court analyzed the statutory mandate crafted through the amendment and determined that no distinction existed between the National Park System's “trust duties” and their “statutory duties.” *Id.* at 449. Under the language of the statute, “[t]he Secretary has an absolute duty, which is not to be compromised, to fulfill the mandate of the 1916 Act to take whatever actions and seek whatever relief as will safeguard the units of the National Park System.” *Id.* at 448 (quoting S. REP. NO. 95-528, at 9 (1977)) (internal quotation marks omitted). The Secretary's “absolute duty” includes the conservation of National Park resources so as to “leave them unimpaired for the enjoyment of future generations.” *Id.* at 447; *see also* 16 U.S.C. §§ 1, 1a-1 (1980). Although an argument could be made that this line of reasoning in *Sierra Club v. Andrus* amounts to implicit statutory displacement, the

tions *and* statutory language to hold that the agency had an affirmative duty to act to protect the trust property.¹⁴⁷ In fashioning a remedy following the agency's failure to act after the first case, the *Sierra Club* court mandated "reasonable steps within a reasonable time" and outlined its definition for what the protection schema might encompass.¹⁴⁸ Notably, the court left the remainder of the details to the agency, but mandated that the property be protected "from adverse consequences of timbering and land use practices."¹⁴⁹ Finally, the court required a progress report from the agency to demonstrate compliance with the court's orders.¹⁵⁰

The injunctive action demanded by the plaintiffs in *Alec L.*, then, represents not a novel manufactured solution, but a carefully crafted remedy rooted in precedent. The contours of how trust protections are made manifest in light of competing policy interests may still be weighed, measured, and executed by the political branches of government. Judicial enforcement of those protections through injunctions merely requires those branches of government to fulfill their sovereign fiduciary obligations. Such a remedy falls squarely within the norm of the resolution of trust violations.

CONCLUSION

As observed by the district court in *Alec L.*, not every dispute is one for the courts to resolve.¹⁵¹ Where violations of basic public trust obligations by the sovereign are alleged, however, the dispute is necessarily one for judicial intervention. Statutory displacement is neither a principled nor practical answer to those questions. The judiciary has an obligation to enforce trust protections, just as the sovereign has fiduciary obligations to both manage and protect the trust property for present and future generations. Statutes may embody the sovereign's understanding of the trust to assist the sovereign in its management of trust property, but a legislative body cannot grant itself the power to erase trust protections merely by enacting a statute. The obligations and limits of the public trust doctrine survive in conjunction with—or in spite of—operative statutes. This understanding of the public trust doctrine, rooted in the earliest expres-

court explicitly recognized that there was in fact *no distinction* between the statutory mandate and the trust itself. *See* 487 F. Supp. at 449. In other words, rather than *displacing* the trust, the statute's mandate to protect the resource adequately *embodied* the trust.

¹⁴⁷ *Sierra Club I*, 376 F. Supp. at 95–96; *Sierra Club II*, 398 F. Supp. at 286–87.

¹⁴⁸ *Sierra Club II*, 398 F. Supp. at 294.

¹⁴⁹ *Id.*

¹⁵⁰ The *Sierra Club* litigation was ultimately unsuccessful in forcing the environmental protections sought by the court, but the cases provide a workable example of how the judiciary can author comprehensive and effective remedies that rely on both general trust obligations and statutory expressions of the trust. *See* BLUMM & WOOD, *supra* note 25, at 253–54.

¹⁵¹ *Supra* note 142 and accompanying text.

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sions and recent iterations of the law, holds true even if the legislature specifically intends to displace the trust, just as it did in *Illinois Central*.¹⁵² A statute that does not clearly express an abdication of the trust or intent to displace it, therefore, does not and cannot replace the trust relationship between sovereign and citizen. The judiciary at both the state and national levels has a vital role to play in enforcing trust obligations in the face of statutes that are failing to protect trust resources from catastrophic impairment. Judges should tread courageously into these substantive questions to fulfill their obligation to protect public trust property for present and future generations. In so doing, those jurists might discover what Judge Wilkins encouraged the litigants in *Alec L.* to seek: the common ground that “courage, goodwill and wisdom might allow to be discovered.”

¹⁵² Ill. Cent. R.R. v. Illinois, 146 U.S. 387 (1892).