

3-15-2019

Environmental Personhood and Standing for Nature: Examining the Colorado River case

Matthew Miller

Follow this and additional works at: https://scholars.unh.edu/unh_lr



Part of the [Law Commons](#)

Repository Citation

Matthew Miller, *Environmental Personhood and Standing for Nature: Examining the Colorado River case*, 17 U.N.H. L. Rev. 355 (2019).

This Notes is brought to you for free and open access by the University of New Hampshire – Franklin Pierce School of Law at University of New Hampshire Scholars' Repository. It has been accepted for inclusion in The University of New Hampshire Law Review by an authorized editor of University of New Hampshire Scholars' Repository. For more information, please contact sue.zago@law.unh.edu.



Matthew Miller

Environmental Personhood and Standing for Nature: Examining the *Colorado River* case

17 U.N.H. L. REV. 355 (2019)

ABSTRACT. As the planet faces the growing threat of climate change, environmental advocates are searching for alternative legal avenues to protect natural entities in the courts. In 2017, the Colorado River Ecosystem brought a lawsuit against the State of Colorado for violating its constitutional rights. The advocates behind this action were seeking to establish in federal court two doctrines that have made strides in other countries as part of the international Rights of Nature movement: environmental personhood and standing for nature. Environmental personhood would recognize natural entities as legal persons, endowing them with corresponding rights and duties under the law. Standing for nature would allow such entities to litigate their grievances on their own behalf in court. If courts were to recognize these doctrines, advocates would gain a significant tool to protect natural entities from ecological catastrophe. However, as an analytical reading of the pleadings in the *Colorado River* case illustrates, litigants must draft robust complaints that specifically address the standing requirements in order to make progress on this front.

In Part I, this Note examines corporate personhood as a possible analogy for the development of environmental personhood. Part II discusses Article III standing as background for the justiciability standard environmental litigants must meet and analyzes animal standing as another comparative path. In Part III, the Note turns to the *Colorado River* lawsuit, critiques its pleadings, and suggests that a stronger litigation strategy would have increased the likelihood of surviving a justiciability challenge. Part IV recounts the international successes of the Rights of Nature movement to provide a global context for the *Colorado River* case. In Part V, the Note explores the issues around representation of natural entities in court and how some of these challenges might be navigated. Finally, this Note provides a few concluding thoughts on the path forward for environmental personhood and standing for nature.

AUTHOR. University of New Hampshire School of Law, J.D. Candidate 2019; University of Vermont, M.A. 2012; Providence College, B.A. 2009. I would like to thank Professor Margaret Sova McCabe for her guidance and support as my Note Advisor.

INTRODUCTION.....	356
I. ENVIRONMENTAL AND CORPORATE PERSONHOOD	360
II. STANDING FOR NATURE	364
A. <i>Standing for Animals and Legislative Authorization to Sue</i>	366
III. THE COLORADO RIVER CASE	368
IV. RIGHTS OF NATURE IN THE INTERNATIONAL DOMAIN	373
V. ISSUES OF REPRESENTATION	374
CONCLUSION	376

INTRODUCTION

In September 2017, the Colorado River Ecosystem filed a lawsuit against the State of Colorado and Governor John W. Hickenlooper, seeking declaratory and injunctive relief from state action that violated the River’s “right to exist, flourish, regenerate, be restored, and naturally evolve.”¹ The suit also sought legal recognition of these rights and of the River’s standing to appear in court to defend them.² The lawsuit was filed by Denver attorney Jason Flores-Williams, with a number of individuals acting as the River’s next friends: five members of the environmental organization Deep Green Resistance, the Executive Director of the organization Living Rivers, and John Weisheit, identified as the “Colorado Riverkeeper.”³ If the action had been successful, it could have opened the door to rivers, forests, mountains, and other natural entities claiming legal rights in federal court. However, following the State’s motion to dismiss in December 2017, the Ecosystem filed its own motion to dismiss, effectively abandoning its lawsuit.⁴ It explained that because the action was “an effort of first impression,” they had a “heightened ethical duty to continuously ensure that conditions are appropriate for

¹ Amended Complaint at 3, *Colorado River Ecosystem v. Colorado*, No. 17-cv-02316-NYW (D. Colo. Nov. 6, 2017), 2017 WL 9472427.

² *Id.* at 2–3.

³ *Id.* at 1.

⁴ Defendants’ Motion to Dismiss, *Colorado River Ecosystem v. Colorado*, No. 17-cv-02316-NYW (D. Colo. Dec. 1, 2017), 2017 WL 4699840; Plaintiff’s Motion to Dismiss, *Colorado River Ecosystem v. Colorado*, No. 17-cv-02316-NYW (D. Colo. Dec. 3, 2017).

our judicial institution to best consider the merits of a new canon.”⁵ The court dismissed it the next day.⁶

While this was the first lawsuit of its kind brought in federal court in the United States, it has roots in the international Rights of Nature movement.⁷ Natural entities have been awarded legal rights in New Zealand, Ecuador, Colombia, India, and local communities throughout the United States.⁸ There are two distinct legal issues embedded in this global push for the rights of nature. First, the concept of environmental personhood suggests that natural entities should have the status of other legal persons, such as corporations, in the eyes of the law.⁹ Second, the idea of legal standing for nature would give these entities access to the legal system to seek remedies in response to violations of their fundamental rights.¹⁰

In the United States, the idea of legal personhood for nature was first suggested by Professor Christopher D. Stone in his 1972 article, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*.¹¹ Soon after Stone published his article in the *Southern California Law Review*, Justices William O. Douglas and Harry A. Blackmun incorporated Stone’s seemingly radical idea into their dissenting opinions in *Sierra Club v. Morton*.¹² In *Morton*, the majority held that the Sierra Club did not have standing to represent the Mineral King Valley in a lawsuit to enjoin the U.S. Forest Service from approving a skiing development in southern California’s Sequoia National Forest.¹³ Douglas dissented, reasoning that “[c]ontemporary public concern for protecting nature’s ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation.”¹⁴

⁵ Plaintiff’s Motion to Dismiss, *supra* note 4, at 3.

⁶ Order, *Colorado River Ecosystem v. Colorado*, No. 17-cv-02316-NYW (D. Colo. Dec. 4, 2017).

⁷ See Christopher D. Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972). See generally Julie Turkewitz, *Corporations Have Rights. Why Shouldn’t Rivers?*, N.Y. TIMES (Sept. 26, 2017), <https://www.nytimes.com/2017/09/26/us/does-the-colorado-river-have-rights-a-lawsuit-seeks-to-declare-it-a-person.html> [perma.cc/SM6S-G27E]. For a discussion of the Rights of Nature movement, see *infra* Part V.

⁸ Amended Complaint, *supra* note 1, at 20–22.

⁹ Gwendolyn J. Gordon, *Environmental Personhood*, 43 COLUM. J. ENVTL. L. 49, 51 (2018).

¹⁰ Hope M. Babcock, *A Brook with Legal Rights: The Rights of Nature in Court*, 43 ECOLOGY L.Q. 1, 3 (2016).

¹¹ Stone, *supra* note 7.

¹² *Sierra Club v. Morton*, 405 U.S. 727, 741–42, 757–58 (1972) (Douglas, J., dissenting) (Blackmun, J., dissenting).

¹³ *Id.* at 741 (majority opinion).

¹⁴ *Id.* at 741–42 (Douglas, J., dissenting).

Blackmun echoed Douglas's approach, suggesting that he "would permit an imaginative expansion of our traditional concepts of standing" to allow the Sierra Club and other organizations to litigate environmental issues on behalf of natural objects.¹⁵ While courts remain skeptical, a growing body of scholarship has developed around environmental personhood and standing for nature, as the Rights of Nature movement continues to gain traction on the international stage.¹⁶

The legal system constitutes an essential forum for advocates seeking to resist the tide of ecological collapse. Historically, the legal effort to protect the environment, whether through legislative action or litigation, has rested upon an anthropocentric worldview.¹⁷ This effort premised the importance of environmental law on the use and enjoyment of nature by human beings.¹⁸ The growing influence of environmental personhood and standing for nature are a result of the gradual shift to ecocentrism in certain countries and communities.¹⁹ This shift will likely accelerate as ecosystems struggle to survive,²⁰ resources dwindle,²¹ and extreme weather events become more commonplace.²² In order to

¹⁵ *Id.* at 757 (Blackmun, J., dissenting).

¹⁶ Gordon, *supra* note 9, at 74 (discussing environmental personhood); *see infra* Part V for a discussion of the Rights of Nature movement.

¹⁷ Gordon, *supra* note 9, at 72–73.

¹⁸ *Id.* at 73–74.

¹⁹ *Id.* at 82–83.

²⁰ *See, e.g.*, Alan K. Brickley et al., *Climate Change and Oregon Law: What Is to Be Done?*, 33 J. ENVTL. L. & LITIG. 235, 282 (2018) (quoting Susanne C. Moser et al., *Coastal Zone Development and Ecosystems*, U.S. GLOBAL CHANGE RESEARCH PROGRAM, <http://nca2014.globalchange.gov/report/regions/coasts#narrative-page-16840> [<https://perma.cc/8Y2W-27JH>]) ("Of particular concern is the potential for coastal ecosystems to cross thresholds of rapid change ('tipping points'), beyond which they exist in a dramatically altered state or are lost entirely from the area; in some cases, these changes will be irreversible.").

²¹ *See, e.g.*, *Water Resources*, OR. CLIMATE CHANGE RESEARCH INST., <http://www.occri.net/pnw-impacts/water-resources/> [<https://perma.cc/A586-EES4>] (last visited Jan. 6, 2019) ("Oregon State University's Oregon Climate Change Research Institute, in its assessment of climate change on Pacific Northwest Water Resources, has projected less water available for all uses as a result of climate change.").

²² *See, e.g.*, Martin Finucane, *Extreme Weather Events Are Becoming More Frequent*, *New Study Says*, BOSTON GLOBE (Mar. 22, 2018), <https://www.bostonglobe.com/metro/2018/03/22/extreme-weather-events-are-becoming-more-frequent-new-study-says/c9OdBuONOHYhAAmMntiLzN/story.html> [<https://perma.cc/46PN-H8QK>] ("Extreme weather events have become more frequent over the past 36 years, according to a new study that calls for increased urgency in European efforts to adapt to climate change."); *see also* Gordon, *supra* note 9, at 76 ("[W]hether we will be able to bring about the requisite institutional and population growth changes [to stem the

adequately address the challenges of climate change, the legal system must acknowledge the rights of nature and allow natural entities some measure of representation in court.

This Note first examines the brief history of environmental personhood and analyzes the Supreme Court's jurisprudence on corporate personhood as a possible analogy. Part II addresses the corresponding issue of standing for nature, explores standing for animals, and addresses authorization to sue under environmental statutes. In Part III, the Note analyzes the pleadings and motions in the *Colorado River* case to find strengths, weaknesses, and potential ways such litigation could be more successfully pursued in the future. In Part IV, the Note reviews other breakthroughs by the Rights of Nature movement. Part V discusses some practical issues associated with litigation brought "by" natural objects. Lastly, the Note addresses certain counterarguments and suggests how environmental advocates may better seek to establish environmental personhood and standing for nature in American courts.

The lawyers and advocates behind the *Colorado River* case were attempting to establish the Rights of Nature doctrine in U.S. courts.²³ However, the plaintiffs' complaint was insufficiently pleaded and failed to satisfy the requirements of Article III standing.²⁴ In order to survive justiciability challenges and have their cases decided on the merits, individuals and organizations that bring suits on behalf of natural entities in U.S. courts must file robust complaints that meet standing requirements: tangible and specific injury to the entity, a clear connection between the injury and the action complained of, and practical measures that would adequately redress the injury.²⁵ I argue that both the environmental personhood and standing for nature doctrines can help natural entities meet the requirements of Article III.

tide of human climate devastation] depends in part upon effecting a radical shift in our feelings about 'our' place in the rest of Nature." (second alteration in original)).

²³ Angela K. Evans, *Rights of Nature Lawsuit Seeks Personhood for the Colorado River*, BOULDER WKLY. (Sept. 28, 2017), <https://www.boulderweekly.com/news/rights-nature-lawsuit-seeks-personhood-colorado-river/> [<https://perma.cc/3BNP-K93K>].

²⁴ See Greg Herbers & Washington Legal Foundation, *A River Runs to Court: Environmental Activists Circumvent Democracy to Impose Agenda*, FORBES (Nov. 30, 2017, 4:36 PM), <https://www.forbes.com/sites/wlf/2017/11/30/a-river-runs-to-court-environmental-activists-circumvent-democracy-to-impose-agenda/#39eb95a91189> [<https://perma.cc/7Z4T-49GU>].

²⁵ *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).

I. ENVIRONMENTAL AND CORPORATE PERSONHOOD

Personhood is not a stand-alone concept; it is defined and given meaning by the law.²⁶ Legal personhood determines the rights and duties of an individual or entity under statutory law and the Constitution.²⁷ Since the founding, the U.S. Supreme Court has dramatically expanded the definition of legal personhood:

Constitutional jurisprudence reveals a history of expanding the Constitution's protections to new entities. Corporations, trusts, ships, joint ventures, municipalities, partnerships, and nation-states have all appeared in federal court in their own right to prosecute their interests. Collectives like families, churches, and universities "gained legal recognition as actors possessing legal rights, capacities, entitlements, and privileges before individuals did," entitling them to seek judicial relief in their own name. Corporations have particularly found the courthouse door open to them. This trend began in 1819 when the Marshall Court authorized the Trustees of Dartmouth College to bring suit against a state-approved secretary of the new board of trustees. It continues to the present in the form of the Roberts Court's extension of the First Amendment to businesses in cases such as *Citizens United v. Federal Communications [sic] Commission* and *Burwell v. Hobby Lobby Stores*.²⁸

The idea of corporate personhood "was anything but inevitable,"²⁹ but received an auspicious welcome in the early nineteenth century. In *Trustees of Dartmouth College v. Woodward*,³⁰ Chief Justice Marshall held that the Contract Clause protects corporate charters from laws passed by state legislatures and wrote that "[a] corporation is an artificial being, invisible, intangible, and existing only in contemplation of law."³¹ Professor Brandon Garrett argues that while the "artificial" language is often employed to denigrate corporate personhood as an ersatz legal fiction, "human artifice and creativity was something to be admired" at the time.³² Garrett goes on to explain the impact of Marshall's opinion on the Court's subsequent rulings: "[c]orporations may be created by law, but they accomplish important goals of individuals, such as protecting property and furthering the public good. The reasoning was consequentialist and pragmatic, and it set the tone for the Court's jurisprudence that followed."³³ At the core of the Court's acknowledgment of corporate personhood, both in 1819 and now, is the idea that

²⁶ Gordon, *supra* note 9, at 50–51.

²⁷ *Id.* at 50.

²⁸ Babcock, *supra* note 10, at 34 (footnotes omitted).

²⁹ Gordon, *supra* note 9, at 51.

³⁰ 17 (4 Wheat.) U.S. 518 (1819).

³¹ *Id.* at 636.

³² Brandon L. Garrett, *The Constitutional Standing of Corporations*, 163 U. PA. L. REV. 95, 112 (2014).

³³ *Id.*

corporations are created by individuals to accomplish their economic and social goals.³⁴ Thus, they are extensions of people and should be treated as such in court. While corporate personhood is now deeply entrenched, “[t]hroughout legal history, each successive extension of rights to some new entity . . . has been a bit unthinkable.”³⁵ Environmental personhood may be in its “unthinkable” early stage, but there is a strong conceptual foundation for it to follow the path of corporations into the legal mainstream.

Decided in 2010, *Citizens United v. FEC*³⁶ offers a pointed illustration of the Supreme Court’s jurisprudence on corporate personhood.³⁷ In that case, the Court substantially expanded the power of corporations to influence the political process by holding that corporate financial contributions to campaigns were considered speech and protected as such by the First Amendment.³⁸ Following that decision, corporations were able to contribute essentially unlimited amounts of money to “independent” political communications.³⁹ The primary vehicle for such communication has been the super PAC, i.e., political action committee, which has reshaped modern politics and allowed corporate actors to have a significant impact on elections at the federal and state levels.⁴⁰ Natural entities have no such power to influence the political process. The expansion of the rights of nature could help to balance the power of corporations to affect political campaigns post-*Citizen United*. If natural entities were recognized as persons and had the power to represent themselves in court, they could develop a similar ability to advocate for their own rights in the legal and political arena.

The extension of rights to nature demands not simply an application or reorganization of existing law, but a shift in the epistemological understanding of the natural world’s relationship to human society.⁴¹ Professor Gwendolyn Gordon makes a distinction between how corporate personhood is understood legally and socially.⁴² She argues that while corporate personhood is accepted as a legal fact, it would be absurd to refer to a corporate person in the social context: “it makes little

³⁴ *Id.* at 111–12.

³⁵ Stone, *supra* note 7, at 453.

³⁶ 558 U.S. 310 (2010).

³⁷ *Id.*

³⁸ *Id.* at 365 (overruling *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990)).

³⁹ *Id.*

⁴⁰ Richard Briffault, *Super PACs*, 96 MINN. L. REV. 1644, 1644 (2012).

⁴¹ See Gordon, *supra* note 9, at 72–76.

⁴² *Id.* at 70.

sense to most people strolling along a street to point out that person over there, Starbucks.”⁴³ She believes the opposite is true for nature, giving the environment a better claim as the “recipient of rights to personhood than the corporation.”⁴⁴ While nature is not created by individuals to pursue their economic and social goals, as corporations are, it constantly interacts with and is shaped by humans. If one considers how often every person comes into contact with trees, rivers, fields, meadows, and mountains, it becomes clear that nature is the essential fabric of our society.⁴⁵ Moreover, all human beings are part of their ecosystem.⁴⁶ The preservation, development, or destruction of nature has the power to impact everyone and everything that interacts with it.

Courts have recognized three theories of corporate personhood: the grant theory, the entity theory, and the association theory.⁴⁷ The grant theory is exemplified by Chief Justice Marshall’s holding in *Trustees of Dartmouth College v. Woodward*: “[b]eing the mere creature of law, [a corporation] possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence.”⁴⁸ Thus, the corporation’s rights and duties are defined by the charter or grant it receives from the state.⁴⁹

The natural entity theory conceives of corporations as natural persons—with the attendant rights and duties.⁵⁰ For courts that accept the natural entity theory of corporate personhood, personhood for nature could logically be recognized by analogy. If environmental personhood were recognized, normative benefits would follow.⁵¹ At a time when climate change is accelerating threats to natural

⁴³ *Id.*

⁴⁴ *Id.* at 71.

⁴⁵ See generally JOHN MUIR, *OUR NATIONAL PARKS* (The Riverside Press, Cambridge 1903) (1901) (including a collection of Muir’s essays, originally published in the *Atlantic Monthly*, encouraging societal support for the preservation of national wild lands); HENRY DAVID THOREAU, *WALDEN* (1854) (emphasizing the value of self-reliance, solitude, meditation, and nature).

⁴⁶ Oliver A. Houck, *Are Humans Part of Ecosystems?*, 28 ENVTL. L. 1, 2 (1998) (asserting that this is arguably the case).

⁴⁷ Babcock, *supra* note 10, at 35–36.

⁴⁸ *Trs. of Dartmouth College v. Woodward*, 17 (4 Wheat.) U.S. 518, 636 (1819); see Babcock, *supra* note 10, at 35–36.

⁴⁹ See 8 Del. Laws § 102 (2018) (defining the contents of a certificate of incorporation).

⁵⁰ Matthew J. Allman, *Swift Boat Captains of Industry for Truth: Citizens United and the Illogic of the Natural Person Theory of Corporate Personhood*, 38 FLA. ST. U. L. REV. 387, 395 (2011).

⁵¹ Babcock, *supra* note 10, at 36.

ecosystems of all kinds,⁵² granting personhood to nature would provide a necessary impetus for cultural and political change. Corporate personhood has been established by courts primarily through the metaphor of the human body.⁵³ This approach rests upon a wobbly legal fiction, but by power of repetition and historical inertia has become entrenched in our law. This process of precedent-creation could inform the establishment of environmental personhood in U.S. courts. Nature's personhood could be achieved through a similar body metaphor, as nature's organic composition actually gives it a better claim to legal personhood than the non-corporeal corporation. However, in order for a legal precedent around environmental personhood to develop, a federal court must first invoke the body metaphor and the decision must survive appeal.

Professor Hope M. Babcock argues that applying the natural entity theory to nature "is problematic because if nature can contend it is a unique entity, there would be no limit on anything else claiming uniqueness—it is a theory without a limiting principle, which is generally disfavored by the courts."⁵⁴ The lack of a conceptual limiting principle on the definition of personhood under the natural entity theory is certainly an obstacle to its acceptance. However, a practical limiting principle exists in the demanding definition of injury under federal standing requirements. Even if courts recognized environmental personhood, the individual or organization representing a natural object in court would be required to demonstrate concrete and particularized injury.⁵⁵ The justiciability doctrines would maintain their teeth as applied to environmental plaintiffs and would prevent a flood of litigation. On the other hand, entities that are legitimately harmed or threatened with harm would be able to pursue necessary judicial remedies.

Babcock argues that only the natural entity theory "supports giving nature constitutional standing in court, since no state has granted any rights to nature, nor can nature be considered to be an aggregate of members."⁵⁶ However, Babcock's narrow view of corporate personhood's possibilities for nature fails to recognize that the association theory may also offer a foothold for establishing environmental personhood. The association theory views the corporation as the aggregate of its

⁵² See *supra* notes 20–22 (describing examples of destruction of ecosystems, dwindling resources, and increasingly frequent extreme weather events).

⁵³ Babcock, *supra* note 10, at 37.

⁵⁴ *Id.* at 36.

⁵⁵ *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).

⁵⁶ Babcock, *supra* note 10, at 36.

shareholders or members.⁵⁷ Under this theory, the corporation is a collection of individuals gathered together in a common economic enterprise.⁵⁸ The rights of the corporation, therefore, are an extension of the rights held by the people that make it up.⁵⁹ A natural ecosystem also includes human beings, who contribute to it, change it, and occasionally harm it in the same way that people contribute to, change, and harm a corporation.⁶⁰ In this way, nature is an aggregate of its components, which include inorganic formations (such as mountains and rocks), plants, and animals of all varieties, including humans. By this reasoning, an ecosystem should have the ability to operate as an extension of its component parts and to exercise the rights of the people who live within it.

The association theory is logically superior to the natural entity theory as applied to both corporations and natural objects. The natural entity theory requires an uncomfortable cognitive leap to acknowledge the legal personhood of nonhuman entities. Conversely, the association theory establishes a direct connection between human beings and the entity. While the natural entity theory offers the more direct route for a Rights of Nature argument, the association theory's foundation in the inseparability of nature and humans is more persuasive. In the *Colorado River* case, the plaintiffs implicitly adopted the natural entity theory of corporate personhood for purposes of comparison with environmental personhood.⁶¹ Even if a court had accepted this theory, the issue of demonstrating legal standing would have remained.

II. STANDING FOR NATURE

Plaintiffs who establish legal personhood must also have standing to bring their grievances before a court. Article III of the Constitution is the source of the standing doctrine applied in federal courts.⁶² Article III limits federal courts to hearing "cases and controversies."⁶³ Under the U.S. Supreme Court's interpretation of the cases and controversies requirement, plaintiffs must establish that (1) they

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ See Houck, *supra* note 46, at 2–5 (explaining that, though humans are part of ecosystems, some believe they manage ecosystems in a way that does not benefit, and may indeed harm, the other species within the ecosystem).

⁶¹ Amended Complaint, *supra* note 1, at 18–19.

⁶² U.S. CONST. art. III.

⁶³ *Id.* § 2.

“suffered an ‘injury in fact’—an invasion of a legally protected interest, which is (a) concrete and particularized, and (b) ‘actual or imminent, not “conjectural” or “hypothetical”’; (2) “a causal connection between the injury and the conduct complained of—the injury has to be ‘fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court’; and (3) that it is “‘likely,’ as opposed to merely ‘speculative,’ that the injury will be ‘redressed by a favorable decision.’”⁶⁴

The standing doctrine in environmental cases has undergone a significant evolution in the last few decades. In 1972, Professor Stone believed there was “a movement in the law toward giving the environment the benefits of standing” through a “marked liberalization of traditional standing requirements in recent cases in which environmental action groups have challenged federal government action.”⁶⁵ However, Stone’s prediction was “entirely wrong,” as the standing doctrine has been dramatically narrowed, especially for environmental plaintiffs.⁶⁶ Since 1990, the Supreme Court’s standing decisions have “contract[ed] the ability of plaintiffs to gain access to federal courts to remedy alleged wrongs”⁶⁷

In *Lujan v. Defenders of Wildlife*,⁶⁸ the Court rejected the plaintiffs’ three proffered standing theories.⁶⁹ These included the ecosystem nexus theory, under which any person who uses part of a contiguous ecosystem that is adversely impacted by an activity funded by the government would have standing to sue.⁷⁰ The Court held that to establish injury, a plaintiff must put forth “a factual showing of perceptible harm.”⁷¹ This language heightened the barrier for plaintiffs to establish injury. In *Clapper v. Amnesty International USA*,⁷² the Court held that the plaintiffs’ argument that there was an “objectively reasonable likelihood” that their communications would be intercepted under the Foreign Intelligence Surveillance Act was “too speculative” and did not satisfy the requirement that the injury be “certainly

⁶⁴ *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992) (alterations in original) (footnote and citations omitted).

⁶⁵ Stone, *supra* note 7, at 467.

⁶⁶ Babcock, *supra* note 10, at 13.

⁶⁷ *Id.*

⁶⁸ 504 U.S. 555 (1992).

⁶⁹ *Id.* at 565–67.

⁷⁰ *Id.* at 565–66.

⁷¹ *Id.* at 566.

⁷² 568 U.S. 398 (2013).

impending.”⁷³ These decisions, among others, have narrowed the standing doctrine and made it more difficult for plaintiffs to litigate their cases on the merits.⁷⁴

The landscape is “now decidedly bleak for environmental litigants seeking to protect some aspect of the natural environment from harm.”⁷⁵ The current state of the Court’s standing jurisprudence suggests that “if nature (or its components, like a creek) cannot gain access to the courts to protect itself, it appears less and less likely that interested third parties such as environmental organizations will be able to step in.”⁷⁶ Individual or organizational environmental plaintiffs must have sustained injury themselves and may not bring an action on behalf of a natural ecosystem.⁷⁷ This reaffirms the importance of establishing environmental personhood as a legal doctrine and allowing organizations to bring lawsuits on behalf of natural entities. In order to establish standing for nature, judges must have intellectual stepping stones to grasp its significance and to ground an opinion recognizing its existence. A potential analogue rests in the movement behind granting standing, and even legal personhood, to animals.

A. Standing for Animals and Legislative Authorization to Sue

The current state of the law around animal standing is complex and contradictory.⁷⁸ Cass Sunstein argues that there are three categories of people who have standing to sue on behalf of animals: “(1) those deprived of legally required information, (2) those facing ‘aesthetic’ injury, and (3) those suffering competitively.”⁷⁹ Animals often appear as named plaintiffs in federal lawsuits, though several courts have found that animals cannot bring suit in their own

⁷³ *Id.* at 401.

⁷⁴ *Massachusetts v. EPA*, 549 U.S. 497 (2007), adds another dimension to the environmental standing debate. In that case, the Court held that the Commonwealth of Massachusetts had standing to bring an action against the EPA because states receive “special solicitude in [the] standing analysis” because they give up their sovereign rights to enter the union. *Id.* at 520. In the opinion, it was clear that Justice Stevens recognized the dire prospects of global warming and adjusted his reasoning to allow for speculative injury to Massachusetts’ property that would be deemed too tenuous under ordinary circumstances. *Id.* at 521–23, 525–26. This decision could open the door to a more liberal standing regime in situations where natural entities are threatened by the effects of global warming.

⁷⁵ Babcock, *supra* note 10, at 17–18.

⁷⁶ *Id.* at 18.

⁷⁷ *Id.*

⁷⁸ Cass R. Sunstein, *Animal Standing (with Notes on Animal Rights)*, 47 UCLA L. REV. 1333, 1334 (2000).

⁷⁹ *Id.* at 1334–35.

name.⁸⁰ Sunstein also reaches another conclusion which raises serious issues for the quest to establish standing for nature:

The question of standing is mostly for legislative resolution, and both people and animals have standing to protect animals to the extent that Congress has said that they do. Under existing law, this means . . . that animals lack standing to sue in their own right, for Congress has restricted standing to “persons.” But it also means that Congress can accord standing to animals if it chooses to do so.⁸¹

This issue ripples through the pleadings in *Colorado River*. Each of the four counts brought by the plaintiffs is constitutional in nature and none invoke a federal statute.⁸² The plaintiffs hang their hopes for recognition of the River’s standing on the definition of “person” in Article III.⁸³ The reasoning behind this approach lies in the absence of legislative authorization for such a suit. Congress has the authority to explicitly grant standing to natural objects as part of environmental legislation, but has never done so.

In the 1970s, Congress began to pass modern environmental legislation, and the courts developed an environmental standing doctrine for lawsuits brought under these new statutes.⁸⁴ While the National Environmental Policy Act, which requires federal agencies to analyze the environmental impact of its activities, does not contain a provision for judicial review, the courts have “heard challenges to non-compliance with NEPA and have consistently held that environmental injury conferred standing.”⁸⁵ The Clean Air Act was the first federal environmental statute that contained a citizen suit provision.⁸⁶ Section 304 of that statute “provides that ‘any person may commence a civil action’ in federal district court to enjoin violations of emission standards or limitations, as well as enforcement orders and certain types of permit violations.”⁸⁷ While the courts have “consistently viewed § 304 as a broad grant of jurisdiction obviating battles over the directness of the injury inflicted . . . they nonetheless recognized the limits imposed by Article III, and found § 304 did not confer standing on plaintiffs that failed to assert any cognizable

⁸⁰ *Id.* at 1359.

⁸¹ *Id.* at 1335.

⁸² Amended Complaint, *supra* note 1, at 23–31.

⁸³ U.S. CONST. art. III; *see* Amended Complaint, *supra* note 1, at 19.

⁸⁴ Philip Weinberg, *Unbarring the Bar of Justice: Standing in Environmental Suits and the Constitution*, 21 PACE ENVTL. L. REV. 27, 36 (2003).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* (quoting 42 U.S.C. § 7604(a) (2000)).

injury.”⁸⁸ The courts took the same approach to actions brought under the citizen suit provisions of the Clean Water Act, Endangered Species Act, Resource Conservation and Recovery Act, and Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).⁸⁹ While these statutes authorized individuals or groups to bring lawsuits premised on covered environmental violations, plaintiffs were limited to injuries specified by the statute. Whether the congressional intent behind these statutes was to shift the economic burden of environmental destruction to private companies or to protect natural entities,⁹⁰ they do not go far enough in the face of today’s environmental threats. In order to protect natural entities from exploitation and degradation, they must have access to the range of legal options a recognized person would. It is exactly this project that the lawyers and activists behind the *Colorado River* case undertook.

III. THE COLORADO RIVER CASE

In *Colorado River Ecosystem v. Colorado*,⁹¹ the plaintiffs petitioned the court to grant environmental personhood to the Colorado River Ecosystem.⁹² They then argued, by implication, that this personhood would entitle the Ecosystem to standing in federal court for violations of its constitutional rights.⁹³ The complaint put a great deal of emphasis on the normative foundation for the lawsuit, including extended discussions of the perils of climate change, corporate personhood, and the international success of the Rights of Nature doctrine.⁹⁴ It put far less emphasis on specific facts that could satisfy the standing requirements.⁹⁵ For lawsuits brought on behalf of nature to succeed, or at least be considered on their merits, they must plead tangible injury to the natural entities at issue. Here, it is possible the plaintiffs did not do the necessary research to survive the standing challenge. However, it is more likely that the complaint was purposefully drafted to highlight the overarching philosophical and political issues at play. Especially in the fourth count, sufficient

⁸⁸ *Id.* at 37.

⁸⁹ *Id.* at 37–38.

⁹⁰ *See id.* at 37 (discussing Congressional intent for enacting such statutes); cf. Heather Elliot, *Congress’s Inability to Solve Standing Problems*, 91 B.U. L. REV. 159, 161 (2011) (discussing Congress’s power to expand the standing doctrine).

⁹¹ No. 17-cv-02316-NYW (D. Colo. Dec. 4, 2017).

⁹² Amended Complaint, *supra* note 1, at 2–3.

⁹³ *Id.* at 27.

⁹⁴ *Id.* at 17–22.

⁹⁵ *See id.* at 23–33.

facts existed to support a narrower, targeted argument for standing.⁹⁶ The plaintiffs dedicated most of their complaint to persuading the court that their cause was worthy of consideration, instead of satisfying technical justiciability requirements.⁹⁷ Even if the court had recognized the Ecosystem's personhood, any person seeking to bring a suit would still need to make a showing of injury, traceability, and redressability. In order to make progress through legal claims on behalf of natural entities, environmental organizations must focus on a stronger and more sophisticated litigation strategy.

A closer analysis of the Ecosystem's amended complaint and the State's motion to dismiss sketches the contours of the standing issue. The plaintiffs' amended complaint included four counts for declaratory and injunctive relief, all of which failed on standing grounds.⁹⁸ In the first three counts, they failed to allege particularized injury to the Colorado River Ecosystem.⁹⁹ In the final count, the plaintiffs alleged sufficient injury, but failed to meet the redressability prong.¹⁰⁰

The first count alleged that the failure of the courts to grant the River legal recognition constituted a violation of the Petition Clause of the First Amendment and the Due Process Clause of Fourteenth Amendment.¹⁰¹ The plaintiffs argued that the "[d]efendant fails and refuses to recognize the rights of the Colorado River Ecosystem, including by refusing to recognize the Ecosystem's right to appear in court."¹⁰² However, such a claim is insufficient to establish actual injury to the Ecosystem. The State's failure to recognize the Ecosystem's rights as a person is too attenuated to constitute actual injury; if the Ecosystem was not recognized by the legislature as a person, then Colorado's refusal to allow it to appear in court is not a violation of the Petition Clause.¹⁰³ The Colorado legislature has not recognized the rights of the Ecosystem, which is its democratic prerogative.¹⁰⁴ Moreover, the Ecosystem's current inability to litigate its grievance stems from Article III standing

⁹⁶ *Id.* at 27–32 (discussing specific harm to the Ecosystem).

⁹⁷ *See id.* at 17–22.

⁹⁸ *Id.* at 23–33.

⁹⁹ *See id.* at 23–27.

¹⁰⁰ *See id.* at 27–31.

¹⁰¹ *Id.* at 23–24.

¹⁰² *Id.* at 24.

¹⁰³ *See generally* Benjamin Plener Cover, *The First Amendment Right to a Remedy*, 50 U.C. DAVIS L. REV. 1741, 1744–47 (2017) (explaining the Petition Clause).

¹⁰⁴ Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 885 (1983) (“But legal injury is by definition no more than the violation of a legal right; and legal rights can be created by the legislature.”).

requirements and the Supreme Court's standing jurisprudence, not from any action by the State.¹⁰⁵

Furthermore, under the procedural due process doctrine, the State's failure to recognize the ecosystem's "inherent rights to exist, flourish, and naturally evolve" do not qualify as a "deprivation of life or liberty."¹⁰⁶ As these rights do not currently exist, the State cannot deprive the Ecosystem of the due process that would be necessary to protect them. While the plaintiffs focus on the deprivation of life or liberty, the more interesting issue is whether there is a violation of the Ecosystem's property rights.¹⁰⁷ If the State were to recognize the Ecosystem as a person, would its due process claim have more traction if it was based on the Ecosystem's property interest? While this approach would be more intellectually congruous than relying on the rights to life and liberty, the lack of detailed injury would still be fatal.

The second count asserted that the River was entitled to legal recognition of its rights to exist, to flourish, to regenerate, to be restored, and to naturally evolve.¹⁰⁸ Here, the plaintiffs relied on the substantive due process doctrine under the Fourteenth Amendment to claim a violation of the River's right to life and liberty.¹⁰⁹ They alleged that the "[d]efendant fails and refuses to recognize the rights of the Colorado River Ecosystem, including by refusing to recognize the Ecosystem's right to life and liberty, and to exist, flourish, and naturally evolve."¹¹⁰ They went on to argue that the "[d]efendant's policy and practice of failing and refusing to recognize the fundamental rights of the Colorado River Ecosystem violates those rights and the Fourteenth Amendment."¹¹¹ Again, these allegations suffer from a lack of particularity. In order to establish an injury, the plaintiffs need to point to specific and well-pleaded instances of actual rights violations.¹¹² Additionally, this count asked the court to recognize new substantive due process rights.¹¹³ Courts are exceedingly reluctant to grant new rights, as many judges believe that such

¹⁰⁵ See U.S. CONST. art. III; *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992).

¹⁰⁶ Amended Complaint, *supra* note 1, at 23.

¹⁰⁷ For a discussion of this question, see, for example, Lee P. Breckenridge, *Can Fish Own Water? Envisioning Nonhuman Property in Ecosystems*, 20 J. LAND USE & ENVTL. L. 293, 293–94 (2005), and W. Earl Webster, *How Can Mother Nature Get to Court? The Status of the Standing Doctrine in a Post Laidlaw Landscape*, 27 J. LAND RESOURCES & ENVTL. L. 453, 467–68 (2007).

¹⁰⁸ Amended Complaint, *supra* note 1, at 25.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² See generally *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992).

¹¹³ Amended Complaint, *supra* note 1, at 25.

decisions are beyond the bounds of judicial power.¹¹⁴ This request presents a burden too heavy for a court to shoulder, especially atop the plaintiffs' requests for recognition of environmental personhood and standing for nature. This claim undermines the plaintiffs' other claims by seeking an unrealistic form of relief. The plaintiffs should have avoided this claim in an effort to legitimize the suit and bolster their other claims.

The third count claimed a violation of the River's right to equal protection.¹¹⁵ The plaintiffs contended that the State's "failure to recognize the rights of the Colorado River Ecosystem, while recognizing, and, in fact, elevating corporate rights above the Ecosystem's rights, violates the Colorado River Ecosystem's right to equal protection."¹¹⁶ Again, the lack of specific violations of the Ecosystem's equal protection rights is fatal to its claim. The plaintiffs pointed to the State's treatment of corporations and its failure to provide the Colorado River the same rights.¹¹⁷ However, other than the right to personhood, they did not enumerate any other rights or any actual circumstances in which the State has interfered with those rights.¹¹⁸ If this count had been pleaded with sufficient specificity to show actual injury, it may have succeeded.

In 1886, the Supreme Court "noted that it did not wish to hear argument in *Santa Clara County v. Southern Pacific Railroad Co.*"¹¹⁹ on the question of whether corporations were protected by the Equal Protection Clause of the Fourteenth Amendment, since the Justices "[we]re all of opinion that it does."¹²⁰ This point was made summarily and with no reliance on existing precedent.¹²¹ The equal protection right of corporations has been consistently reaffirmed over the years, fueled by the idea "that corporations exist to protect the property interests of their owners and can therefore assert those interests in litigation."¹²² If the environmental personhood of the River were similarly established by the court, it would be entitled to equal protection under the law. However, the court had no occasion to make such a determination on the merits because the plaintiffs failed to

¹¹⁴ Peter J. Rubin, *Square Pegs and Round Holes: Substantive Due Process, Procedural Due Process, and the Bill of Rights*, 103 COLUM. L. REV. 833, 833–34, 837 (2003).

¹¹⁵ Amended Complaint, *supra* note 1, at 26–27.

¹¹⁶ *Id.* at 27.

¹¹⁷ *Id.*

¹¹⁸ *See id.*

¹¹⁹ 118 U.S. 394 (1886).

¹²⁰ Garrett, *supra* note 32, at 112 (alteration in original) (citing *Santa Clara Cty.*, 118 U.S. at 396).

¹²¹ *See Santa Clara Cty.*, 118 U.S. at 396.

¹²² Garrett, *supra* note 32, at 113.

establish standing.

The fourth count alleged that certain actions taken by the State had violated the rights of the Ecosystem to “exist, flourish, regenerate, be restored, and naturally evolve.”¹²³ The plaintiffs argued that “[a]ctions taken by Defendant, to approve permits and issue other regulatory approvals for certain actions regarding the Colorado River Ecosystem” would violate these rights.¹²⁴ They cited examples of these violations, which included water pollution from the Gold King Mine, over-allotment of the River’s water, and the destructive impact on the Ecosystem of dams operating along the River.¹²⁵ This count may adequately state an injury but falters on redressability. It is not clear from the complaint that recognizing the rights of the River would adequately address these issues. If the complaint had clarified how a recognition of rights could redress the referenced examples of environmental harm, it may have survived on this count. For example, the complaint could have argued that recognition as a person would allow the ecosystem to request an injunction on specific harmful activities or monetary damages for mitigation. However, as it was drafted, this count could not survive a justiciability inquiry.

The State’s motion to dismiss makes several persuasive arguments regarding the court’s lack of jurisdiction:

First, the Amended Complaint is barred by the State’s Eleventh Amendment immunity. Second, the Amended Complaint fails to prove constitutional standing under Article III. The Amended Complaint alleges hypothetical future injuries that are neither fairly traceable to actions of the State, nor redressable by a declaration that the ecosystem is a “person” capable of possessing rights. Third, the Amended Complaint fails to demonstrate jurisdiction under any other federal statute in the absence of an actual case or controversy under Article III. Fourth, the Amended Complaint presents a non-justiciable issue of public policy. Whether the ecosystem should have the same rights as people, and who should be allowed to assert those rights in federal courts, are matters reserved to Congress by the Constitution.¹²⁶

The State’s second argument is the most germane to issues of environmental personhood and standing for nature. The challenges in the State’s motion were insurmountable based on the way the plaintiffs drafted the complaint and structured the lawsuit. In response, the plaintiffs filed a motion to dismiss their amended complaint, stating that the lawsuit was a “good faith attempt to introduce the Rights of Nature doctrine to our jurisprudence” but that such an effort is

¹²³ Amended Complaint, *supra* note 1, at 27–28.

¹²⁴ *Id.* at 28.

¹²⁵ *Id.* at 28–31.

¹²⁶ Defendants’ Motion to Dismiss, *supra* note 4, at 2.

admittedly a “difficult and legally complex matter.”¹²⁷ The issue is indeed difficult and complex. However, if even the plaintiffs in the Colorado River case agreed that the case should be dismissed, would it be possible to address the State’s arguments and achieve legal recognition for the rights of nature? If the plaintiffs had drafted their pleadings in a way that met the requirements for standing and not as a Rights of Nature manifesto, they would have had a much better chance to litigate the case on the merits and make inroads toward the recognition of environmental personhood.

IV. RIGHTS OF NATURE IN THE INTERNATIONAL DOMAIN

While a legally insufficient complaint is not the proper place for public policy advocacy on the Rights of Nature, I argue that legislatures and courts in the United States should move in the direction of recognizing such rights by looking to the international community—and a few jurisdictions here in the U.S.—as models. Over the last decade, the rights of nature have been legally recognized by countries and communities around the world. In 2008, Ecuador changed its constitution through a national referendum to recognize rights for nature.¹²⁸ Nature now has rights “to exist, persist, maintain[,] and regenerate its vital cycles, structure, functions[,] and its processes in evolution,” and every person and community can advocate for it.¹²⁹ In 2010, Bolivia legally recognized “Mother Earth” as a “collective public interest” through legislative action.¹³⁰ All of nature now has certain rights enumerated by law in that country.¹³¹

In New Zealand, ideas of environmental personhood were partially spurred by Stone’s 1972 article, which inspired two Maori scholars to advocate for granting personhood to rivers.¹³² Their efforts resulted in the decision to grant personhood to the forest Te Urewera and the Whanganui River.¹³³ In India, Rights of Nature developments followed a similar track to those in New Zealand and specific natural

¹²⁷ Plaintiff’s Motion to Dismiss, *supra* note 4, at 2–3.

¹²⁸ Gordon, *supra* note 9, at 53.

¹²⁹ *Id.* at 54.

¹³⁰ *Id.* at 54, 54 n.22.

¹³¹ *Id.* at 55. Gwendolyn Gordon has argued that the evolution in legal rights for nature in Ecuador and Bolivia was partially fueled by the increased cultural visibility and political power of indigenous peoples. *Id.* at 53–54.

¹³² *Id.* at 56.

¹³³ *Id.* at 56–57.

entities were considered for legal recognition.¹³⁴ In 2012, the Indian Supreme Court declared the legitimacy of considering “non-anthropocentric views of the protection of nature.”¹³⁵ In March 2017, a court recognized the Ganga River Basin as a legal person entitled to the rights that come along with personhood.¹³⁶ Notably, several local communities in the United States have already taken similar measures to recognize some form of rights for nature, including Tamaqua Borough and Pittsburgh in Pennsylvania, and local communities in Maine, New Hampshire, and California.¹³⁷

All of these legal developments suggest that the Rights of Nature doctrine is gaining steam on the international stage. Many of them stem from legislative action and constitutional referenda.¹³⁸ In several countries, rights of nature have been judicially enacted.¹³⁹ While progress continues to be made internationally, these precedents will most likely fail to sway American courts to recognize rights for natural entities in the United States. Recognizing such rights to natural objects and allowing them to sue in court still requires “an imaginative expansion of our traditional concepts of standing.”¹⁴⁰ In order to persuade judges to adopt such a doctrine, we must rely on more practical arguments—such as those posited above—to shift the way they conceive of personhood and legal standing.

V. ISSUES OF REPRESENTATION

Nature does not have an actual voice. Thus, it would require some form of representation in order to appear in court. However, this issue has not been an impediment for a legion of other entities that have accrued legal rights. As Stone pointed out in 1972, voiceless entities who can appear in court include corporations, “states, estates, infants, incompetents, municipalities [and] universities.”¹⁴¹ Under the third-party standing doctrine, an organization is permitted to bring a legal

¹³⁴ *Id.* at 57.

¹³⁵ *Id.*

¹³⁶ *Id.* at 57–58.

¹³⁷ *Id.* at 58–59. Tamaqua Borough was the first municipality to adopt such legislation in 2006, which was designed to protect the community and environment from toxic sewage. *Id.* The other United States-based efforts have sought to protect natural resources. *Id.*

¹³⁸ Where citizens recognize the rights of nature through constitutional referenda, they directly encode the abiding respect for nature in their society’s foundational document.

¹³⁹ See, e.g., Gordon, *supra* note 9, at 57–58.

¹⁴⁰ *Sierra Club v. Morton*, 405 U.S. 727, 757 (1972) (Blackmun, J., dissenting).

¹⁴¹ Stone, *supra* note 7, at 464.

action on behalf of a third party if it meets certain requirements.¹⁴² The application of the third-party standing doctrine in the context of a natural entity raises a serious concern: how can an organization understand nature's best interests? It's a task for which human beings have proved themselves particularly unsuited and could present an ongoing challenge. One way to approach the issue would be to lay down a broad rule that nature seeks to continue existing in a state of wildness. This rule would essentially harken back to the rights of nature before humans arrived on the scene.

Stone's solution for this practical problem was for a "friend of a natural object [who] perceives it to be endangered" to "apply to a court for the creation of a guardianship."¹⁴³ He suggested that either current guardianship statutes could accommodate the guardianship of natural objects, or "special environmental legislation could be enacted along traditional guardianship lines."¹⁴⁴ Babcock took issue with Stone's proposal because it would "take time and impose administrative costs on the plaintiff."¹⁴⁵ Instead, she offered a variation on the proposal, suggesting that "having nature represented by a properly qualified lawyer with sufficient expertise, resources, and commitment to make arguments on nature's behalf or with a special connection to the resource under threat is all the representation nature needs in court."¹⁴⁶ These qualified lawyers "could be from nationally or regionally recognized environmental organizations or even from local ones who can make the necessary showings . . ."¹⁴⁷ She contended that her approach "eliminates the need for a court to appoint a guardian and the reliance on a human plaintiff to complain about nature's injuries."¹⁴⁸

Babcock's critique of Stone's proposal is a legitimate one, as the institutional costs of a new guardianship regime would be difficult to swallow when combined with the existing resistance to establishing standing to nature. However, Babcock's alternative proposal presents challenges of a different kind by entrusting the representation of natural entities to national environmental organizations. Part of the issue for any court considering whether to recognize the legal rights of nature will inevitably be the optics of such a "radical" opinion. If the court were to give a

¹⁴² Tacy F. Flint, *A New Brand of Representational Standing*, 70 U. CHI. L. REV. 1037, 1037 (2003).

¹⁴³ Stone, *supra* note 7, at 464.

¹⁴⁴ *Id.* at 465.

¹⁴⁵ Babcock, *supra* note 10, at 49.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

national organization the right to represent any such plaintiff simply because it has the resources and expertise to do so, the opinion would risk immediate politicization and cultural backlash. Requiring a local organization with members who interact with and benefit from the natural entity, similar to the next friends in the *Colorado River* case, would help avoid such contentious politicization and ensure that such litigation be brought by actual members of the ecosystem. While national organizations would be allowed to provide support to the lawsuit, they would not be able to become the sole representative of the environmental plaintiff.

CONCLUSION

There is a near-unanimous consensus in the scientific community that man-made climate change is real, is accelerating, and is having a major and continuing impact on our environment.¹⁴⁹ Babcock makes a stark case for allowing nature to advocate for its rights in court:

It is important to give nature the independent legal right to go to court to protect itself from harm because the current system will not allow others to intervene on nature's behalf. . . . [T]hird parties face nearly insurmountable barriers when they advocate for nature in court. The executive branch is perpetually hampered by limited resources, and occasionally a lack of will, when it comes to protecting nature from harm. Congressional paralysis (or worse), in matters affecting the environment has made that branch of government the least effective of all. The existing situation has real consequences for the environment—"hundreds of thousands of species on the brink of extinction, and only a tiny fraction will ever find activists in or out of the government to defend them."¹⁵⁰

This passage highlights the urgency of recognizing the rights of nature in court. It also raises one of the counterarguments: while the judicial path is the most efficient way to establish environmental personhood, there are significant separation of powers concerns. However, there is strong precedent for the Court to shape the justiciability doctrines through robust interpretation.¹⁵¹ In the Court's recent standing jurisprudence, there have been instances where the Court did not grant

¹⁴⁹ See *Scientific Consensus: Earth's Climate Is Warming*, NASA, <https://climate.nasa.gov/scientific-consensus/> [<https://perma.cc/MXR8-6YQ2>] (last visited Jan. 29, 2019); see also INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2014 SYNTHESIS REPORT (2014).

¹⁵⁰ Babcock, *supra* note 10, at 18–19 (footnotes omitted).

¹⁵¹ See, e.g., *Lujan v. Defs. of Wildlife*, 504 U.S. 555 (1992); Babcock, *supra* note 10, at 13–15 (describing several such cases); see also Flint, *supra* note 142, at 1042 (describing certain implications of derivative standing).

standing to parties where Congress had arguably granted it.¹⁵² The effort to encourage courts to recognize environmental personhood and standing for nature faces an uphill battle and the most certain way to achieve this objective is through legislative action. Nevertheless, courts are well within their power to recognize such a doctrine.

The other major challenge to standing for nature is administrative; many critics argue that allowing such suits would lead to an influx in litigation brought on behalf of natural entities.¹⁵³ However, as addressed above, recognizing environmental personhood does not automatically grant standing for nature. The individual or organization bringing the suit on behalf of a natural entity would be required to demonstrate Article III standing by showing injury, traceability, and redressability.¹⁵⁴ These requirements, especially as they have been construed by the U.S. Supreme Court, continue to present significant barriers to environmental litigants.¹⁵⁵ For example, even if the Colorado River's right to sue on its own behalf had been recognized, the deficient pleadings submitted by the plaintiffs would not have survived the standing analysis. Additionally, the expense associated with environmental litigation would discourage quixotic lawsuits. In order to make a showing to meet the standing requirements, the natural entity's next friends would need to commission studies and engage scientific or technical experts. These practical challenges would prevent the courts from being overrun with frivolous actions while opening the door to meritorious lawsuits where environmental devastation could be avoided or redressed through litigation.

For such meritorious lawsuits to proceed, organizations must develop a more focused and nuanced litigation strategy that pleads specific injury to the natural entity, a clear link between the injury and the state action, and realistic remedies that would sufficiently reverse or mitigate the injury. Only through such a strategy can advocates and activists hope to advance the causes of environmental personhood and standing for nature in the courts.

¹⁵² Babcock, *supra* note 10, at 13.

¹⁵³ *Id.* at 45.

¹⁵⁴ *Lujan*, 504 U.S. at 560–61.

¹⁵⁵ See Babcock, *supra* note 10, at 13 (“[S]tarting in 1990 and continuing almost unbroken to the present, the Court has issued decisions, especially in environmental cases, contracting the ability of plaintiffs to gain access to federal courts to remedy alleged wrongs—access that, in some cases, Congress arguably assured them of.” (footnotes omitted)).