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A Brook with Legal Rights: The Rights of Nature in Court

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A Brook with Legal Rights: The Rights of Nature in Court

Hope M. Babcock*

*Our brooks will babble in the courts,/Seeking damages for torts.*¹

Over two decades ago, Professor Christopher Stone asked what turned out to be a question of enduring interest: should trees have standing? His question was recently answered in the affirmative by a creek in Pennsylvania, which successfully intervened in a lawsuit between an energy company and a local township to prevent the lifting of a ban against drilling oil and gas wastewater wells. Using that intervention, this Article examines whether such an initiative might succeed on a broader scale. The Article parses the structure, language, and punctuation of Article III, as well as various theories of nonhuman personhood to see if, like corporations, the Constitution might be sufficiently capacious to allow nature direct access to Article III courts. Finding toeholds in these theories, the Article identifies some institutional and practical problems with allowing nature to appear directly in court. The Article suggests possible answers to these problems, such as limiting the type of cases brought by nature to those that involve important and/or irreplaceable resources threatened by government inaction and requiring that nature must be represented by lawyers who have sufficient expertise, commitment, and resources to prosecute her interests. While success is not guaranteed, nor can it ever be, the author hopes that others, like the lawyers representing Little Mahoning Creek, will petition for judicial relief in nature's name. Given the rigidity and hostility of the current Court's standing jurisprudence, the intransigence of Congress, and the over-crowded agenda of the Executive Branch, this may be the only way to protect our disappearing natural resources.

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* Professor of Law at Georgetown University Law Center where she teaches natural resources and environmental law and also directs an environmental clinic. She presented the Article in very preliminary form to a Law Center workshop and benefitted from the comments of my colleagues. She is particularly grateful for the Law Center's continuing generous support of her scholarship and to Morgan M. Stoddard, Research Services Librarian at the Law Center, for assistance in tracking down some particularly elusive sources.

1. John M. Naff, Jr., Reflections on the Dissent of Douglas J., in *Sierra Club v Morton*, 58 Am. Bar Ass'n J. 820 (1972).

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INTRODUCTION

More than forty-two years after Professor Christopher Stone wrote his paradigm-busting article, “Should Trees Have Standing?—Toward Legal Rights for Natural Objects,”² a watershed in western Pennsylvania moved to intervene in a state court lawsuit brought by Pennsylvania General Energy Co. (PGE) against Grant Township, Pennsylvania. PGE’s lawsuit challenged a law enacted by the town banning the drilling of oil and gas wastewater wells.³

2. 45 S. CAL. L. REV. 450 (1972) [hereinafter “Stone (Univ. of S. Cal. 1972)”]. Several outlets have republished Stone’s article since then. *See, e.g.*, CHRISTOPHER D. STONE, SHOULD TREES HAVE STANDING? TOWARD LEGAL RIGHTS FOR NATURAL OBJECTS xvi (William Kaufmann, Inc. 1974) (1972); CHRISTOPHER D. STONE, SHOULD TREES HAVE STANDING? TOWARD LEGAL RIGHTS FOR NATURAL OBJECTS (Avon Books 1975) (1972); CHRISTOPHER D. STONE, SHOULD TREES HAVE STANDING? AND OTHER ESSAYS ON LAW, MORALS AND THE ENVIRONMENT (Oceana Publications 1996) (1972); CHRISTOPHER D. STONE, SHOULD TREES HAVE STANDING? LAW, MORALITY, AND THE ENVIRONMENT (Oxford Univ. Press, 3d ed. 2010) (1972). When this Article cites a version other than the original in 45 S. CAL. L. REV. 450 (1972), it indicates which version it is referring to by noting the publisher and the date of the edition.

3. Pa. Gen. Energy Co. v. Grant Twp., No. 14-209, 2015 WL 6001882, at *2 (W.D. Pa. Oct. 14, 2015) (describing the intervention by East Run Hellbenders Society and Little Mahoning Creek).

Although the motion was also brought in the name of a citizen environmental group, the East Run Hellbenders Society, the named intervenor is Little Mahoning Creek.⁴ The Creek's lawyers were doing exactly what Stone had suggested, bringing to the court's attention harm to the affected environment without the artifact of a human intermediary. While this is not the first time a nonhuman has appeared as a party in a lawsuit involving a natural resource,⁵ the intervention petition was sufficiently novel to garner immediate attention in the press.⁶

Reflecting on the intervention petition of Little Mahoning Creek, the time seems ripe to revisit Stone's proposal.⁷ If there was a moral and practical imperative to giving nature an independent voice in court in 1972, it is even truer today. The current trend in the Supreme Court is to increase the barriers facing surrogate litigants who seek to protect some feature of the environment from harm, particularly the barrier presented by Article III standing. Why these cases increasingly fail—despite the ingenuity of the lawyers—is the attenuated, almost fictive connection between the interested or injured party and the threatened resource. The lack of success in prosecuting these cases forces the resolution of natural resource conflicts into the political branches, which evince no capacity to act. But, if the natural resource could appear in its own right to complain of threats to its continued existence, the injury prong of Article III standing should cease to be a problem.⁸

4. *Id.*

5. See, e.g., STONE (Oxford Univ. Press 2010), *supra* note 2 (listing a variety of resources, including a river, a marsh, a brook, a beach, a national monument, a tree, and an endangered Hawaiian bird as examples of where lawsuits were filed in the name of nonhumans).

6. See, e.g., Ellen M. Gilmer, *Speaking for the Trees, Lawyer Pushes Unconventional Doctrine*, ENERGYWIRE (Jan. 7, 2015), <http://www.eenews.net/stories/1060011209> ("The rights-of-nature doctrine . . . first gained traction in 1972 when University of Southern California law professor Christopher Stone published the ground breaking 'Should Trees Have Standing—Toward Legal Rights for Natural Objects.'"); Melissa Troutman, *Pennsylvania Ecosystem Fights Corporation for Rights in Landmark Fracking Lawsuit*, PUB. HERALD (Dec. 10, 2014), <http://publicherald.org/grant-township-speaks-for-the-trees-in-landmark-fracking-lawsuit/>.

7. See Peter Manus, *The Blackbird Whistling—The Silence Just After Evaluating the Environmental Legacy of Justice Blackmun*, 85 IOWA L. REV. 429, 509–510 (2000) ("Along with Blackmun's model for organizational standing, revived consideration is needed for the model presented by Professor Stone in *Should Trees Have Standing* . . . Stone's work is reminiscent of Blackmun's in its detail, thoughtfulness, and prescience."); see also *id.* at 512–14 (listing reasons that the time is right to adopt Blackmun and Stone's argument including citizen suit provisions in environmental statutes, the EPA's prominence in Executive decision making, and the emergence of environmental justice movements).

8. See Tamie L. Bryant, *Sacrificing the Sacrifice of Animals: Legal Personhood for Animals, the Status of Animals as Property, and the Presumed Primacy of Humans*, 39 RUTGERS L.J. 247, 276 (2008) ("[T]here are obvious differences between humans' claiming injury for harms done to an animal and animals' claiming harm to themselves. First, recognizing that the alleged injury really is to the animal, not to the human, correctly identifies the victim and the harm. Second, [this] . . . does less conceptual violence to the traditional idea of standing than does expanded legal standing for humans, who would be claiming that they are injured by virtue of injuries to another"); but see *id.* at 277 (noting a disadvantage of pursuing direct legal standing for animals is that it could lead to unifying debates about what animal

As this Article discusses, there are positive features of giving nature a legal voice in court as well as negative and confounding ones.⁹ At the time, Stone's proposal to grant nature direct standing was greeted with a mixture of derision and curiosity.¹⁰ Indeed, most attempts to allow nature to bring cases in its own right have either failed or were saved by the presence of human co-plaintiffs.¹¹

One possible reason why earlier attempts to allow nature to speak for itself in court failed, and why Stone's proposal did not gain any traction, may have been the lack of a coherent theoretical basis for granting nature rights it could prosecute and defend in court. Stone ultimately relied on laws like the Endangered Species Act¹² and public lands laws¹³ because they arguably impose a trust obligation on federal agencies to directly prosecute the interests of the resources under their protection. But as even Stone admitted, relying on these laws left many resources without a legal voice, and those that are statutorily protected suffer from lack of government attention and enforcement.¹⁴

Even if a theoretical purchase for Stone's proposal can be found, there are still serious institutional concerns about implementing it. These include the risk of flooding the courts with nonmeritorious claims and transferring potentially political disputes from the political branches of government to the nonpolitical one. There are practical problems as well, such as who should speak for nature

characteristics require their recognition as persons, distracting from the more legally significant question, which is the status of animals as legal property).

9. One negative effect of giving nature juridical rights is that it gives the judiciary supremacy over interpreting and implementing those rights. See Joseph L. Sax, *The Search for Environmental Rights*, 6 J. LAND USE & ENVT'L. L. 93, 93 (1990).

10. STONE (Oxford Univ. Press 2010), *supra* note 2, at xiv–xvi.

11. See, e.g., *Hawaiian Crow v. Lujan*, 906 F. Supp. 549, 551–552 (D. Haw. 1991) (dismissing complaint due to endangered bird's lack of constitutional standing); *but see Palila v. Haw. Dep't of Land & Nat. Res.*, 852 F.2d 1106, 1107 (9th Cir. 1988) (“[The palila] wings its way into federal court as a plaintiff in its own right.”); *Mt. Graham Red Squirrel v. Yeutter*, 930 F.2d 703 (9th Cir. 1991); *V.I. Tree Boa v. Witt*, 918 F. Supp. 879 (D.V.I. 1996); *Loggerhead Turtle v. City Council*, 896 F. Supp. 1170 (M.D. Fla. 1995); *N. Spotted Owl v. Lujan*, 758 F. Supp. 621 (W.D. Wash. 1991); *N. Spotted Owl v. Hodel*, 716 F. Supp. 479 (W.D. Wash. 1988).

12. 16 U.S.C. §§ 1531–1544 (2012).

13. E.g., National Forest Management Act of 1976, 16 U.S.C. §§ 1600–1614 (2012); National Park Service Organic Act of 1916, 16 U.S.C. §§ 1–18f (2012) (repealed 2014), Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1702–1785 (2012); Wilderness Act of 1964, 16 U.S.C. §§ 1131–1136 (2012).

14. Stone (Univ. of S. Cal. 1972), *supra* note 2, at 472–73 (discussing how conceiving of the Department of the Interior as a quasi-guardian covered only federal lands, leaving uncovered state and local public lands as well as natural resources on private lands). Stone also notes that the government's guardianship of even the resources under its control is uneven at best, in part because it must fulfill several institutional goals, some of which conflict. *Id.* He makes the point that even where a government agency is allegedly acting on your behalf, you still want to retain independent legal counsel to protect your interests, adding “I would not ask more trust of national forests” vis-à-vis some putative governmental guardian. *Id.*

since nature is voiceless.¹⁵ Stone suggests using guardians in a representational capacity as a way of giving nature a voice. Justice Douglas, in his dissent in *Sierra Club v. Morton*,¹⁶ picked up Stone's idea,¹⁷ rhetorically asking who better to speak for the trees than an environmental organization dedicated to their protection.¹⁸ Yet this proposal creates its own problems. For example, who should the guardian be when more than one organization applies? What should they be the guardian of when there are conflicting nonhuman interests? And for what public interest should the guardian advocate in those situations?¹⁹ Besides, using guardians still requires the presence of human interlocutors and would not necessarily limit the number of cases that might be filed. Nor would the use of guardians respond to the separation of powers problems embedded within Stone's proposal.

This Article suggests that theoretical support for Stone's proposal might be found in several sources: in Article III itself, in a critique of the Court's standing jurisprudence that emphasizes the institutional and fairness reasons to keep courts open to claims brought by minority interests, in the growing salience of dignity as a constitutional right, and in Court precedent, which, since the early days of the Republic, has found room in the Constitution for corporations based on their legal personhood—a theory that has found new prominence in the Roberts Court.²⁰ Various theories of animal personhood, although less robust, may also lend some support for granting nature rights in court. However, those theories have failed to embed animal rights in the legal system; their usefulness should not be overstated.

Part I of this Article describes Stone's proposal in more detail, what prompted him to write it, and the piece's role in Justices Douglas' opinion in *Sierra Club v. Morton*. Part II briefly discusses the barriers that the Court's current standing jurisprudence creates for plaintiffs seeking to prevent or

15. However, as the Court said in *Clapper*, “[t]he assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing.” *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138, 1147 (2013).

16. 405 U.S. 727 (1972).

17. *Id.* at 741 (Douglas, J., dissenting) (“The critical question of ‘standing’ would be simplified and also put neatly in focus if we . . . allowed environmental issues to be litigated . . . in the name of the inanimate object about to be despoiled, defaced, or invaded.”).

18. *Id.* at 743 (Douglas, J., dissenting) (“The river as plaintiff speaks for the ecological unit of life that is part of it. Those people who have a meaningful relation to that body of water—whether it be a fisherman, a canoeist, a zoologist, or a logger—must be able to speak for the values which the river represents and which are threatened with destruction.”).

19. Stone (Univ. of S. Cal. 1972), *supra* note 2, at 471 (discussing and responding to the problem of guardians not being able to determine the needs of the natural resources in their charge, and noting a guardianship system is not very different from the Interior Department's guardianship over public lands).

20. See, e.g., *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010) (declaring unconstitutional under the First Amendment a federal law that limited a corporation's ability to pay for political advertisements out of its general funds); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (allowing a corporation to claim an exemption from the requirements of the Affordable Care Act on the basis of its religious beliefs).

remediate harm to the natural environment. Part III discusses the executive branch's incapacity to enforce protective laws and how Congress' political stasis underscores the importance of courts assuming a more protective stance. Part IV searches for a theoretical basis for Stone's proposal that does not depend on human intermediaries or supplemental statutory support. Here, the Article looks to the Constitution, particularly the language and punctuation in Article III, section 2, clause (hereinafter paragraph) 1, and some early Supreme Court cases granting access to court for nonhuman entities, like corporations. Before focusing on corporations and their legal personhood, this Part discusses the growing importance of dignity as a constitutional concept and how the concept might be applied to nonhumans to strengthen any bid for standing,²¹ as well as the work of Professor Vicki Jackson. She argues, among other things, that the Court's current standing jurisprudence is unfair to individual litigants.²² It also leaves society without the benefit of the judicial branch's contribution to democratic accountability and undermines the institutional status of courts.²³ The Article then examines various theories of animal personhood. Although these theories are unfortunately less availing than the entrenched concept of corporate personhood, they are not completely unhelpful for purposes of granting nature standing.²⁴

Part V identifies and proposes solutions to various institutional problems with Stone's proposal, such as the risks that it might flood the courts with nonmeritorious claims and intrude into the sphere of the political branches of government, as well as practical problems associated with nature representing herself in court. To overcome the institutional problems, Part V suggests carefully cabining the circumstances in which nature could directly advocate for herself in court to situations where the resource in dispute is of substantial importance or irreplaceable and where the failure of the political system to protect it could cause catastrophic or irreversible harm. This might constrain the flood of nonmeritorious cases and control against potential separation of powers problems. As an alternative to Stone's court appointed organizational guardians, which would be costly and time consuming to implement, the Article proposes to solve the practical problems raised by nature's inability to speak by using qualified lawyers whose prior practice suggests that they have a special connection to the threatened resource or that they possess the commitment, expertise, and resources to represent it. This might also reduce the

21. See *infra* Part IV.C (discussing the issue of dignity).

22. See Vicki C. Jackson, *Standing and the Role of Federal Courts: Triple Error Decisions in Clapper v. Amnesty International USA and City of Los Angeles v. Lyons*, 23 WM & MARY BILL RTS J. 127, 136–137 (2014).

23. See *id.* at 142.

24. Another potential area of support for granting trees standing, undeveloped here but worthy of mention, is the recognition by some courts of the rights of future generations to initiate legal action. See, e.g., *Minors Oposa v. Factoran*, G.R. No. 101083, 224 S.C.R.A. 792 (July 30, 1993) (Phil.) (holding of the Supreme Court of the Philippines that plaintiffs had standing to represent themselves, their children, and their descendants).

number of cases actually filed. This latter proposal also resonates with Justice Blackmun's suggestion in *Sierra Club v. Morton* that there should be an "imaginative expansion of our traditional concepts of standing in order to enable an organization . . . [with] pertinent, bona fide and well-recognized attributes in the area of the environment" to litigate.²⁵ The only difference is that it would be the lawyers, not the organizations who qualify.

I. STONE'S PROPOSAL TO ALLOW NATURE TO SPEAK FOR ITSELF IN COURT

*Even the narrowest view of the interests of mankind, if pursued to its furthest bound, leads us to conclude that our greatest happiness, especially if we are mindful of the survival in dignity of our posterity, demands that we give some sort of standing in court to the lilies, the trees, and all the other glories of nature.*²⁶

Stone would be the first to admit that the idea for his article came from an offhand remark he made in a first year property class to gain the dwindling attention of the class at the end of the hour.²⁷ This led to a search for a pending case "in which this Nature-centered conception of rights might make a difference in outcome," which, in turn, led to a research librarian finding *Sierra Club v. Morton*, and the idea of writing an article which might influence the case's outcome—a "ready-made vehicle to bring to the Court's attention the theory that was taking shape" in Stone's mind.²⁸ But the case had been docketed for argument a month or two after the librarian found the case, and the next edition of the *Southern California Law Review*, a symposium on technology, was not scheduled for publication until late March, too late to influence any briefs or oral argument. But Justice Douglas, who was tasked with writing the preface to the edition, would have to see all the articles. Stone wrote the article at "breakneck" speed, getting it to the printer in late December. The rest is history.

Stone's principal purpose behind writing *Should Trees Have Standing?* was to persuade the Court in the Mineral King case, *Sierra Club v. Morton*, to consider a park "a jural person."²⁹ If he succeeded, he reasoned, the merits of

25. 504 U.S. at 757 (Blackmun, J., dissenting); see also Manus, *supra* note 7, at 434 ("Blackmun's *Sierra Club* thesis [should be] a model for environmental standing"); see also Hope M. Babcock, *The Problem with Particularized Injury The Disjunction Between Broad-Based Environmental Harms and Standing Jurisprudence*, 25 J. LAND USE & ENVTL. L. 1, 15 (2009) (discussing allowing organizations in possession of sufficient commitment, expertise, agenda, and resources to not make a showing of particularized injury when representing the environment).

26. STONE (William Kauffman, Inc. 1974), *supra* note 2, at xvi (commenting on Justice Blackmun's dissent in *Sierra Club*, 405 U.S. at 760 & n.2 (Blackmun, J., dissenting) which said he preferred John Donne's statement "No man is an [island]" to the majority's reference to De Tocqueville).

27. This backstory on Stone's article comes from STONE (Oxford Univ. Press 2010), *supra* note 2, at xii–xiv.

28. *Id.* at xii–xiv.

29. *Id.* at xiii.

the case might be heard because while the injury to the Sierra Club (Club) was “tenuous,” that to the park was not.³⁰ Thus, the demands of the first prong of Article III standing doctrine, the need to show a direct, concrete, nonhypothetical personal injury, could be met. How close he came to meeting that goal is reflected in the 4–3 decision,³¹ which Stone lost. Even though the Court for the first time recognized in *Sierra Club* that aesthetic noneconomic injuries were cognizable under Article III, the Court held that plaintiff organizations, like the Club, still had to show that it or its members had suffered a direct and immediate injury, which the Club had not done. But the decision provoked one of Douglas’ most famous dissents. Taking a page from Stone’s article, Justice Douglas argued that nature could be a litigant speaking through people “who have so frequented the place as to know its values and wonders.”³²

30. STONE (William Kauffman, Inc. 1974), *supra* note 2, at xiii (quoting Stone’s recitation of how and why he wrote the article). Stone identified the pending Mineral King case as a good vehicle for showing his class a situation in which giving a thing legal rights might “make a real operational difference.” *Id.* The Ninth Circuit recently had decided that the Club did not have standing to enjoin the Forest Service from granting Walt Disney Enterprises, Inc. the right to build a \$35 million complex of motels, restaurants, and recreational facilities in Mineral King, a wilderness area in California’s Sierra Nevada Mountains. *Id.* The basis for the court’s decision was that the Club did not demonstrate that it was adversely affected by the agency’s decision and that fact that there was no one else who could make that demonstration did not create a right in an appellee to seek a judicial remedy. *Id.* (citing *Sierra Club v. Hickel*, 433 F.2d 24, 32 (9th Cir. 1970), *aff’d sub nom Sierra Club*, 405 U.S. 727). What followed was Stone’s breakneck writing of his article in roughly two months, its unlikely placement in a Symposium edition on Law and Technology of the Southern California Law Review, and then its circulation to Justice Douglas who was writing the preface for the edition and would see all the draft article articles before he contributed his piece. *Id.* at xiv. The article went to the printer in late December, the case was held up until April 19, 1972, at which point it upheld the Ninth Circuit, with an extraordinary footnote by Justice Stewart to his majority opinion in which he invited the Club to amend its complaint to invoke some other theory of jurisdiction. *Id.* (citing *Sierra Club*, 405 U.S. at 735 n.8). Additionally, Justice Douglas’ dissent citing Stone’s article as support for his statement 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 . . . This suit would therefore be more properly labeled as *Mineral King v. Morton*.” *Id.* at xv (quoting *Sierra Club*, 405 U.S. at 741–42 (Douglas, J., dissenting)).

31. Both Justices Blackmun and Brennan agreed with Douglas’ characterization and according to Hardin, “would have ‘interpreted’ the Sierra Club’s complaint as though it had been intended to raise Stone’s thesis (conceiving Mineral King as the party in interest and the Sierra Club as its guardian).” *Id.* at xv. Within a month of the Court’s decision, Senator Philip A. Hart commended Stone’s article on the Senate floor and had it reprinted in the Congressional Record. *Id.* at xvi.

32. *Sierra Club*, 405 U.S. at 751–52 (Douglas, J., dissenting). Justice Douglas’ position on granting nature standing in her own right contrasted with the position of Justice Blackmun, who instead advocated expanding organizational standing to enable groups to demonstrate that they have a “provable, sincere, dedicated, and established status” that enabled them to represent nature. *Id.* at 757–58 (Blackmun, J., dissenting); *see also* Manus, *supra* note 7, at 446 (“While Douglas demanded a revolutionary recognition of rivers and mountains as legal parties, Blackmun urged the judicial entertainment of petitions by environmental organizations through which they might gain legal recognition as advocates on particular environmental issues.”). “Whether or not Douglas’ ecosystem-as-litigant concept actually boiled down to a legal mechanism with any more than a symbolic distinction from Blackmun’s organizational standing (or even from the majority view), Douglas alone insisted that environmental law needed recognition as unique.” *Id.* at 449.

In his article, Stone described the evolution of legal rights for children, prisoners, aliens, married women, the insane, African Americans, fetuses, Indians, and inanimate entities like corporations, trusts, and ships as solutions to the “unthinkable”—giving rights to what had previously been a “rightless” thing.³³ He noted that every time there is a campaign “to confer rights onto some new ‘entity,’” the proposal sounds strange, often frightening, even “laughable,”³⁴ because “until the rightless thing receives its rights, we cannot see it as anything but a *thing* for the use of ‘us,’” the current rights-holders.³⁵ He remarked on the circularity of the reasoning that resists giving “things” rights until they can be valued for themselves, noting that until a thing receives rights most people will refuse to believe that it has value in and of itself, even though giving a thing rights will “sound inconceivable to a large group of people.”³⁶ He then set out to do the *unthinkable*; to argue why legal rights should be given to the “natural environment as a whole.”³⁷

Stone proposed giving nature jural standing through the presence of a guardian who could speak for it.³⁸ He believed the appointment of a guardian would overcome the putative barrier to nature seeking judicial redress for wrongs done to it. After all, guardians are appointed for people who have been deemed legally incompetent because of a mental disease, or senility, or because they are attached to life support and unable to speak.³⁹ Indeed, the capacity of those who are adjudged legally incompetent to engage in litigation “by human proxy” is valued by society.⁴⁰ He found states like California, that have laws

33. Stone (Univ. of S. Cal. 1972), *supra* note 2, at 453 (using as an example the struggle of medieval legal scholars with the idea of the legal nature of corporate entities like the Church and the state and the lengths to which they went to develop “elaborate conceits and fallacies to serve as anthropomorphic flesh for the Universal Church and the Universal Empire”). Sunstein adds to this list slaves who were considered nonpersons, but who could bring suit “often through a white guardian or ‘next friend,’ to challenge unjust servitude.” Cass R. Sunstein, *Standing for Animals (with Notes on Animal Rights)*, 47 UCLA L. REV. 1333, 1361 (2000).

34. Stone (Univ. of S. Cal. 1972), *supra* note 2, at 455.

35. *Id.* (emphasis in the original).

36. *Id.* at 456.

37. *Id.*

38. Sunstein makes a similar proposal, suggesting that “it would be acceptable for Congress to conclude that a work of art, a river, or a building should be allowed to account as a plaintiff or a defendant, and authorize human beings to represent them to protect their interests. So long as the named plaintiff would suffer injury in fact, the action should be constitutionally acceptable.” Sunstein, *supra* note 33, at 1361.

39. Stone (Univ. of S. Cal. 1972), *supra* note 2, at 464. Stone also notes that a law professor successfully petitioned the New York Court of Appeals to make him the legal guardian of an unrelated fetus scheduled to be aborted so he could bring a class action on behalf of similarly situated fetuses in the city’s municipal hospitals. *Id.* at 464 & n.52. According to Stone, doing this seemed “to be a more radical advance in the law than granting a guardianship over communal natural objects,” because in the case of the fetus there was a mother who favored abortion. *Id.* at 464 n.52; see also Richard L. Cupp, Jr., *Children, Chimps, and Rights Arguments from “Marginal” Cases*, 45 ARIZ. ST. L.J. 1, 24 (2013) (“Translating acceptance of the argument from marginal cases to a legal context would likely require assigning guardians ad litem to asset qualifying animals’ basic rights in courts.”).

40. Emma A. Maddux, Comment, *Time to Stand Exploring the Past, Present, and Future of Nonhuman Animal Standing*, 47 WAKE FOREST L. REV. 1243, 1261 (2012).

defining incompetent to be *any person* who is unable to take care of themselves, no bolder nor more imaginative than the Supreme Court's declaring that a railroad corporation qualified as a *person* under the Fourteenth Amendment.⁴¹ Stone acknowledged that there were problems with his guardian proposal, such as the appointment of different guardians by state and federal courts for protection of the same natural resource like a stream, or a federal guardian, who is appointed to protect the entire watershed of which the stream is a part, bringing suit on behalf of the larger system, but ignoring the stream. Yet Stone felt these problems, while "difficult," were not "impossible to solve."⁴² From his perspective, "[i]f the environment is not to get lost in the shuffle, we would do well . . . to adopt the guardianship approach as an additional safeguard, conceptualizing major natural objects as holders of their own rights, enforceable by court-appointed guardians."⁴³

Stone observed that there are multiple environmental organizations, "which have manifested unflagging dedication to the environment and which are becoming increasingly capable of marshalling the requisite technical experts and lawyers," any one of which might seek guardianship status on behalf of a natural resource.⁴⁴ Guardians could be given the right to inspect a threatened area to present the court with a more complete finding on the area's condition, as well as to present the land's right to redress for any harm, without having "to make the roundabout and often unavailing demonstration" that the rights of the organization's members had somehow been "invaded."⁴⁵ Stone believed that the guardianship concept would prevent the flood of litigation that some feared might result from liberalized standing because the presence of a guardian assured that an adverse judgment against the natural resource would be bound by principles of *res judicata*.⁴⁶

For support for his proposal, Stone relied heavily on procedural protections for nature, such as those found in section 102(2)(C) of the National

41. Stone (Univ. of S. Cal. 1972), *supra* note 2, at 465; see generally, Paul Kens, *Nothing to Do with Personhood: Corporate Constitutional Rights and the Principle of Confiscation* (2015) (working draft in possession of author) (explaining the evolution of corporate constitutional rights from early Supreme Court decisions such as *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518 (1819) through contemporary cases like *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010)).

42. Stone (Univ. of S. Cal. 1972), *supra* note 2, at 464, n.49 (suggesting pretrial hearings and intervention as two among many ways to ameliorate the problem and noting that the issues are no more complex than similar problems arising in class actions).

43. *But see* Cupp, *supra* note 39, at 47 ("[A] guardian ad litem seeking to enforce the rights of a child has a more solid basis for knowing what that child would want if it could assert its own rights than would be the case in some situations involving a guardian ad litem seeking to assert rights for animals."); *id.* at 47–48 ("[O]ur special capacity to understand children in a manner that greatly exceeds our ability to understand any other living beings adds to the reasons for favoring a rights paradigm for children but a human responsibility paradigm regarding our interactions with animals.").

44. Stone (Univ. of S. Cal. 1972), *supra* note 2, at 473.

45. *Id.* at 466.

46. *Id.*

47. *Id.* at 470–71.

Environmental Policy Act⁴⁷ and laws creating a federal trust responsibility, like the National Park Service Organic Act⁴⁸ and the Wilderness Act,⁴⁹ but worried that this would leave many resources unprotected.⁵⁰ This concern led him to argue that the threat of irreparable injury to a natural object might create the equivalent of an absolute right.⁵¹ Stone also suggested, for illustrative purposes, that a case might be made for an electoral apportionment system “that made some systematic effort to allow for the representative ‘rights’ of non-human life.”⁵²

Although Stone was not an environmental lawyer,⁵³ his article has influenced the thinking of many such lawyers and even some judges. The ideas and beliefs expressed in Stone’s article, some of which are set out above, “personifie[d] for lawyers and non-lawyers alike, many of the root philosophical questions in the policy and jurisprudence of our natural resources.”⁵⁴ This may be one reason his article has endured beyond its initial publication, even though its influence to date in court is less than Stone might have wished for.

II. THE SUPREME COURT HAS MADE IT INCREASINGLY HARD FOR ENVIRONMENTAL ORGANIZATIONS TO USE THE COURTS TO PROTECT NATURE FROM HARM, LEAVING IT LARGELY UNPROTECTED

*History is suggestive, but it need not bear argumentative weight.*⁵⁵

Article III is the source of the “irreducible constitutional minimum” for a litigant to invoke the jurisdiction of the court. Under Article III, plaintiffs must establish that (1) they suffered 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) there is a causal connection between the

47. National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(C) (2012).

48. See, e.g., 16 U.S.C. § 1 (2012) (“The [National Park] Service thus established shall promote and regulate the use of the Federal areas known as national parks, monuments, and reservations . . . in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.”).

49. See, e.g., 16 U.S.C. § 1131 (2012) (“[I]t is hereby declared to be the policy of the Congress to secure for the American people of present and future generations the benefits of an enduring resource of wilderness.”).

50. Stone (Univ. of S. Cal. 1972), *supra* note 2, at 472 (commenting that the federal government is only a guardian with respect to federal public lands, which excludes local public and private lands).

51. *Id.* at 486. However, he concedes that lack of understanding of how natural systems work, at least when he was writing, might make it hard to prove irreparable injury in court—though this is less true today—and in some cases the marginal cost of abating the damage will exceed the marginal benefits from doing that. *Id.*

52. *Id.* at 487.

53. STONE (Oxford Univ. Press 2010), *supra* note 2, at xvi.

54. Manus, *supra* note 7, at 448 n.90 (quoting Charles F. Wilkinson, *Justice Douglas and the Public Lands*, in *HE SHALL NOT PASS THIS WAY AGAIN* 233, 243 (Stephen L. Wasby, ed. 1990)).

55. Richard H. Fallon, Jr., *How to Make Sense of Supreme Court Standing Cases—A Plea for the Right Kind of Realism*, 23 WM. & MARY BILL RTS. J. 105, 114 (2014).

injury and conduct complained of—the injury must be fairly traceable to the defendant’s challenged action, and not result of independent action of third party not before the court; and (3) that it is likely, as opposed to merely “speculative,” that injury will be redressed by a favorable decision.⁵⁶ According to Professor Jackson, there are three constitutional concerns behind the standing doctrine: fulfillment of “the basic purpose of courts, including protection of rights” through the application of doctrines that encourage the other branches of government to undertake those responsibilities; the imposition for “self-limitations on the exercise of jurisdiction to preserve the courts’ institutional capacities”; and imposing “self-limitations on the exercise of jurisdiction to allow room for democratic self-governance.”⁵⁷

Stone identifies standing as a primary indication that nature is not a rights-holder—it has “none.”⁵⁸ However, writing in 1972, he mistakenly assumed that there was “a movement in the law toward giving the environment the benefits of standing,”⁵⁹ citing as an example of this the second circuit’s decision in *Scenic Hudson Preservation Conference v. Federal Power Commission*.⁶⁰ That case granted an environmental organization standing to challenge the Federal Power Commission’s grant of a license to Consolidated Edison to construct a pump storage facility on Storm King Mountain, even though the group had not alleged any personal economic injury flowing from the Commission’s decision.

56. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992); see also Hope M. Babcock, *supra* note 25, at 9 (describing generally the irreducible constitutional minimum of Article III standing and noting that demonstrating an injury in fact, as modified by the need to show that the injury reflected “a personal stake” in the underlying action, “was at the core of the standing doctrine”).

57. Jackson, *supra* note 22, at 132; see Brandon L. Garrett, *The Constitutional Standing of Corporations*, 163 U. PA. L. REV. 95, 164 (“[T]he law of standing ‘is founded in concern about the proper—and properly limited—role of the courts in a democratic society.’”) (citing *Summers v. Earth Island Inst.*, 555 U.S. 488, 492–93 (2009) (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975))).

58. Stone (Univ. of S. Cal. 1972), *supra* note 2, at 459. Stone points out that this was true in common law, noting that the only way to challenge a polluter’s action was at “the behest of a lower riparian” who could show an invasion of his legal rights as a downstream riparian. *Id.*; see also Katie Sykes, *Human Drama, Animal Trials: What the Medieval Animal Trials Can Teach Us About Justice for Animals*, 17 ANIMAL L. 273, 275 (2011) (“In a sense, the legal definition of a person is someone who can have legal standing, someone who can have a lawyer. It makes sense, then, that some animal rights scholars and advocates have focused on expanding legal doctrines like standing to give animals more access to the legal apparatus—the possibility for the rights of animals to be asserted in their own name through a human representative, such as a court-appointed guardian, an animal advocacy organization, or a private citizen seeking to enforce animal-protection laws.”); GARY L. FRANCIONE, *ANIMALS, PROPERTY AND THE LAW* II 65 (Temple Univ. Press 1995) (“Simply put, it makes no sense to say that someone has a legal right to something if that person does not possess standing to assert that right.”); *Sierra Club v. Morton*, 405 U.S. 727, 749 n.8 (1972) (Douglas, J., dissenting) (“Permitting a court to appoint a representative of an inanimate object would not be significantly different from customary judicial appointments of guardian ad litem, executors, conservators, receivers, or counsel for indigents.”).

59. Stone (Univ. of S. Cal. 1972), *supra* note 2, at 467. Even Stone thought that liberalization of standing would achieve too little because the decisions were based on an interpretation of a specific federal law and required some act or omission by a federal agency as well as some statutory language like “aggrieved by” on which environmental plaintiffs could rely. *Id.* at 470.

60. 354 F.2d 608, 615 (2d Cir. 1965).

Perhaps because Stone did not fully appreciate how complex, confusing, and politicized standing would become, his prediction was entirely wrong, as explained more fully below.⁶¹

Prior to Stone's article, and in the decade that followed, a combination of creative lawsuits and congressionally enacted citizen suit provisions in federal environmental laws laid "[t]he foundation for citizen suits under federal environmental laws."⁶² But starting in 1990 and continuing almost unbroken to the present,⁶³ the Court has issued decisions, especially in environmental cases, contracting the ability of plaintiffs to gain access to federal courts to remedy alleged wrongs⁶⁴—access that, in some cases, Congress arguably assured them of.⁶⁵ For example, in *Lujan v. National Wildlife Federation (NWF)*, the Court held that plaintiffs lacked standing to challenge the Bureau of Land Management's land withdrawals in a single programmatic lawsuit because they had to be in the vicinity of where the harm might occur.⁶⁶ In *Lujan v.*

61. See Fallon, *supra* note 55, at 126 ("Beyond any shadow of doubt, standing doctrine is complex and confusing. Given its vagaries, anyone who takes all of the Supreme Court's seemingly categorical pronouncements at face value will swiftly fall into error."); see also Hope M. Babcock, *Dismissal of the Certiorari Petition in Pacific Rivers Council A Bullet Dodged in the Supreme Court's War Against Public Challenges to Flawed Federal Land Planning*, 32 VA. ENVTL. L.J. 226, 228 (2014) (discussing the possibility that the Court's standing jurisprudence may become even more complex with the application of *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138 (2013), to the federal land use planning process). Many have criticized the Court's standing jurisprudence. See, e.g., William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 224 (1988) (proposing that the Court abandon the requirement that plaintiffs establish injury-in-fact and instead move right to the merits of their claims); Matt Handley, Comment, *Why Crocodiles, Elephants, and American Citizens Should Prefer Foreign Courts A Comparative Analysis of Standing to Sue*, 21 REV. LITIG. 97, 100 (2002) ("Neither the derivation nor the application of these constitutional and prudential requirements is based on natural law principles of right and wrong but instead on controversial public policies, erroneous historical assumptions, and general animosity towards particular groups of plaintiffs."). Even Stone acknowledges that the liberalization he had seen in the Court's standing jurisprudence in the 1970s and early 1980s ended firmly with *Lujan v. Defs. of Wildlife*, 504 U.S. 555 (1992). STONE (Oxford Univ. Press 2010), *supra* note 2, at 173.

62. Randall S. Abate, *Public Nuisance Suits for the Climate Justice Movement The Right Thing and the Right Time*, 85 WASH. L. REV. 197, 247 (2010); see also Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 694 (2004) ("Of course, legislatures have considerable power to create new rights and to redefine existing rights in ways that affect whether they are public or private . . . [and] may add to public law by enacting new regulatory and criminal statutes . . . [, and] may create statutory duties or 'entitlements,' . . . [which] can be treated as private rights for standing purposes.").

63. The exception being *Friends of the Earth v. Laidlaw Env'tl. Servs.*, 528 U.S. 167 (2000) (granting standing to an environmental organization because of a reasonable anxiety that a river formerly enjoyed by a member of the plaintiff organization was now too polluted to be used).

64. See Handley, *supra* note 61 at 100 ("[S]tanding has traveled far from its original doctrinal underpinnings and lacks a coherent and uniform application, now placing it in a position to do more harm than good"); but see Woolhandler, *supra* note 62, at 692 (saying the nineteenth century Supreme Court found a "constitutional dimension to standing" law, discussed it in "constitutional terms," and "suggested that a legislatively created cause of action would not necessarily be enough for standing.").

65. See Manus, *supra* note 7, at 493–94 (noting that one aspect of the Court's antienvironmental jurisprudence is a restrictive approach to standing and attributing much of this to Justice Scalia's hostility to environmental litigation).

66. 497 U.S. 871, 871 (1990).

Defenders of Wildlife (DOW), the Court rejected various standing theories like the ecosystem nexus theory and the vocational nexus theory as “beyond all reason,”⁶⁷ saying standing requires “a factual showing of perceptible harm.” The Court did this even though these theories might have been sufficiently capacious to address the harms to nature the plaintiffs sued to prevent. In *Bennett v. Spear*,⁶⁸ the Court narrowed the prudential zone of interests test to require plaintiffs to show that they were the intended beneficiaries of the specific section of the law they were seeking relief under, as opposed to the statute as a whole.⁶⁹ This helped the economic interests in that case gain standing under the Endangered Species Act.⁷⁰ In *Summers v. Earth Island Institute*,⁷¹ the Court extended *NWF* and *DOW* by holding that an organization’s member’s general intent to return to a specific Sierra Nevada forest for recreational purposes, coupled with his fear that a proposed project in the forest might threaten his organization’s interests in protecting wilderness lands, was insufficient to allow the member access to the courts.⁷²

In *Clapper v. Amnesty International USA*,⁷³ a nonenvironmental case, the Court held that petitioners lacked standing to challenge the constitutionality of a provision in the 1978 Foreign Intelligence Surveillance Act because they were unable to show that any injury its members might suffer was “certainly impending.”⁷⁴ The Court explicitly rejected the more lenient test proposed by

67. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 566–67 (1992). Noting the Court’s preoccupation with environmental claims, Justice Blackmun commented that he had “difficulty imagining this Court applying its rigid principles of geographic formalism anywhere outside the context of environmental claims.” *Id.* at 594–95; see also Manus *supra* note 7, at 475 (“In promoting organizational standing, Blackmun insisted that the human-focused limits of the law could accommodate environmental grievances without disguising them as personal injuries or taking the juridical leap of recognizing legal rights in non-humans.” (emphasis in original)).

68. 520 U.S. 154, 173–74.

69. See *id.* at 175–76.

70. See *id.* at 177. Courts may impose prudential standing requirements in addition to Article III’s minimum requirements. Generally, prudential standing doctrine has included (1) “the general prohibition on a litigant’s raising another person’s legal rights,” (2) “the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches,” and (3) “the requirement that a plaintiff’s complaint fall within the zone of interests protected by the law invoked.” *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)). Of these three prudential requirements, only “the ban against third party standing remains within the prudential rubric.” Bradford C. Mank, *Is Prudential Standing Jurisdictional?*, 64 CASE W. RES. L. REV. 413, 422 (2013). On the question of whether the Court’s prudential requirements are jurisdictional, see *id.* at 414 (concluding that the judges’ jurisdictional decisions tend to be contrary to the Anglo-American tradition of a party-controlled adversarial legal system) and Handley, *supra* note 61 (comparing the legal systems of Great Britain, Italy, Germany, and Brazil with regard to citizen access to the courts to rectify environmental harms).

71. 555 U.S. 488 (2009).

72. *Id.* at 496–97.

73. 133 S. Ct. 1138 (2013).

74. *Id.* at 1143; see also Jackson, *supra* note 22, at 150 (contending that the “certainly impending” rule from *Clapper*, 133 S. Ct. at 1143, is more rigorous than the “objectively reasonable present fear and apprehension” standard applied in *Duke Power Co. v. Carolina Envtl. Study Grp.*, 438

petitioners that injury could be established if there was an “objectively reasonable likelihood” of an injury occurring.⁷⁵ Professor Jackson criticizes the “Court’s choice to deny justiciability in *Clapper*” because it “did not advance self-governance and cannot be squared with the fundamental rights-protecting role of the Article III judiciary.”⁷⁶ She also found that the “certainly impending” standard was not dictated by prior Court precedent, meaning that “the denial of standing in *Clapper* was very much a choice, or at least open under the precedents.”⁷⁷

Though the Court has not yet applied *Clapper* to an environmental case,⁷⁸ the government’s use of the case in a reply to a certiorari petition⁷⁹ filed in *U.S. Forest Service v. Pacific Rivers Council*⁸⁰ (involving a challenge to a federal land management plan) indicates it may apply in the future.⁸¹ If *Clapper* is eventually applied in the land management context, it will insulate land management plans from judicial review even though decisions made in them are determinative of actions at the later project approval stage. *Clapper* could also make judicial review of agency plans substantially more difficult. It is highly unlikely that environmental litigants will be able to prove that injury arising from alleged planning errors meets the “certainly impending” standard because those injuries require independent action by future decision makers. Flawed plans, in other words, cannot harm until they are actually implemented. Thus *Clapper* will require plaintiffs to wait until the last stage in a chain of events to be assured of standing, because only at that point will the harm be “certainly impending.” This delay makes harm more likely to occur.

Nor is this all. *Clapper* also allows the underlying deficiencies in the land management plan, which authorizes a specific activity, to escape review

U.S. 59, 73 (1978) and far stronger than the “actual or imminent” standard used in *Massachusetts v. EPA*, 549 U.S. 497, 522 (2007)).

75. *Clapper*, 133 S. Ct. at 1143.

76. Jackson, *supra* note 22, at 137. Professor Jackson describes *Clapper* as “an unforced error in the direction of tightening standards for standing to avoid deciding the constitutionality of a new program of mass surveillance,” which “goes beyond the requirements of standing applied in other arguably analogous cases.” *Id.*

77. *Id.* at 152.

78. *Cf. Organic Seed Growers & Trade Ass’n v. Monsanto*, 718 F.3d 1350, 1355–58 (Fed. Cir. 2013), *cert. denied*, 134 S. Ct. 901 (2014) (holding that appellants organic farmers and organizations that sell seeds failed to demonstrate a “substantial risk” that the harm will occur, which may prompt [them] to reasonably incur costs to mitigate or avoid that harm” where Monsanto unequivocally disclaimed any intent to sue appellants for inadvertently using or selling trace amounts of genetically modified seeds).

79. Reply Brief for Petitioners at *1, *3, *U.S. Forest Serv. v. Pac. Rivers Council*, 133 S. Ct. 1582 (2013) (No. 12-623), 2013 WL 785624.

80. 689 F.3d 1012 (9th Cir. 2012).

81. See Bradford C. Mank, *Clapper v. Amnesty International Two or Three Competing Philosophies of Standing Law?*, 81 TENN. L. REV. 211, 264–74 (2014) (discussing the doctrinal incoherence of the Court’s application of standing jurisprudence in *Clapper*, 133 S. Ct. 1138, and five lower court decisions taking different approaches to the Court’s holding); Jackson, *supra* note 22, at 130 (criticizing the Court’s decision in both *Clapper* and *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), as unwise and inconsistent with established principles).

because tiering under National Forest Management Act and Federal Land Policy Management Act makes it almost impossible for a court to reach planning infirmities in later, more narrowly focused documents.⁸² Another concern in *Clapper* is that an authorized, subsequent, site-specific action, if based on what turns out to have been an unlawful land use plan, might preclude subsequent challenges to similar activities based on the same flawed plan under claim preclusion or res judicata.⁸³ The combination of *NWF* and *Clapper* will increase the expense and time commitment of bringing procedural and substantive challenges to agency land use management decisions. Each individual action taken under a plan will now have to be challenged for failings in the plan as opposed to challenging the plan itself—assuming this is possible—making it less likely that these claims will be brought.⁸⁴

Another nonenvironmental case pending before the Court with potentially large consequences for environmental plaintiffs is *Spokeo v. Robins*.⁸⁵ There, the Ninth Circuit put into question whether a plaintiff who suffered no immediate harm can invoke federal jurisdiction under a congressionally authorized private right of action. Until *Spokeo*, under footnote seven of *DOW*,⁸⁶ there was a lesser pleading burden in certain types of cases. Environmental plaintiffs who brought suit under a citizen suit provision for violation of a procedural requirement, until now, have not needed to establish the immediacy of the harm or that the harm is capable of remediation by judicial decree. The pending decision in *Spokeo* has placed those more lenient interpretations of Article III in doubt.

Professor Jackson maintains that what she calls “door-closing decisions” by courts have costs. Among these costs are “unfairness to individual litigants and losses to society of judicial contributions to democratic accountability mechanisms,” as well as impairment of “the legitimacy and strength of independent courts.”⁸⁷ As she notes,

82. See Babcock, *supra* note 61, at 230–33 (explaining the federal land management planning process and the concept of tiering).

83. Claim preclusion, or res judicata, bars the relitigation of a claim already subject to a final judgment on the merits. LAWRENCE B. SOLUM, 18-131 MOORE’S FEDERAL PRACTICE—CIVIL § 131.01 (2015). Issue preclusion, or collateral estoppel, bars the relitigation of an issue that was litigated and necessarily decided in a prior action. *Id.*

84. For a more detailed discussion of the effect of *Clapper* on the federal land management planning process, see Babcock, *supra* note 61.

85. *Spokeo, Inc. v. Robins*, 135 S. Ct. 1892 (2015).

86. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 572 n.7 (1992).

87. Jackson, *supra* note 22, at 137. Professor Jackson goes on to explain what she means by legitimacy, drawing in part from Professor Richard Fallon’s description of constitutional legitimacy as consisting of “legal legitimacy . . . sociological legitimacy. . . and moral legitimacy,” the most important of which, according to Fallon, is the “sociological acceptance of the Court’s role, by various communities of influence, including the general public, elected branches of government, and legal and political experts.” *Id.* at 176 (citing Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1803–05, 1824 (2005)). Professor Jackson adds to Fallon’s list “institutional or ‘role’ legitimacy for the Court, relating to the justifications in political theory for the special role, and special independence, that the Court has.” *Id.*

[j]usticiability doctrines must be used and deployed in ways that plausibly enhance rather than detract from the Court's legitimacy both with the public and with the legal community. The written decisions must be sufficiently plausibly principled to appear as acts of a court. And they must allow the Court to fulfill those basic functions on which its place in the constitutional system, and through which its own institutional legitimacy, is secured.⁸⁸

She singles out *Clapper* as an example of these costs, identifying the failure to provide an "impartial forum to evaluate claims of rights denials by minority groups or persons taking unpopular positions" as a serious error.⁸⁹ She also sees potential "harm to society from the Court's failure to allow merits adjudication."⁹⁰ Environmental plaintiffs frequently take unpopular positions and, when denied access to the courts, are unable to adjudicate the merits of claims arguably of broad importance to society as a whole or to hold accountable other governmental actors.⁹¹

While there are other so-called "discretionary avoidance devices," such as abstention or even denial of certiorari, none of them necessarily bars another court from hearing the issue, as happens when a court finds a plaintiff lacks standing.⁹² A denial of standing by the Court can effectively close the door on other cases reaching the merits in the lower federal courts.⁹³

The trend line that looked so optimistic to Stone over forty years ago is now decidedly bleak for environmental litigants seeking to protect some aspect

88. *Id.* at 187. Professor Jackson suggests that the two cases she analyzed in her article, *Clapper* and *Lyons*, "were both 'triple error' cases," where the "court fell down in performing aspects of its essential roles." *Id.* She worries that "if justiciability doctrines, including 'standing,' are applied in an insufficiently reasoned way, both legal and sociological legitimacy may be undermined." *Id.* at 177.

89. *Id.* at 133. Professor Jackson also analyzed *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), and reached conclusions similar to those in *Clapper*, including that the Court defaulted "on its proper role in a constitutional democracy, a role of special importance for those who are relatively powerless in majoritarian political settings, when they are injured by official violations of constitutional norms." *Id.* at 161–75 (referring to both cases).

90. *Id.* at 133–34.

91. *Id.* at 158 ("Another important function of the Court is to provide, through public adjudication, a degree of accountability under law for other government actors."); see also *id.* at 159–60 ("[T]he claim that decisions upholding government practices necessarily result in uncritical legitimization effects foreclosing further political attention is open to doubt."); *id.* at 177 ("[T]he habits of principled decision making may be more generally undermined by departures sanctioned under prudential doctrines, especially if courts lose the habit of honest explanation of their decisions."). Professor Jackson also argues that nonjusticiability decisions "remove pressures on the political branches to take hard looks at challenged practices," and "undermine the courts' ability to promote democratic self-government, by depriving the polity of information" about the constitutionality of certain practices. *Id.*

92. *Id.* at 178.

93. *Id.* See e.g. *Rodriguez v. Pa. Dep't of Env'tl. Prot.*, 604 F. App'x 113, 115 (3d Cir. 2015) (affirming the district court decision denying standing to a doctor who challenged a state law requiring doctors seeking information about chemicals used in fracking to sign a confidentiality agreement because he failed to allege an injury-in-fact.). A similar challenge in Pennsylvania state court applying state standing law was found constitutional. See Ellen M. Gilmer, *Hydraulic Fracturing Federal Judges Uphold Pa. Doctor Disclosure Rule*, ENERGYWIRE (Mar. 18, 2015), <http://www.eenews.net/energywire/2015/03/18/stories/1060015217>.

of the natural environment from harm. As a result, 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.⁹⁴ Justice Blackmun, in his dissent in *Sierra Club*, identified as “a wide, growing, and disturbing problem . . . the Nation’s and the world’s deteriorating environment with its resulting ecological disturbances.”⁹⁵ He then asked a profound question that Stone attempted to address with his proposal: “[m]ust our law be so rigid and our procedural concepts so inflexible that we render ourselves helpless when the existing methods and traditional concepts do not quite fit and do not prove to be entirely adequate for new issues?”⁹⁶ Justice Blackmun’s words seem increasingly apt today.

III. IT IS IMPORTANT TO GIVE NATURE ACCESS TO THE COURTS BECAUSE DOING SO HAS BOTH PRACTICAL AND LEGAL EFFECT AND IS THE RIGHT THING TO DO

*To imagine this change, we have to accept that our existing moral grammar, which the atmosphere’s complexity thwarts, is not fixed once and for all, but can expand to make perceptible and salient what was once unavailable or impossibly obscure.*⁹⁷

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. As discussed above, third 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.⁹⁸ Congressional paralysis (or worse), in matters affecting the environment has made that branch of government the least effective of all.⁹⁹ The existing situation has real

94. Manus, *supra* note 7, at 502 (“[T]he fragility of the threshold over which environmentalism must cross to enter the courts is apparent both in the vagaries of the ‘aesthetic injury,’ and the difficult-to-prove allegations of personal emotional distress on which environmental plaintiffs are forced to rely.”).

95. 405 U.S. 727, 755 (1972).

96. *Id.* at 755–76.

97. Jedediah Purdy, *Our Place in the World: A New Relationship for Environmental Ethics and Law*, 62 DUKE L.J. 857, 924 (2013). Professor Purdy argues that developments that seem to introduce a more “ecological” ethic into the law, one concerned with the operation of systems of indirect, complicatedly mediated effects, seem on closer inspection to rely on traditional conceptions of harm and “morally compelling victims”—sometimes including spectacular places—“in ways that do not work for appeals about climate change.” See *id.* at 921–22. Attempts to anchor a climate politics on the projected fate of individual species, notably the polar bear, are also a desperate attempt at a heroic synecdoche. *Id.* at 922.

98. See, e.g., Phil Taylor, *Public Lands: BLM Reopens Range to Ranchers Who Defied Grazing Ban*, E&ENewSPM (June 10, 2015), <http://www.eenews.net/eenewspm/stories/1060020027/> (recounting how BLM agreed to allow a trespass on a closed range).

99. See, e.g., *Sierra Club*, 405 U.S. at 745 (Douglas, J., dissenting) (“The suggestion that Congress can stop action which is undesirable is true in theory; yet even Congress is too remote to give meaningful direction and its machinery is too ponderous to use very often.”); Mark Murray, *113th*

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.”¹⁰⁰

Granting something rights has real importance¹⁰¹: “[p]rocedural determinations about which parties and persons can come into the courtroom create substantive outcomes and entail social ramifications. These substantive implications have a constitutive role in determining who does or does not belong within a community of legal subjects.”¹⁰² However, “rights exist in competition with other rights,” which means, for example, that granting animals rights interferes with humans’ right to treat them like personal property.¹⁰³ This makes expanding the circle of rights-holders controversial.

Granting something rights also has more than symbolic effect.¹⁰⁴ Justice Blackmun saw

the legal recognition of environmental injuries as more than a mechanism for saving national forests; it was a means through which environmentalism could evolve into an integral element of the ills addressed by law, permeating the federal constitution, laissez faire economics, nonpartisan politics, and even our cultural sense of morality.¹⁰⁵

Stone believed that a society that spoke of the “legal rights of the environment” would be inclined to enact more laws protecting the environment.¹⁰⁶ Identifying something as a right invests the underlying activity with “meaning,” vague but still “forceful,” in everyday language.¹⁰⁷ When the concept of a right is infused into our thinking, it intuitively becomes “part of the context against which the ‘legal language’ of our contemporary ‘legal rules’ is interpreted.”¹⁰⁸ Calling something a right can also subtly shift “the rhetoric of explanations available to judges,” leading to the exploration of “new ways of

Congress Not the Least Productive in Modern History, NBC NEWS (Dec. 29, 2014, 11:07 AM), <http://www.nbcnews.com/politics/first-read/113th-congress-not-least-productive-modern-history-n276216> (“296 bills were signed into law during the 113th Congress (2013-2014), as of Dec. 19, barely surpassing the all-time low of 283 enacted during the 112th Congress (2011-2012).”).

100. Zygmunt J.B. Plater, *Human-Centered Environmental Values Versus Nature-Centric Environmental Values—Is This the Question?*, 3 MICH. J. ENVTL. & ADMIN. L. 273, 287 (2014).

101. The only legal right under consideration in this Article is the limited right to seek relief from a court. In the case of nature, it is the right of nature to prosecute an injury to it in court directly, without the presence of a third party (human) intermediary.

102. Saru M. Matambanadzo, *The Body, Incorporated*, 87 TUL. L. REV. 457, 498 (2013).

103. Tania Rice, Note, *Letting the Apes Run the Zoo Using Tort Law to Provide Animals with a Legal Voice*, 40 PEPP. L. REV. 1103, 1129 (2013).

104. Stone did not think of legal rights as authorizing coercion as Christine Korsgaard does. See Christine M. Korsgaard, *Kantian Ethics, Animals, and the Law*, 33 OXFORD J. LEGAL STUD. 629, 644 (2013) (arguing that another way to view a legal right is as permission to use coercion, but only to the extent that use is consistent with or essential to freedom).

105. Manus, *supra* note 7, at 454.

106. Stone (Univ. of S. Cal. 1972), *supra* note 2, at 489.

107. *Id.* at 488.

108. *Id.* at 488. Stone suspected that if the environment had legal rights courts, when faced with resolving some discretionary matter, such as where the burden of proof in a case might lie, might “be inclined to interpret such rules . . . far more liberally from the point of the environment.” *Id.*

thinking” and “new insights.”¹⁰⁹ These new insights might encourage judges to “develop a viable body of law,” which, in turn, might “contribute to popular notions,” thus changing how the new rights-holder is viewed.¹¹⁰

Granting something rights also has rhetorical importance. Naming a nonhuman, like an animal, as a party in a lawsuit tends to symbolically give the animal and its cause “greater significance.”¹¹¹ This might cause people to stop thinking of animals as mere property, because property cannot sue.¹¹² Current constitutional and prudential standing requirements have made “ineffective” most efforts to enforce the Animal Welfare Act under its own provisions or under the Administrative Procedure Act.¹¹³ But “designating animals as something more than property, and allowing animals and people with interests in animals greater access to standing, will advance the progression of animal rights so that they more accurately depict the significance animals hold in our current world and give them the protections they deserve.”¹¹⁴ As Professor Taimie L. Bryant notes,

[l]egal standing for animals could be considered simply as a pragmatic means of increasing humans’ compliance with human-made laws to protect animals by way of a procedural mechanism that does the least conceptual violence to traditional standing principles. . . . In seeking to address the harm to an animal, it makes more procedural sense for a lawyer to say, “I am here representing a particular animal plaintiff who has been harmed by a particular human’s failure to provide food and water” than to say, “I am

109. *Id.*

110. *Id.* at 489; see also Sunstein, *supra* note 33, at 1367 (noting that a decision by Congress granting animals standing would have symbolic importance and would guide the interpretation of often ineffective statutes that seek to protect animals).

111. Lisa Marie Morrish, Comment, *The Elephant in the Room: Detrimental Effects of Animals’ Property Status on Standing in Animal Protection Cases*, 53 SANTA CLARA L. REV. 1127, 1149 (2013); see Cass R. Sunstein, *The Rights of Animals*, 70 U. CHI. L. REV. 387, 399 (2003) (arguing that a change in rhetoric, such as destroying “the idea of ownership in order to make simply and all at once, a statement that the interests of animals count, and have weight independent of the interests of human beings” can have significant practical consequences).

112. Morrish, *supra* note 111, at 1150 (“Naming an animal as a party only clarifies in the minds of the people what interests are at stake.”); see also Sunstein, *supra* note 33, at 1365 (“But the rhetoric does matter. In the long term, it would indeed make sense to think of animals as something other than property, partly in order to clarify their status as beings with rights of their own.”).

113. Michael J. Ritter, Note, *Standing in the Way of Animal Welfare: A Reconsideration of the Zone-of-Interest “Gloss” on the Administrative Procedures Act*, 29 REV. LITIG. 951, 972 (2010).

114. Morrish, *supra* note 111, at 1152; see Ritter, *supra* note 113, at 954–55 (arguing federal laws that only give humans interests in animals, rather than conferring legal rights on animals offer inadequate protection); *id.* at 956 (“At most, animal welfare laws act as mere restrictions that ‘override property concerns’ of animal owners rather than giving animals legal rights or interests.”); Rice, *supra* note 103, at 1132 (“The problem is that improvements in animal laws may be driven more by human self-interest than a legitimate concern for animal welfare.”). Sunstein suggests amending the Animal Welfare Act “to create a private cause of action by affected persons and animals so they may bring suit against facilities that violate the act.” Sunstein, *supra* note 33, at 1366.

here representing a human plaintiff who has been harmed by another human's failure to provide food and water to an animal."¹¹⁵

But granting something a right is of symbolic importance only until a court is willing to review actions that are inconsistent with that right.¹¹⁶ To "count jurally," what Stone describes as having "legally recognized worth and dignity in its own right," the rights-holder must be able to "institute legal actions *at its behest*," and a court must consider injury to the thing when it determines legal relief, which, in turn must benefit the rights-holder.¹¹⁷ The purpose of granting nature standing, then, is to protect other rights nature possessed and to ensure that whatever harm to the environment occurs will be mitigated or repaired.¹¹⁸ In the words of Justice Douglas, granting nature access to court is the only way "[t]here will be assurances that all of the forms of life which [nature] represents will stand before the court—the pileated woodpecker as well as the coyote and bear, the lemming as well as the trout in the streams."¹¹⁹

Stone concurred for reasons of morality and self-interest. Stone believed that "the strongest case can be made from the perspective of human advantage for conferring rights on the environment."¹²⁰ He advocated that steps be taken away from a human need to dominate things, "to objectify them, to make them

115. Bryant, *supra* note 8, at 254; *see also id.* ("The idea that injured parties should have access to the courts to enforce existing law should, as a matter of logic, result in recognition of standing for both the human and the animal as to their respective injuries.").

116. Stone (Univ. of S. Cal. 1972), *supra* note 2, at 458 ("[I]f the term is to have any content at all, an entity cannot be said to hold a legal right unless and until *some public authoritative body* is prepared to give *some amount of review to actions* that are colorably inconsistent with that 'right.'") (emphasis in original); *see also* Sunstein, *supra* note 33, at 1363 ("Speaking pragmatically, the foundation for a legal right is an enforceable claim of one kind or another.").

117. Stone (Univ. of S. Cal. 1972), *supra* note 2, at 458 (emphasis in original). On the topic of dignity as a foundation for human rights, its content as a legal concept, and some conceptual problems with it, *see generally* Matthias Mahlmann, *Human Dignity and Autonomy in Modern Constitutional Orders*, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW, 371–95 (Michel Rosenfeld & András Sajó, eds., 2012). *See id.* at 388 (stressing the importance of the concept of dignity and noting it is foundational to a democracy).

118. Most successful lawsuits for environmental harm brought under environmental laws result in the violator paying civil penalties, injunctive relief stopping the harm, or mandated compliance with the breached law. However, the value of these remedies may be limited if nature lacks its own legal rights. To start, Stone feared that when nature was without legal rights, the application of tests which balance economic hardship against competing interests, would exclude environmental degradation from the balance—for example, damage to a stream or to its inhabitants like fish and amphibians. Stone (Univ. of S. Cal. 1972), *supra* note 2, at 461. Stone also commented that under common law, damages do not go towards restoring the injured resource. *See* Stone (Univ. of S. Cal. 1972), *supra* note 2, at 463, n.44. This is also true under most federal pollution control laws, there is no recovery for damages, only penalties, which accrue to the federal treasury. Provisions in laws like the Comprehensive Environmental Response Compensation, and Liability Act allowing for the recovery of natural resources damages as well as the costs of assessing that damage have changed this situation in certain limited circumstances. *See* 42 U.S.C. § 9607(a)(4)(C) (2012).

119. *Sierra Club v. Morton*, 405 U.S. 727, 752 (1972) (Douglas, J., dissenting).

120. Stone (Univ. of S. Cal. 1972), *supra* note 2, at 492.

ours, to manipulate them, to keep them at a psychic distance.”¹²¹ Stone believed that the gap between humans and the natural environment needed to lessen.¹²² One way to help integrate humans into the natural environment was to encourage the popular consciousness to relinquish its “psychic investment in our sense of separateness and specialness in the universe.”¹²³ Stone found evidence that a new “sort of consciousness” was developing “for the betterment of the planet and us.”¹²⁴

Stone also remarked on a “heightened awareness” that people have about the dangers of pollution and other harms to the environment, which “enlarges our sense of the dangers to us,” and at the same time “enlarges our empathy.”¹²⁵ In his article, he optimistically comments that humans are “developing the scientific capacity” to understand this as well as “cultivating the personal capacities *within us* to recognize more and more the ways in which nature—like the woman, the Black, the Indian, and the Alien—is like us.”¹²⁶ Ever the optimist, Stone theorized that “[t]he time may be on hand when these sentiments and the early stirrings of the law, can be coalesced into a radical new theory or myth—felt as well as intellectualized—of man’s relationship to the rest of nature”¹²⁷ that could “fit our growing body of knowledge of geophysics, biology and the cosmos.”¹²⁸

121. *Id.* at 495; *see also* 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 2 (Layston Press 1967 (1723–1780)) (“[Property is] that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.”); Purdy, *supra* note 97, at 865 (“Legal and moral concepts such as rights assumed that rights holders mattered, regardless of whether their existence satisfied any human preferences.”).

122. Stone was concerned about the propensity of humans to objectify things and to “keep them at a psychic distance.” Stone (Univ. of S. Cal. 1972), *supra* note 2, at 495. He called for humans “to give up some psychic investment in our sense of separateness and specialness in the universe.” *Id.* at 496. He believed it not “too remote that we may come to regard the Earth, as some have suggested, as one organism, of which Mankind is a functional part.” *Id.* at 499.

123. *Id.* at 496; *see also* Joseph L. Sax, *Ownership, Property, and Sustainability*, 31 UTAH ENVTL. L. REV. 1, 10 (2011) (“[M]aintaining biodiversity is very much our (the public’s) business. So it seems the public has a legitimate stake in the way in which owners use land, even though the owner is not doing anything that has traditionally been thought of as outside his private domain and therefor as unpermitted.”); Plater, *supra* note 100, at 277 (“But the unfortunate pragmatic reality is that in the realm of societal governance practice, direct human-centered utility, not nature-centric value, is almost always a subordinating consideration.”).

124. Stone (Univ. of S. Cal. 1972), *supra* note 2, at 497; *see also* Purdy, *supra* note 97, at 924 (agreeing with Stone and arguing that seeing the environment in a new way helps lead to new accounts of nature’s value and humanity’s relationship to it).

125. Stone (Univ. of S. Cal. 1972), *supra* note 2, at 498.

126. *Id.* (emphasis in the original).

127. *Id.*

128. Stone (Univ. of S. Cal. 1972), *supra* note 2, at 498. By “myth,” Stone meant those times in history when “our social facts” and relationships have been comprehended and integrated by reference to myths,” like the social contract theory of government or that all men are created equal. *Id.*; *but see* Cupp, *supra* note 39, at 51 (“A legal rights paradigm is simply not a good fit for nonhumans with little relationship to the social contract upon which legal rights are based.”); MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960, at 106 (1977) (warning that any theory placed in a given historical context necessarily comes with legal and intellectual baggage); *see* Rice, *supra* note

Stone also recognized that the moral imperatives involved required the Court to take action. He called on the Court to summon up “from the human spirit the kindest and most generous and worthy ideas that abound there, giving them shape and reality and legitimacy.”¹²⁹ He referenced the school desegregation cases, which “awakened us to moral needs which, when made visible, could not be denied.”¹³⁰ He asked the Court to do the same thing by awarding rights to the environment “in a way that will contribute to a change in popular consciousness.”¹³¹ In words that Stone might have used, Professor Jedediah Purdy calls on law to provide “a forum in which we give increasingly definite shape to shared questions that, however regrettably, we are not yet prepared to resolve.”¹³²

Subsequent animal rights and environmental theoreticians took up Stone’s belief that morals play an important role in granting nonhumans legal rights,¹³³ arguing that at least at a minimum, they are important in analyzing the appropriateness of a legal rule.¹³⁴ Professor Purdy maintains that “the legitimacy of a legal rule must be tested by, among other factors, generally shared moral precepts.”¹³⁵ And, while a “[m]oral theory is not determinative of the proper legal rule,” it “is an element in a broader analysis of the legitimacy of a rule.”¹³⁶ For example, “[e]ven though laws regulating the use of animals

103, at 1128 (“[O]pponents of animal rights look to the social contract theory as a reason for drawing a sharp line between human and nonhuman. In this view, the foundation for our civilization is based upon a pairing of rights and responsibilities—in order to gain the rights and protections that come with being a member of society, we also undertake responsibilities and give up some freedoms.”).

129. Stone (Univ. of S. Cal. 1972), *supra* note 2, at 500.

130. Stone (Univ. of S. Cal. 1972), *supra* note 2, at 500; *but see* Purdy, *supra* note 97, at 885–86 (“History also illuminates why no new consensus emerged from the ecological revolution of the early 1970s, despite widespread expectations to the contrary. Those who opposed the new environmental laws were deeply established in both culture and law. The new ecological era did not wash away its predecessors. Instead, it added to a cultural and legal palimpsest of ethical views.”) Purdy, *supra* note 97, at 885–86.

131. Stone (Univ. of S. Cal. 1972), *supra* note 2, at 599; *see* Purdy, *supra* note 97, at 925–26 (“[W]e might regard law and lawmaking as forums in which a cultural and imaginative argument proceeds, an argument that will help to lay the foundation of any legal regime that effectively addresses climate change.”).

132. Purdy, *supra* note 97, at 926.

133. *Id.* at 883 (“Environmental law needs ethics because it is blind without values.”).

134. Thomas G. Kelch, *Toward a Non-Property Status for Animals*, 6 N.Y.U. ENVTL. L.J. 531, 555 (1998); *see also id.* at 282 (“[I]t is difficult to talk about ‘equal consideration’ of the interests of beings who have unequal moral standing. Indeed, it is difficult to see how, by itself, the recognition of animals’ lesser moral standing does anything other than justify the status quo.”); *but see* Bryant, *supra* note 8, at 256 (“The amorality of killing animals sustains a view of animals as sufficiently different from humans that concepts of justice are not offended when animals are exploited in ways that humans cannot be exploited.”).

135. *See* Purdy, *supra* note 97, at 929 (“The question to ask about any formulation of ethics is how it serves this beneficial cooperation by producing and supporting virtues, practices, and institutions that make defection from cooperation less frequent and damaging.”); *see also* Kelch, *supra* note 134, at 555.

136. Kelch, *supra* note 134, at 555; *see* Stone (Univ. of S. Cal. 1972), *supra* note 2, at 491 (“Ethics cannot be put into words, . . . such matters make themselves manifest.”). Stone went on to quote L. WITTGENSTEIN, *TRACTATUS, LOGICO-PHILOSOPHIC IRONY*, §§ 6.421, 6.522 (D. Pears & B. McGuinness trans. 1961) (Animals have inherent rights because they are “the subjects of a life that is better or worse

have always been minimally protective of nonhumans, ethically proper conduct often demands more than the law commands.”¹³⁷ Some even argue that “the community has the duty, as well as the right, to preserve and to defend the environment.”¹³⁸

Having suggested, one hopes persuasively, that there are legal, rhetorical, practical, and moral reasons to grant nature access to the courts, Part IV sets out the potential barriers to that access.

IV. THE CONSTITUTION, COURT PRECEDENT CREATING LEGAL PERSONHOOD FOR NONHUMANS, AND ANIMAL LAW SUPPORT GRANTING NATURE RIGHTS¹³⁹

*The most difficult question is how law, that very conservative and precedent-driven discipline, can be made to listen to the new knowledge we have acquired.*¹⁴⁰

for them, logically independently of whether they are valued by anyone else.”). *Id.*; but see Patrick Lee & Robert P. George, *The Nature and Basis of Human Dignity*, 21 *RATIO JURIS* 173, 191 (2008) (“[H]uman beings are animals of a special kind. They differ in kind from other animals because they have a rational nature, a nature characterized by having the basic natural capacities for conceptual thought and deliberation and free choice.”); *id.* at 187 (“Neither sentience nor life itself entails that those who possess them must be respected as ends in themselves or as creatures having full moral worth. Rather, having a rational nature is the ground of full moral worth.”).

137. David Hoch, *Environmental Ethics and Nonhuman Interests A Challenge to Anthropocentric License*, 23 *GONZAGA L. REV.* 331, 334 (1987–88); see *id.* at 346 (“If animals have interests, we have moral obligations toward them.”)

138. Handley, *supra* note 61, at 130 (quoting Edesio Fernandes, *Collective Interests in Brazilian Environmental Law*, in *PUBLIC INTEREST PERSPECTIVES IN ENVIRONMENTAL LAW* 124 (David Robinson & John Dunkley eds., 1995)); but see Richard A. Epstein, *The Next Rights Revolution? It's Bowser's Time at Last*, *NAT'L REV.*, Nov. 8, 1999, at 44, 45 (“It is one thing to raise social consciousness about the plight of animals and another to raise their status to an asserted parity with human beings. That move, if systematically implemented, would pose a moral threat to society that few human beings will, or should accept.”); *id.* (“By treating animals as our moral equals, we would undermine the liberty and dignity of human beings.”).

139. Interestingly Ecuador and Bolivia have granted legal rights to nature and have allowed cases to be brought in the name of important natural resources. JAMES R. MAY & ERIN DALY, *GLOBAL ENVIRONMENTAL CONSTITUTIONALISM* 257 (2015); see Rickard Lalander, *Rights of Nature and the Indigenous Peoples in Bolivia and Ecuador A Straitjacket for Progressive Development Politics?*, 3 *IBEROAMERICAN J. DEV. STUD.* 148, 169 (2014) (“Bolivia and—particularly—Ecuador have undeniably challenged the world giving nature a proper legal voice, at least indirectly, proposing a new model of state-nature-society relations around the Indigenous concept of *Sumak Kawsay/Living Well*.”) Professor Erin Daly examines the significance of a ruling by a provincial court in Ecuador vindicating that country’s grant of constitutionalized rights to nature, and notes the existence of discussions about granting nature similar in Turkey, and Nepal, and even some municipalities in the United States. Erin Daly, *The Ecuadorian Exemplar The First Ever Vindications of Constitutional Rights of Nature*, 21 *REV. EUR. COMMUNITY & INT’L ENVTL. L.* 63, 63 (2012) [hereinafter Daly, *Exemplar*]; see also Erin Daly, *Ecuadorian Court Recognizes Constitutional Right to Nature*, *WIDENER ENVTL. L. CTR.* (July 12, 2011, 3:32 PM), <http://blogs.law.widener.edu/envirolawblog/2011/07/12/ecuadorian-court-recognizes-constitutional-right-to-nature/> (summarizing the case and providing links to the decision). The Ecuadorian government successfully brought a second suit under the same constitutional provision to block an illegal mining operation, resulting in the government destroying between 70 and 120 backhoes and other mining equipment. Daly, *Exemplar*, *supra*, at 65.

140. Martha C. Nussbaum, *Animal Rights The Need for a Theoretical Basis*, 114 *HARV. L. REV.* 1506, 1526 (2001); see also John C. Eastman, *Judicial Review of Unenumerated Rights Does*

According to Professor Richard Fallon, “[l]egal theories should be tested against the dual criteria of fit and normative attractiveness.”¹⁴¹ Applying this principle to patterns of judicial decisions, a good theory “should both describe the results of cases accurately and ascribe to them a more normatively attractive set of controlling and limiting principles than any rival explanation.”¹⁴² Professor Jackson shows how the Court’s increasingly restrictive standing jurisprudence neither accurately reflects precedent nor propounds a set of normatively attractive controlling and limiting principles.¹⁴³ Granting nature direct access to courts offers a more appealing theory to the extent that it reflects widely held principles about access to courts and the importance of nature, and it responds to an exigency created by declining and disappearing natural resources where alternative approaches are unavailing.¹⁴⁴ Persistent public concern about environmental protection¹⁴⁵ also means that protecting the environment would now fit within Professor Alexander M. Bickel’s rejoinder that the Supreme Court “should declare as law only such [moral] principles as will—in time, but in a rather immediate foreseeable future—gain general assent.”¹⁴⁶

However, granting standing to nonhumans, like any jurisprudential evolution,

will crucially depend upon such subjective and shifting elements as a judge’s sense of appropriateness and right; her credit of the authority of competing sources of law; her core beliefs about how the world should work; her tendencies to focus upon similarities or differences; her

Marbury’s Holding Apply in a Post-Warren Court World?, 28 HARV. J.L. & PUB. POL’Y 713, 732–33 (2005) (precedent “is a maxim among . . . lawyers, that whatever has been done before may legally be done again: and therefore they take special care to record all the decisions formerly made against common justice and the general reason of mankind.”). For a humorous view of precedent, see JONATHAN SWIFT, *GULLIVER’S TRAVELS* 256 (1950).

141. Fallon, *supra* note 55, at 115 (referring to RONALD DWORKIN, *LAW’S EMPIRE* 52–53, 255–58 (1986)).

142. *Id.* at 115–16.

143. See *supra* Part II.

144. Maddux, *supra* note 40, at 1260 (“[F]undamental pillars of law, such as liberty and equality, may overpower longstanding precedent in circumstances where modern science, societal understanding, and moral perception become precisely aligned.”).

145. *How Americans View the Top Energy and Environmental Issues*, PEW RES. CTR. (Jan. 15, 2015), <http://www.pewresearch.org/key-data-points/environment-energy-2/> (“Environmental protection draws more support in principle than when the issue of potential costs is raised. Among the public, 71 [percent] said the country ‘should do whatever it takes to protect the environment’ according to a January-March 2014 survey. But a smaller majority (56 [percent]) said ‘stricter environmental laws and regulations are worth the cost.’ Nearly four-in-ten (39 [percent]) said tougher environmental laws and regulations cost too many jobs and hurt the economy.”)

146. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH—THE SUPREME COURT AT THE BAR OF POLITICS* 127 (1969); see Fallon, *supra* note 55, at 125 (“In Bickel’s formulation . . . [i]f a majority of the Justices thought the public unlikely to accept a ruling that they would otherwise make . . . postponement of the issue to await future, hoped-for evolution in public attitudes as frequently constituting the best available option.” (citing BICKEL, *supra*, at 149)).

imagination, intuition, and judgment; and her desire and ability to harmonize incommensurable principles while preserving the integrity of what she most highly values.¹⁴⁷

While this indeterminacy in judicial mindset makes it difficult to predict which standing theories might work with a given judge or judges, it also creates room to try different theoretical approaches.

It is with these overarching thoughts in mind that Part IV first examines the language and punctuation of Article III to see if it is sufficiently capacious to allow nonpersons access to federal courts. It then turns to two nonhuman actors—one constitutionally privileged (corporations),¹⁴⁸ the other not (animals)—and tries to identify lessons from each which might have bearing on granting nature standing in an Article III court.¹⁴⁹ The constitutional concept of dignity rights, which animal rights scholars rely on to support their arguments for animal personhood, is also explored to see if it might apply to nature.

A. Article III

*Since it is fair to assume that the Framers were not writing facetiously and were attempting to use standard rules of English to communicate their ideas, semantic and syntactical analysis of the constitutional text is at least a worthwhile starting point.*¹⁵⁰

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to all Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands

147. Steven M. Wise, *Hardly a Revolution—The Eligibility of Nonhuman Animals for Dignity—Rights in a Liberal Democracy*, 22 VT. L. REV. 793, 797–98 (1998). Professor Joseph L. Sax notes that “[s]pecific rights usually grow out of some core social value,” making it “necessary to ask how they fit into the values underlying other basic rights.” Sax, *supra* note 9, at 94. This Article identifies as such a core value the ethical obligations which recognize the intrinsic value of all living things and what Sax calls a “patrimonial responsibility as a public duty,” by which he means not to make irreversible decisions that “impoverish” future generations. *Id.* at 102–03.

148. Thomas W. Joo, *Contract, Property, and the Role of Metaphor in Corporations Law*, 35 U.C. DAVIS L. REV. 779, 817 (commenting on the revision in the property law schema in *Goldberg v. Kelly*, 397 U.S. 254, 263 n.8 (1970) when the Supreme Court recognized recipients of government benefits, like social security, held property rights). Joo further states, “[a] different revision of the property schema has assimilated ‘intellectual property’ and conventional property into a broader schema.” *Id.*

149. Another potential area of support for granting trees standing, undeveloped here but worthy of mention, is the recognition by some courts of the rights of future generations to initiate legal action. See *supra* note 24 and accompanying text (discussing a Supreme Court of the Philippines decision that plaintiffs had standing to represent their descendants).

150. David S. Yellin, *The Elements of Constitutional Style A Comprehensive Analysis of Punctuation in the Constitution*, 79 TENN. L. REV. 687, 690 (2012).

under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or subjects.¹⁵¹

The language of Article III, section 2, paragraph 1¹⁵² is not particularly helpful to nature's cause. Although the word "person" does not appear in the paragraph, it is specific about who or what can present "cases or controversies" to the Court, including in the Court's jurisdiction disputes brought to it by states, ambassadors, and citizens.

However, the paragraph's structure might be slightly more helpful, as it may reduce the importance of the named disputants. While the first clause of paragraph 1 expansively describes the Court's jurisdiction as extending to "all Cases in Law and Equity, arising under this Constitution, the laws of the United States, and Treaties made, or which shall be made, under their Authority,"¹⁵³ this does not mean that the clause necessarily functions either as an umbrella or as a broad grant of jurisdiction limited in some way by what follows.¹⁵⁴ It is equally plausible to consider the first clause as first among equals in a roster of cases over which the federal courts have final authority, leaving open the possibility that the first clause carries some independent weight. Professor Akhil Amar goes one step further and argues that the list is subdivided into two tiers: the first three clauses comprise the first tier, which only a federal court can hear, and the remaining clauses comprise the second tier, over which the Court has jurisdiction but does not need to exercise it.¹⁵⁵ The repetition of the word "all" in each of the first tier clauses suggests coordination, but not subordination of one to the other, each sharing the common attribute of being subject to final federal authority. However, taking Professor Amar's analysis yet one step further, the absence of the word "all" for the remaining "Controversies," arguably signifies some form of subordination to the first tier, which may have significance for purposes of this Article with respect to importance of the type of disputant listed in the remaining part of the paragraph.¹⁵⁶

151. U.S. CONST. art. III, § 2, cl. 1.

152. Sunstein, *supra* note 33, at 1360 ("Nothing in the text of the Constitution limits cases to actions brought by persons."). According to Sunstein this omission permits Congress to amend relevant federal laws to grant nature standing. *Id.* at 1359 (applying this lesson to amending the Animal Welfare Act).

153. U.S. CONST. art. III, § 2, cl. 1.

154. However, it is interesting to note that Professor Akil Reed Amar, denotes the clause "'all Cases, in Law and Equity, arising under' federal law" as first in the list of disputes over which the Court had jurisdiction, followed by suits dealing with admiralty, and still later "an assortment of suits involving state law," implying some sort of further hierarchy in which the first clause is the most important. See AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 225 (2005).

155. *See id.* at 227–28.

156. Professor Amar attributes the intermittent use of "all" to the drafters' intent to leave Congress leeway as to whether state or federal courts had the "last word" in certain types of cases. *Id.* at 228. Yet Amar does not examine the use of "Cases" for the first tier of disputes and the use of "Controversies" for the bottom tier. Ritter complains that the Court has conflated "Cases" (subject matter specific) with

The strange-to-modern-eyes punctuation in paragraph 1 of section 2 of Article III may help craft an argument that subordinates the importance of the list of disputants so that they do not constrict the scope of the section's first statement. The importance of punctuation for understanding text is reflected in the punctuation canon, which says "the placement of every punctuation mark is potentially significant."¹⁵⁷ While punctuation is not always definitive of the text's meaning,¹⁵⁸ it can be a useful starting point for understanding constitutional text, which, in turn, can cabin the predilection of some constitutional scholars to adhere to their "own policy preferences when punctuation becomes inconvenient."¹⁵⁹ To avoid this, Professor David S. Yellin recommends that those attempting to construe the Constitution first "get a firm grasp on the fundamentals of constitutional punctuation for guidance on the best reading of any constitutional text" to help them resist "the pushes and pulls of our own policy predilections."¹⁶⁰

The problem is that the punctuation of paragraph 1 is strange to the modern eye.¹⁶¹ According to Michael Nardella, "[i]f the punctuation of the Constitution is an integral part of the document, just as important as the text itself, then it follows that our most fundamental document is written in a quasi-foreign language."¹⁶² Each item on the list of jurisdictional claims, with the exception of the first one, is preceded by a semicolon and a dash. The dashes appear to be used to separate who or what is subject to federal matter jurisdiction.¹⁶³ While "[t]he Constitution contains sixty-five semicolons,

"Controversies" (focus on the complaining party), which has emphasized the importance of personhood to the detriment of nonhumans like animals. See Ritter, *supra* note 113, at 961–62.

157. William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 664 (1990).

158. But note that David Yellin, who bemoans the lack of attention paid to punctuation in the Constitution and argues its use can clarify some of the document's ambiguities, admits that "[b]ecause so much variation is possible, the work of parsing the Constitution must be done carefully." Yellin, *supra* note 150, at 711.

159. *Id.* at 690.

160. *Id.* (quoting Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1279 (1995)). Constitutional scholars disagree about the significance of punctuation, or even if the framers followed any punctuation rules. See Yellin, *supra* note 150, at 692–705 (discussing some of those contrasting views). Yellin, for one, believes passionately that they did. See Yellin, *supra* note 150, at 706 ("To be sure, the Framers did not follow the convention of the British Parliament in drafting the fundamental law of the United States [which were to ignore punctuation]. They almost always employed punctuation marks in drafting the substantive provisions of the Constitution, and they created a Committee of Style to attend to punctuation and other matters before submitting the Constitution to the several States for ratification.").

161. For a succinct discussion of the origins of punctuation and punctuation rules the Framers would have been familiar with, see Michael Nardella, Note, *Knowing When to Stop: Is the Punctuation of the Constitution Based on Sound or Sense?*, 59 FLA. L. REV. 667, 676 (2007) (saying, among other things, that until the seventeenth century punctuation was rhetorical instead of syntactic); *id.* at 679 ("The late eighteenth century saw a number of treatises published specifically on punctuation. These treatises were even more inconsistent than the general grammars. . . . [P]unctuation was not immune to the general eighteenth-century culture of intellectual upheaval.").

162. *Id.* at 696.

163. Yellin, *supra* note 150, at 718.

including those that are paired with dashes as in Article III, Section 1,”¹⁶⁴ dashes appear only nine times in the document,¹⁶⁵ and then “only in coordination with other marks, a stylistic move that looks odd to modern eyes.”¹⁶⁶ Although this combination of dashes with semicolons was apparently quite common in the eighteenth century,¹⁶⁷ Yellin concedes that the use of dashes in Article III, Section 2, paragraph 1 is not only curious and unclear, but does not appear to fit within any generally accepted grammar rules,¹⁶⁸ including those familiar to the Framers, and is not repeated elsewhere in the Constitution.¹⁶⁹ One possible explanation is that the dash is a rhetorical flourish intended to draw attention to the repetition of certain words in the Section. Another possibility is that the use of dashes in paragraph 1 may have been intended to emphasize where there is repetition in the text and where there is not—e.g. “all” and “cases.”¹⁷⁰ Another curious fact about dashes in the Constitution is that the printed version of the document contained no dashes,¹⁷¹ they are found only in the engrossed version, which is considered by most to be the official document.¹⁷²

Nardella’s attempt to make sense of constitutional punctuation by looking at the Constitution through the prism of rhetoric confounds matters further.¹⁷³ He maintains that, when the Constitution was written, punctuation was primarily thought of as an aid in reading documents out loud, rather than a matter of sentence structure.¹⁷⁴

164. *Id.* at 716. Nardella would find this number of semicolons unsurprising. *See* Nardella, *supra* note 161, at 684 (“[T]he eighteenth century has been described as highlighted by ‘the overwhelming dominance of the semicolon,’ with rates of semicolon use per word higher by far than at any other time in history.”).

165. Yellin, *supra* note 150, at 718.

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.* at 718–19 (“[T]he use of ‘all Cases’ as opposed to ‘Controversies between’ different parties has significance.”); *see also* AMAR, *supra* note 154, at 228 (parsing the significance of the intermittent use of “all”).

171. *See* Yellin, *supra* note 150, at 710 (“The printed version also seemed to omit dashes entirely whereas the use of dashes in the engrossed copy may seem notably odd to many modern readers.”).

172. *See id.* (“Although the Convention probably worked off of printed copies, it was the engrossed copy that they actually signed, and this same copy was presented to, and voted on by, the congress of the United States on September 20. On the other hand, it was the printed version of September 18 that Congress reproduced and distributed to the states for ratification; this was also the version that was distributed to the population at large. . . . [T]he engrossed copy is. . . , the version that is currently reprinted in the United States Code and treated as authoritative today.”).

173. *See generally* Nardella, *supra* note 161. Nardella’s view of the importance of rhetoric to understanding the Constitution’s punctuation may be his alone, as no other sources were found maintaining this view of constitutional punctuation.

174. *Id.* at 680 (“[R]eading was considered to be ‘artificial speaking’ and ‘an imitative art which has eloquent speaking for its model, as eloquent speaking is an imitation of beautiful nature.’ The written word was considered a subspecies of the spoken one, and the rules developed by these grammars reflected that philosophy.”); *id.* at 681 (“[T]he underlying message behind the rhetorical grammars and

In fact, the aim of the rhetorical grammars was to teach how to speak and write with forcefulness, clarity, and beauty, having particular regard for ‘pauses, tones, and variations of voice.’ Essential to this goal was the proper use of punctuation, and every rhetorical grammar contained extensive sections solely devoted to the exploration of punctuation’s nature and use.¹⁷⁵

Although a strange view of grammar to the modern reader, it was not strange to the eighteenth century writer, including Thomas Jefferson, who fully accepted the rhetorical use of punctuation.¹⁷⁶ According to Nardella, the rhetorical purpose of writing animated the drafting of the Constitution, which was probably intended to be read aloud because of the low level of literacy in the country at that time.¹⁷⁷

While modern constitutional scholars struggled to make syntactical sense of constitutional text, others, like former Justice Souter, rejected the effort of trying to wrest understanding from punctuation alone:

A statute’s plain meaning must be enforced, of course, and the meaning of a statute will typically heed the commands of its punctuation. But a purported plain-meaning analysis based only on punctuation is necessarily incomplete and runs the risk of distorting a statute’s true meaning. . . . No more than isolated words or sentences is punctuation alone a reliable guide for discovery of a statute’s meaning. Statutory construction ‘is a holistic endeavor,’ and, at a minimum, must account for a statute’s full text, language as well as punctuation, structure, and subject matter.¹⁷⁸

The challenge for courts is to determine when the “grammar of a particular text may safely be ignored in the name of drafters’ intent; this task takes on added importance when the text as written has a meaning that differs significantly from the meaning that the text would have had if the drafters had used different grammar and syntax.”¹⁷⁹

Whether constitutional punctuation was intended to be syntactical, in accordance with eighteenth century rules, prosodic, or both, it is not surprising that constitutional punctuation seems at times odd to the twenty-first century reader.¹⁸⁰ What is “abundantly clear, however, [is] that the Framers did not use

the elocutionary movement in general: that writing was a subset of language and that language was primarily spoken in nature; that writing was to be made over ‘in the image of speaking.’”).

175. *Id.* at 680.

176. *See id.* at 681 (“To the modern sensibilities, the notion that punctuation ought to take a musical, over a logical, form seems rather romantic and impractical. To the eighteenth-century mind, however, such an analogy was very well accepted.”).

177. *Id.* at 682 (“Any important or popular writing (especially anything as important as the constitutional documents) would have been read aloud over and over to those not privileged enough to acquire the skill.”).

178. *U.S. Nat’l Bank of Or. v. Indep’t. Ins. Agents of Am., Inc.*, 508 U.S. 439, 454–55 (1993).

179. Peter Jeremy Smith, *Commas, Constitutional Grammar, and the Straight-Face Test: What if Conan the Grammarian Were a Strict Textualist?*, 16 CONST. COMMENT. 7, 27 (1999).

180. Nardella, *supra* note 161, at 683 (“Framers almost certainly understood punctuation to be something quite different from what we understand it to be today. Some period writers considered it

punctuation the same way we do now.”¹⁸¹ While some “[f]raming-era sources describe punctuation as not merely a matter of oratorical or stylistic choice, but as bound by rules that affect meaning,”¹⁸² others took the contrary position.¹⁸³ Nardella reconciles these different views of constitutional punctuation and finds that “the punctuation of the times was neither chaotic nor extraordinarily complex, but a transitional mixture of both prosody and syntax,” making it “logical that both types of punctuation found their way into the founding texts.”¹⁸⁴ The interpretive rule of parsing the Constitution carefully should guide any modern reader.¹⁸⁵

Punctuation puts back into play the question of to what extent the list of who or what can seek the Court’s jurisdiction limits the scope of the first statement or is subordinate to it.¹⁸⁶ Whether the strange use of semicolons followed by dashes in paragraph 1 of Article III section 2 is syntactical or prosodic could determine the relationship between the list of nine types of subject matter jurisdiction and the broad introductory statement. In other words, if the punctuation has a syntactical purpose, it could mean that the list defines and limits the scope of the introductory statement; if done purely for rhetorical effect, then it might not. For example, Nardella’s view that “when the sense of certain phrases depends upon an earlier phrase, it is proper to attach them into one big sentence using semicolons to separate the phrases”¹⁸⁷ could establish a dependent relationship between the list and introductory phrase. However,

purely prosodic, some purely syntactic, and others considered it both.”). Indeed, according to Nardella, if his conclusion that the Framers used prosodic punctuation is wrong, “then it is quite likely that the Drafters were in fact punctuationally incompetent.”) *Id.* at 684 n.99.

181. Yellin, *supra* note 150, at 714.

182. *Id.* at 711.

183. See, e.g., Nardella, *supra* note 161, at 685 (“[T]he drafters and editors of the amendment had cadence and elocution in mind, consciously or unconsciously, when they inserted and deleted the semicolon [in the Fifth Amendment].”).

184. *Id.* at 684.

185. See Yellin, *supra* note 150, at 711; see also Nardella, *supra* note 161, at 696 (“[W]e must recognize our limits, taking into account the vast differences between then and now and keeping those differences in mind whenever we make a textual argument about the Constitution.”); Smith, *supra* note 179, at 17 (“Any principled approach to textual construction, of course, must presuppose, at least to some extent, normative rules of grammar and syntax.”).

186. But see Vasani Kesavan & Michael Stokes Paulsen, *Is West Virginia Unconstitutional?*, 90 CAL. L. REV. 291, 345 (2002) (“Article III, Section 2 employs the semicolon seven times within the same paragraph to neatly separate the nine categories of federal jurisdiction. It is beyond question that the preceding phrase, ‘The judicial Power shall extend,’ applies to each member of the series.”). Yellin has a slightly different view of semi colons. See Yellin, *supra* note 150, at 732 (“Taking account of the rules that governed comma use, semicolons seem to appear in three places. First, they stand in for commas in separating the items in a list where those items contain internal commas. Second, they separate some independent clauses from one another. Third, they separate dependent clauses that either contain internal commas or are conceptually distinct from one another—including replacing the comma required before a conjunction in these circumstances.”). The first two do not apply to paragraph one. However, the third use might apply, which would emphasize the independence of the nine clauses from each other.

187. Nardella, *supra* note 161, at 687–88 (citing JOSEPH ROBERTSON, AN ESSAY ON PUNCTUATION 18 (photo. reprint 1969) (1785)).

when one reads the entire paragraph out loud, it has a certain rhythm, helped in part by the repetition of “between” when one gets to suits brought by or against states, but most certainly by the dashes, which soften the effect of the half stop of the semicolon.¹⁸⁸ Another indication that the punctuation may be more rhetorical than syntactical is that the Framers also shortened the text by eliminating the introductory phrase “to Controversies” toward the end of the text, thus quickening the text’s cadence and pace.¹⁸⁹

Regardless of how one understands paragraph 1’s punctuation, Professor Amar’s interpretation—that the list of disputes set out, like the enumerated powers granted to Congress, is exhaustive¹⁹⁰—poses a separate problem for granting nature standing. If his interpretation is correct, then for nature to gain Article III standing it would have to fit somewhere on that list, regardless of which tier the dispute fits in or how the strange punctuation might be understood. In other words, unless the case in question involves some breach of a statute or the United States as a party (nothing else on the list appears even remotely relevant) a federal court cannot, and probably would not, hear the dispute.¹⁹¹

One last theoretical argument supporting interpreting Article III as capable of granting nature standing is the malleability of the Court’s standing jurisprudence.¹⁹² Standing doctrine reflects self-imposed, prudential restraints to protect courts from nonmeritorious claims and issuing declaratory or advisory opinions.¹⁹³ Consequently, the Court can, and has, modified the doctrine over time¹⁹⁴ and has the capacity to modify it further, including expanding its scope to cover nonpersons, as noted previously.¹⁹⁵ Two recent

188. The commas appearing in the last clause were commonly used after conjunctions, except when they separated only two words. See Yellin, *supra* note 150, at 713–15 (explaining the use of commas).

189. Nardella, *supra* note 161, at 690 (explaining a similar rhetorical device in the Fifth Amendment involving the substitution of a comma for a semicolon and adding “[b]y deleting part of the compound verb included in the other clauses, the Founders added a little variety to the text and in doing so probably noted that they quickened the pace of the latter half of the Amendment. To compensate for the natural acceleration brought along by the abbreviation, they cut the pause time for breath in half—from that of one half of a period, to that of one fourth of a period—thereby forming the text and structure more closely to the natural cadence of the passage.”)

190. AMAR, *supra* note 154, at 225.

191. Statutes granting a private right of action containing language limiting the party who might initiate such an action to “citizens,” e.g., Clean Air Act, 42 U.S.C. § 7604 (2012), or “persons,” e.g., Clean Water Act, 33 U.S.C. § 1365 (2012). As nature is neither a person nor a citizen, these provisions are of no help granting her access to the courts, even without determining whether she could gain Article III standing.

192. See Babcock, *supra* note 25 at 11–12.

193. But see *Defs. of Wildlife v. Hodel*, 851 F.2d 1035, 1039 (8th Cir. 1988) (holding Congress can abolish prudential standing requirements by legislation). However, the Supreme Court’s pending decision in the appeal of *Robins v. Spokeo Inc.*, 742 F.3d 409 (9th Cir. 2014), *cert. granted*, 135 S. Ct. 1892 (Apr. 27, 2015) (No. 13–1339), throws *Hodel*’s holding into doubt.

194. Ritter, *supra* note 113, at 962.

195. See *infra* at Part IV.C (discussing nonhuman plaintiffs like corporations); Sunstein, *supra* note 33, at 1360 (using this argument to justify granting standing to animals in the face of contrary

examples of this liberalization are *Massachusetts v. EPA*¹⁹⁶ (allowing state plaintiffs to plead sovereignty interests to satisfy standing) and *Sprint v. APCC*¹⁹⁷ (allowing assignees of a claim to bring suit in federal court if the assignor would have had standing).¹⁹⁸ The Court has also relaxed the immediacy and redressability elements of standing when the plaintiff complains of procedural injuries.¹⁹⁹ Thus, “[l]ike the Pillsbury dough boy, the contours of the standing doctrine . . . appear infinitely malleable.”²⁰⁰ Unfortunately, in recent years the doctrine’s contours have become more rigid and less embracing of environmental plaintiffs.²⁰¹

This analysis of Article III, while far from conclusive on the issue of granting nature standing, is not preclusive of that argument. Quite the contrary. On one hand, support might be found in Professor Amar’s division of the paragraph into two tiers, with the second tier being subordinate to the first, which still leaves “persons” in play, and, on the other, in a view of the paragraph’s punctuation as prosodic, which might subordinate the entire list to the first clause, making “persons” less important. Still, Professor Amar’s view that the list of entities capable of invoking the Court’s subject matter jurisdiction is exhaustive means that any claim brought by nature must involve federal law or somehow involve the federal government. This may significantly curtail nature’s ability to seek relief in an Article III court.

The fact that various interpretations of the structure and punctuation of Article III might be sufficiently generous to admit nonhumans puts a premium on developing theoretical support. To achieve this, subpart B examines how corporations have gained juridical status through metaphors of corporate personhood, and subpart C discusses how animals have not.

arguments that the founders could not have anticipated, let alone understood “that dogs or chimpanzees could bring suit in their own name” (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 566–67 (1992) as an example of those arguments)).

196. 549 U.S. 497, 520–21 (2007).

197. 554 U.S. 269 (2008).

198. Ritter, *supra* note 113, at 968.

199. *Defs. of Wildlife*, 504 U.S. at 572 n.7; *Massachusetts v. EPA*, 549 U.S. at 517–18; *Summers v. Earth Island Inst.*, 555 U.S. 488, 496–97 (“Only a ‘person who has been accorded a procedural right to protect *his concrete interests* can assert that right without meeting all the normal standards for redressability and immediacy.’ . . . Unlike redressability, however, the requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute.” (emphasis in original)).

200. See Babcock, *supra* note 25, at 12; see also Garrett, *supra* note 57, at 101 (“Article III standing doctrine has been criticized since its inception as a highly malleable set of jurisdictional barriers contrary to congressional intent and the structure of the modern regulatory state, contrary to the text and history of Article III, and prone to particularly controversial and unjustified rulings in cases regarding public law and civil rights litigants.”).

201. See *supra* Part II (discussing the Court’s recent standing jurisprudence).

B. Corporations—Juridical Persons Entitled to Constitutional Protection

*Significant legal change depends on changed convictions.*²⁰²

Constitutional jurisprudence reveals a history of expanding the Constitution's protections to new entities.²⁰³ Corporations, trusts, ships, joint ventures, municipalities, partnerships, and nation-states have all appeared in federal court in their own right to prosecute their interests.²⁰⁴ 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.²⁰⁵ Corporations have particularly found the courthouse door open to them.²⁰⁶ 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.²⁰⁷ 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 Commission*²⁰⁸ and *Burwell v. Hobby Lobby Stores*.²⁰⁹ Because of this history, this Article has selected corporations for closer examination to see what lessons, if any, corporate jurisprudence holds for an effort to grant nature similar rights in Article III courts.

The law recognizes that a corporation has "a separate legal existence from its shareholders, directors, and officers," who, in turn, enjoy limited liability from the wrongs committed by the corporation, "even though their decisions

202. Stephen A. Plass, *Exploring Animal Rights as an Imperative for Human Welfare*, 112 W. VA. L. REV. 403, 430 (2010).

203. Maddux, *supra* note 40, at 1264.

204. Stone (Univ. of S. Cal. 1972), *supra* note 2, at 452; see Garrett, *supra* note 57, at 102 ("a court is most likely to view corporations as having Article III standing to assert a constitutional right when that right relates to the economic interests. In contrast, associations and religious organizations have broad standing to litigate injuries of their members.").

205. Matambanadzo, *supra* note 102, at 469.

206. According to Kens, by "defining a corporate charter as a contract," the Court, in *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518 (1819), "opened the door for giving corporations constitutional rights." Kens, *supra* note 41, at 24.

207. *Woodward*, 17 U.S. 518 (1819).

208. 558 U.S. 310 (2010) (overruling a federal law restricting the ability of a corporation to pay for political advertising out of its general funds on the ground that the application of the law violated the corporations right to freedom of speech). *Citizens United* has triggered significant controversy. See, e.g., Kens, *supra* note 41, at 41 ("The actual problem with *Citizens United* stems from Justice Kennedy's reasoning that a corporation should not be treated differently under the First Amendment simply because they are not 'natural persons.'"); Matambanadzo, *supra* note 102, at 462 (This controversy [around *Citizens United*] comes, in part, from the underlying false equivalency that equates individual 'natural' human persons with collective or individual 'juridical' persons like corporations, unions, or limited liability companies.").

209. 134 S. Ct. 2751 (2014) (granting a for-profit corporation the right to claim an exemption from Affordable Care Act requirements based on its religious convictions); see Garrett, *supra* note 57, at 103 ("The *Hobby Lobby* decision contains dicta suggesting that courts need not adhere to well-established categories of Article III standing, opening the door to all manner of ill-advised corporate standing.").

and preferences control the actions of the corporate person.”²¹⁰ This separate legal status means that corporations can bring lawsuits and be the subject of a lawsuit, hold and manage property, and enter into contracts, all in their own name.²¹¹ And under the Fourteenth Amendment, corporations are entitled to equal protection under the law and due process rights equivalent to those possessed by other legally recognized persons, as well as to “limited liberty protections and due process rights under the Fifth Amendment.”²¹² Their constitutional rights extend to the right to engage in political and commercial speech, freedom from unreasonable criminal and regulatory searches, protection from double jeopardy and governmental takings of their property, and the right to trial by jury in a criminal matter, which is limited in a civil case.²¹³

At the root of corporations’ legal status is the concept of corporate personhood: “[a]ll entities, individuals, and collectives seeking membership in the community of persons, even those that lack bodies, do so by arguing that they are similarly situated to embodied human beings.”²¹⁴ Thus, while a corporation “is both a person and a thing in law,” its “status as a legal person has been central to legal efforts not only to secure various legal rights and entitlements, but also to expand the scope of legal privileges for corporate persons.”²¹⁵

Scholars commonly recognize three theories of corporate personhood to explain why corporations can possess constitutional rights: the grant theory, the association theory, and the unique or natural entity theory.²¹⁶ *Trustees of Dartmouth College v. Woodward* is a classic exposition of the grant theory of corporate personhood.²¹⁷ In *Dartmouth College*, Chief Justice Marshall reflected the grant theory of corporate personhood when he wrote that

[a] corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either

210. Matambanadzo, *supra* note 102, at 470.

211. *See id.* at 471.

212. *Id.* at 471–72. Some state constitutions, like Montana’s, grant corporation limited privacy protections. *Id.* at 471.

213. Matambanadzo, *supra* note 102, at 472. Indeed, “[c]orporations and other types of organizations have long exercised a range of constitutional rights, including those found under the Contracts Clause, Due Process Clause, Fourteenth Amendment Equal Protection Clause, First Amendment, Fourth Amendment, Fifth Amendment Takings and Double Jeopardy Clauses, Sixth Amendment, and Seventh Amendment.” Garrett, *supra* note 57, at 97. Indeed, “[c]orporate constitutional litigation is pervasive.” *Id.* But courts have not extended to corporations constitutional rights that are “individual-centered and not plausible as rights of corporations[.]” such as the right against self-incrimination or the right to vote. *Id.* at 98.

214. Matambanadzo, *supra* note 102, at 509.

215. *Id.* at 476; *see Joo, supra* note 148, at 805 (explaining the use of the body metaphor probably reflects the difficulty of explaining hard and complicated legal concepts without resorting to some form of abstraction, which leads to metaphors.).

216. *See Kens, supra* note 41, at 11–12 (describing each of these theories).

217. Kens, *supra* note 41, at 11–21.

expressly, or as incidental to its very existence. There are such as are supposed best calculated to effect the object for which it was created.²¹⁸

Under the association theory of corporate personhood, a corporation is considered to be an aggregate of its shareholders or members who are cooperating in a common enterprise, which for “convenience conduct[s] business through the corporate form.”²¹⁹ This theory of corporate personhood views “corporate rights as an extension of the rights on individual owners”²²⁰

The third theory of corporate personhood views corporations as separate and unique entities.²²¹ Only this last theory of corporate personhood 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. But even applying that 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.²²²

If nature gained personhood status like corporations, normative and legal benefits might flow to it. The concept of corporate personhood “entails a moral force, a normative push for the expansion of the corporation’s status as a member of the community and its rights as a citizen.”²²³ If nature could be personified in the same way, it might benefit from the same normative impetus.²²⁴ Corporate personhood has also given “corporations access to an increasing collection of constitutional rights, protections, and entitlements; and provided justification for the corporation to be considered ‘an autonomous

218. Woodward, 17 U.S. 518, 636 (1819).

219. Kens, *supra* note 41 at 12; *but see* Garrett, *supra* note 57, at 146. (“[N]othing could be more fundamental to modern corporate law than the complete separation of the owners from the legal entity itself.”). Garrett criticizes the majority opinion in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), for blurring the line between different types of legal organizations and ignoring that “legal separateness is the point of creating a corporation” when it could have avoided “unnecessary language suggestive of standing for corporations generally.” *Id.* This view of corporations as totally separate from their members is helpful to nature, which likewise has no “members.”

220. Kens, *supra* note 41, at 12; *but see* Elizabeth Pollman, *A Corporate Right to Privacy*, 99 MINN. L. REV. 27, 52 (2014) (“[C]orporations do not receive rights because the characteristics of the entity so closely resemble a natural human so as to merit granting the right; rather corporations receive rights because, as forms of organizing human enterprise, they have natural persons in them, and sometimes it is necessary to accord protection to the corporation to protect their interests.”).

221. According to Kens, it offers the only theory of corporate personhood that is “compatible with the idea that a corporation is a person as a matter of constitutional law.” Kens, *supra* note 41, at 3; *see also* Joo, *supra* note 148, at 818 (“The contractarian metaphor is especially effective as a rhetorical device to advance a laissez faire political agenda with respect to large firms.”).

222. *See* Babcock, *supra* note 25, at 14 (“[N]o court is likely to abandon or modify the requirement [of standing] without some limiting principles to curb the number and type of potential plaintiffs who might otherwise flood the courts.”).

223. Matambanadzo, *supra* note 102, at 478.

224. Some corporate theoreticians argue that “determining rights of corporations should turn on a consideration of the moral and political values that might be served by attributing to groups legal rights and responsibilities.” *See* Kens, *supra* note 41, at 42. This concept might also be usefully applied to granting nature juridical rights.

creative, self-directed economic being.”²²⁵ However, comparable benefits from considering nature as a constitutionally protected entity, such as providing “an efficient, unified source of control for the collective property of shareholders” or the benefit of being considered “an autonomous, creative, self-directed economic being,”²²⁶ do not exist. Nature lacks any functional structure remotely similar to a corporation and offers no reason that it should be considered an economic being of any type. The only thing that nature may share with corporations is that the basis for legal personhood is undertheorized, leaving them both as “legal persons on the margins.”²²⁷

1. *Metaphors of Corporate Personhood*

An analogy to the human body “has been used, through complex rearticulations and reimaginings of what the body is and means, to endow disembodied artificial entities like corporations with legal personhood.”²²⁸ Indeed, “[t]he human body has consistently provided the framework for conceptualizing the capacity to hold rights, privileges, and entitlements to explicitly embodied natural persons,”²²⁹ making “the paradigmatic legal person . . . the embodied human being.”²³⁰ Thus conceptualizing corporations “through the lens of the human body and embodiment”²³¹ facilitated corporations gaining legal status.²³² More specifically, “[t]he embodiment theory of corporate personhood rests upon the metaphorical notion that a corporation, a disembodied, legally constructed entity, is identical to, or at least similarly situated to, an embodied human being.”²³³ Rhetorical metaphors about the human body have been crucial in the past in determining corporate capacity as well as in contemporary cases, like *Citizens United*.²³⁴

225. Matambanadzo, *supra* note 102, at 476; *see id.* at 474 (“[T]he personification of corporations has consistently been regarded as a useful way to ensure that those individuals behind the corporation receive the rights and protections to which they are entitled as persons.”).

226. *Id.* at 476.

227. *Id.* at 473 (referring to corporations); *see id.* at 474 (calling the theory of corporate personhood a useful legal fiction).

228. *Id.* at 501.

229. *Id.* (“[T]he corporation’s status as a holder of rights, entitlements, and privileges is often still grounded in the metaphorical conceptualization of the corporation as a body resembling the human body in its organization and its capacity.”).

230. *Id.* at 505.

231. *Id.* at 483.

232. *Id.* (“The corporation, therefore, gained its intelligibility and status as a holder of rights, entitlements, obligations, duties, and privileges in part because of the metaphorical understanding of the corporation as an embodied entity that resembled the human body.”).

233. *Id.* at 502; *see id.* at 509 (“[E]ven disembodied juridical entities recognized as persons are contemplated, conceptualized, and clarified in reference to the bodies of natural persons and the embodiment of human beings.”).

234. *Id.* at 498 (“Rhetorical devices like metaphors have played an important role in past determinations of corporate capacity and in contemporary cases like *Citizens United*.”); *see* Linda L. Berger, *The Lady, or the Tiger? A Field Guide to Metaphor and Narrative*, 50 WASHBURN L.J. 275, 284–85 (2011) (noting that three metaphors must be used to grant corporations protected access to

That the embodied human serves as the paradigmatic legal person helps inform the legal determinations of judges.²³⁵ This appears to have been particularly true for corporations. What seems to have been key to jurists and legal scholars alike with respect to the legal claims of corporations was the belief that the “corporation resembled natural persons or natural bodies.”²³⁶ In turn, “[i]f one can argue that a legal entity, collective, or individual resembles an embodied human being, then it draws on shared intuitions about who counts in our community of legal persons and how we should take account of them.”²³⁷

Thus, “metaphors of corporate personhood matter.”²³⁸ They might even be “a productive way of thinking about legal personhood, not only for corporations but also for other persons,”²³⁹ perhaps even for other nonhumans, like nature. If “the way we speak about something influences how we experience it,”²⁴⁰ then to the extent that nature can be spoken of in the language of embodiment, nature, like corporations, might gain the same legal rights and normative benefits.²⁴¹ Damage to a wetland might be taken more seriously if the wetland was considered a vital organ, for example a kidney, which could conceivably open the door to a tort claim. Poisoning a river, an artery, with toxins or destroying plants, nature’s lungs, might be viewed as a criminal act, if the harm caused the death of the system. Likewise, scarring a landscape through mountaintop removal mining techniques might engender more of a sympathetic response if it was viewed as akin to disfiguring a face.

Can any of this thinking about corporate personhood and human embodiment help nature gain access to courts? While there are theoretical toeholds in the corporate experience, only one theory of corporate personhood—the corporation as a unique entity—holds out any theoretical hope for nature gaining a constitutional basis to seek relief in court. That hope is dependent on identifying some limiting principle to confine it to nature, which is broad enough already. But, perhaps, given the debates over the concept of corporate personhood, the theory enabling it is less important than

political speech—courts must recognize the corporation as a person, then money must be recognized as speech, and then the market must be viewed as the correct model for examining free speech concerns); *see also* Matambanadzo, *supra* note 102, at 481 (“Scholars in law have not connected the metaphorical relationship between the body and embodiment to the legal recognition of the corporation as a person.”).

235. Matambanadzo, *supra* note 102, at 506.

236. *Id.* at 495.

237. *Id.* at 506; *but see* Kens, *supra* note 41, at 2 (maintaining that the focus on corporate personhood is misguided and potentially counterproductive, preferring instead to rely on the constitutional principle prohibiting confiscation of corporate property).

238. Matambanadzo, *supra* note 102, at 502.

239. *Id.* at 502–03.

240. *Id.* at 504.

241. Matambanadzo argues that “the conceptual use of the body and embodiment in relation to legal persons plays a constitutive role in the recognition of who counts and how they count in law.” *Id.* at 488.

the rights that inanimate corporations have, and whether there is any reason to withhold those rights from nature, which is at least animate.²⁴²

C. Animals—Nonjuridical Persons with No Constitutional Protections

*There would be nothing left of human society if we treated animals not as property but as independent holders of rights.*²⁴³

The law is clear: “[d]esignated as property, animals have no legally cognizable right, and thus cannot have standing to sue to enforce the laws designed to protect them.”²⁴⁴ Like nature, no federal statute, including the Animal Welfare Act,²⁴⁵ grants animals a private right of action.²⁴⁶ Like standing for nature, “[s]tanding for animals in the future will depend upon the willingness of society to recognize nonhuman animals as legal persons deserving fundamental protections in law.”²⁴⁷ With respect to animal rights, advocates on their behalf “must contend with the reality that humans cling to hierarchical structures that benefit them even if this means being cruel to animals, or to other humans.”²⁴⁸ In fact, “humans will not allow the broad interests of animals to be protected to the detriment of real and perceived human welfare.”²⁴⁹ Perhaps for this reason, the intertwining of standing with

242. Another potentially helpful principle from corporate personhood theory is the confiscation principle, which uses to demarcate “the nature and limits of corporate constitutional rights.” Kens, *supra* note 41, at 45. The principle requires corporations to show “that its property has been confiscated or it had been deprived of the essential object of its franchise.” *Id.* This limits the extension of any constitutional right “to a particular corporation rather than to corporations in general” and gives courts “more flexibility in distinguishing the rights of corporations from those of flesh and blood human beings. *Id.* This same principle could be applied to constrain nature’s claims of constitutional standing by limiting the right to gain court access to the particular natural object that is claiming harm—i.e. suffering the equivalent of confiscation by some negative action against it—as opposed to nature as a whole.

243. Epstein, *supra* note 138, at 45.

244. Morrish, *supra* note 111, at 1141; *see also* Corso v. Crawford Dog and Cat Hosp., Inc., 415 N.Y.S.2d 182, 183 (N.Y. Civ. Ct. 1979) (granting plaintiff more than market value damages when defendant replaced plaintiff’s dead dog with a dead cat); Bueckner v. Hamel, 886 S.W.2d 368, 378 (Tex. App. 1994) (Andell, J. concurring) (“The law should reflect society’s recognition that animals are sentient and emotive beings . . . [l]osing a beloved pet is not the same as losing an inanimate object.”); *but see* Morrish, *supra* note 111, at 1142 (arguing animals are different from other forms of property because they can suffer and love, and people form attachments with them that distinguishes them from inanimate property). This sentiment distinguishes much of this case law from the broader claims made in this Article about rights of nature. *See* Kelch, *supra* note 134, at 537–40 (discussing these cases). *Cf.* Tilikum *ex rel.* People for the Ethical Treatment of Animals, Inc. v. SeaWorld Parks & Entm’t, Inc., 842 F.Supp.2d 1259, 1264 (S.D. Cal. 2012) (holding plaintiffs lacked standing to bring a Thirteenth Amendment claim, but mentioning animals have legal rights).

245. Animal Welfare Act of 1966, 7 U.S.C. § 2131 (2012).

246. Sunstein, *supra* note 33, at 1359 (“Animals lack standing as such, simply because no relevant statute confers a cause of action on animals.”).

247. Maddux, *supra* note 40, at 1257.

248. Plass, *supra* note 202, at 416; *see id.* at 430 (“Animal rights, like civil rights for humans, will be a relative concept that is adjusted to suit our real and perceived needs.”).

249. Plass, *supra* note 202, at 430.

legal personhood, while helpful to corporations,²⁵⁰ has not been much use to animals.²⁵¹

As with theories of corporate legal rights, granting animals legal personhood has a theoretical basis—two, in fact.²⁵² The first of these, animal autonomy, calls for “permitting nonhuman animals of certain autonomy to have equal status under the law as humans of full autonomy, humans of comparable autonomy, or (at least) humans of no autonomy.”²⁵³ The second theory supporting granting animals legal rights is based on comparing the situation of animals to that of less capable humans, like children or mentally impaired individuals with full constitutional rights: “if less capable (‘marginal’) human beings, such as . . . children, are assigned rights, justice requires that other intelligent animals with greater ‘practical autonomy’ than rights-bearing ‘marginal’ humans should be granted rights too.”²⁵⁴

As in the case of theories supporting corporate personhood, theories supporting animal personhood are contested.²⁵⁵ For example, Professor Richard L. Cupp disagrees with the second basis for granting animals legal rights, especially regarding children, because, unlike animals, children will eventually attain “practical autonomy.”²⁵⁶ Children are “the future of the social contract,” making “the social contract’s rights paradigm a better fit for children” than animals.²⁵⁷ Additionally, according to Cupp, human and animal cognitive ability are not “readily comparable on a simple continuum,” and

250. See *supra* Part IV.C.

251. Maddux, *supra* note 40, at 1247 (“[T]he concept of standing has been inextricably intertwined with legal personhood and legal personhood has been the true obstacle to the recognition of Article III standing.”); but see Plass, *supra* note 202, at 417 (“[H]uman personhood is not a prerequisite for the grant of legal rights . . . even more importantly, a change in label will not automatically change human interests that require subordination.”); *id.* at 429 (“This world-wide belief that animals must be exploited to advance human health and welfare is embedded in American society. Dramatic changes in the legal system are not likely unless public convictions changes.”). Sunstein argues “the capacity to suffer is . . . a sufficient basis for legal rights for animals.” Sunstein, *supra* note 33, at 1363.

252. See Bryant, *supra* note 8, at 255 (“Among those legal scholars who do attempt to elevate the standing of animals, there is primary reliance on arguments that animals have particular attributes that make them worthy of respect, consideration, and protection.”).

253. Maddux, *supra* note 40, at 1255 (citing Wise, *supra* note 147, at 800–01).

254. Cupp, *supra* note 39, at 5. Professor Cass Sunstein presents a variation on the second basis for granting animal legal personhood, which is based on animals’ extant capabilities. Sunstein, *supra* note 111, at 400–01 (2003). Sunstein argues that preventing suffering and ensuring the capabilities of animals should “count in the balance of law.” *Id.* at 400. On the topic of suffering and legal personhood, see Bryant, *supra* note 8, at 255 (“When animals can be lawfully treated in ways that cause such great suffering for human ends, it is difficult to conceptualize them as “legal persons” under any definition of that term.”).

255. Bryant, *supra* note 8, at 253 (criticizing the concept of legal personhood, and recommending its rejection because it “requires endless, fruitless proofs that animals bear such substantial similarity to humans”); Epstein, *supra* note 138, at 45 (“We should never pretend that the case against recognizing animal rights is easier than it really is; by the same token, we cannot accept the facile argument that our new understanding of animals must lead to a new appreciation of their rights.”).

256. Cupp, *supra* note 39, at 5.

257. *Id.*

children's humanity is central to societal decisions, justifying granting them legal rights.²⁵⁸

Further, the concept of contractualism, which "promotes the notion of the social contract, in which societally imposed responsibilities are accepted in exchange for individual rights owed by society," works against granting animals rights "because no animals, either as a species or individually, are viewed as capable of bearing significant moral responsibility."²⁵⁹ This is because, according to Cupp, "[a]nimals will never attain the level of moral agency of the adult humans participating in the social contract."²⁶⁰ Julia Tanner, on the other hand, argues that animals can acquire moral standing, which is not to be confused with legal standing, based on humans taking an interest in them.²⁶¹ She supports granting animals "secondary moral standing when a human who meets the conditions for primary moral standing takes an interest in the animal's interests and then insists that they will not cooperate unless the animal is accorded moral consideration."²⁶² This same argument could apply to granting animals, and even nature, the equivalent of legal standing.

Central to both theories of animal personhood are the "overarching values and principles of traditional Western law—fairness, liberty, equality, and integrity in judicial decision making."²⁶³ According to some animal rights

258. *Id.* at 5–6. Cupp argues that the "centrality of humanity to rights and other factors also argue for distinguishing mentally incapable adults from animals." *Id.* at 6; *see id.* at 51 ("Being a speciesist is good, not bad, when substantial differences exist between species"); Epstein, *supra* note 138, at 45 ("But the fact remains that they [animals] do not have the higher capacity for language and thought that characterizes human beings as a species."); *but see* PETER SINGER, *ANIMAL LIBERATION*, 18 (2d ed. 1990) (contending that the only support for arguing that a child with limited intelligence has a right to life where an animal with more intelligence is denied that right is speciesism).

259. Cupp, *supra* note 39, at 13; *see also* Julia Tanner, *Contractarianism and Secondary Direct Moral Standing for Marginal Humans and Animals*, 19 *RES PUBLICA* 141, 142 (2013) ("Traditional contractarianism has notorious difficulties according direct moral standing to those who are not rational agents[, like] animals and/or marginal humans.").

260. Cupp, *supra* note 39, at 31; *see also id.* at 36 ("[T]he strongest reasons for granting rights to children relate to their humanity, and comparing humans to humans will always reveal closer connections than comparing animals to humans."); *id.* at 41 ("The distinctiveness of human reasoning seems rooted not simply in the degree of our intelligence, but also in the humanness of our intelligence."); *but see* Tanner, *supra* note 259, at 154 (The flaw in the contractarian's approach is the authority for it is that it is based on "self-interest, self-interest will leave non-rational individuals (both humans and animal) in the background, only being considered when a rational agent is willing and/or able to do so.").

261. Tanner, *supra* note 259, at 143–44.

262. *Id.*; *see also* Barbara Newell, Essay, *Animal Custody Disputes A Growing Crack in the Legal Thinghood' of Nonhuman Animals*, 6 *ANIMAL L.* 179, 183 (2000) (discussing the growing trend in judicial decisions, local ordinances, and state legislation in companion animal disputes to consider the interest of the animal, which "is thoroughly supported by our society's vast personal experience, and considerable scientific knowledge, of the interests of nonhuman animals who—though perhaps not possessing minds identical to those of competent adult humans—certainly possess a similar nervous system, experience similar physical sensations such as hunger and pain, and have mental and emotional lives.").

263. Wise, *supra* note 147, at 796.

activists, like Steven Wise, these principles “demand that dignity-rights be extended to all qualified to receive them, irrespective of their species.”²⁶⁴ As discussed further below, whether animals have dignity rights, let alone legal personhood,²⁶⁵ is far from resolved, and, therefore, offers only a slim reed on which to rest animals’ legal standing, let alone nature’s.

Human dignity “fulfils various functions in constitutions, constitutional instruments, and international law: It serves as a normative protection of individuals. It constitutes objective law and an important part of the general principles of the law, not least as a guideline for the interpretation of other fundamental rights.”²⁶⁶ A core purpose of human dignity is to establish “a baseline for what is impermissible treatment of individuals under any circumstances.”²⁶⁷ If animals are conceived as autonomous, under the first theory of animal personhood, with full legal status equivalent to humans, then animals should be granted equivalent legally protected dignity rights.²⁶⁸ Wise believes that concepts of “fundamental fairness and equality demand that nonhuman animals who possess either a full Kantian autonomy or a realistic autonomy be entitled to dignity rights granted to humans who lack any autonomy whatsoever (i.e. a human vegetable or a fetus).”²⁶⁹

264. *Id.*; see Mahlmann, *supra* note 117, at 372 (“For some, the light it sheds is not the light of judicial insight and normative progress, but the dubious phosphorescent, seductive glow of a legal will-o’-the-wisp that leads one astray in the dangerous swamp of hidden ideologies, false essentialism, masked power, and self-righteous cultural and religious parochialism treacherously adorned in the splendid robe of universalism.”); see also *supra* Part II (discussing Professor Jackson’s critique of the Supreme Court’s standing jurisprudence).

265. However, times may be changing. A New York Supreme Court judge recently issued an order granting a writ of habeas corpus to an animal rights group seeking the release of two chimpanzees from a research facility at Stony Brook University for ultimate transfer to a Florida sanctuary. The group had argued that animals are entitled to legal personhood. See *New York Court Issues Habeas Corpus Writ for Chimpanzees*, BBC NEWS (Apr. 21, 2015), <http://www.bbc.com/news/world-us-canada-32396497>; see also Jesse McKinley, *Judge Orders Stony Brook University to Defend Its Custody of 2 Chimps*, N.Y. TIMES (Apr. 21, 2015), <http://www.nytimes.com/2015/04/22/nyregion/judge-orders-hearing-for-2-chimps-said-to-be-unlawfully-detained.html> (quoting Professor Laurence H. Tribe saying habeas corpus should be available to test the confinement and treatment of beings of limited capacities, including chimps).

266. Mahlmann, *supra* note 117, at 379; see *id.* at 372 (“[H]uman beings are invested with a particular worth commanding care and respect, for others and for their own proper selves.”); *id.* at 389 (“Human dignity as a legal concept aims to protect the inherent, supreme, and inalienable worth of human beings.”).

267. *Id.* at 382; see *id.* at 380 (human dignity is an “expression of an ungraspable essence of human beings on the basis of respect for the uniqueness and individuality of the person and protection against objectification or degradation or focus more abstractly on the particular equal worth entitling human beings to respect and equal consideration underlining as well the importance of autonomy and self-determination.”).

268. On some of the legal permutations of “dignity rights,” see *id.* at 283 (“Dignity is often regarded as unalienable. In legal terms, this can mean different things: that the content of the protection is not modified according to the actions of the bearer, that human beings are not only the necessary bearer of this right, but that the status is unforfeitable or that there are specific limits to any system of limitation.”).

269. Maddux, *supra* note 40, at 1257 (citing Wise, *supra* note 147, at 910).

Cupp disagrees with Wise that animals are entitled to dignity rights. Because humans can attain greater “practical autonomy rights” than any other species, it is not unreasonable to argue that humans “have a degree of unique intrinsic dignity.”²⁷⁰ This is especially true in light of “the increasing evidence that our intelligence is not simply greater than the intelligence of other species, but that it is also uniquely human intelligence—a fundamentally different cognitive architecture rather than a simply superior cognitive ability on the same continuum with other species.”²⁷¹ He applies these arguments to mentally impaired adults, noting that even mentally limited humans are protected regardless of their capacity for autonomy because of differences in brain function and because they possess “unique intrinsic dignity” which is “based on shared humanity.”²⁷² But the concept of dignity is expansive and there are “many different conceptions and understandings of fundamental legal concepts” such as human dignity.²⁷³ The question is whether it is capacious enough to extend to animals and grant them a form of legal personhood, as Wise contends it is,²⁷⁴ let alone extend to nature.

However, it is hard to see how any of the theories supporting granting legal rights to animals could be helpful to nature. Neither of the theories supporting animal legal personhood—animal autonomy or comparison with fully rights-vested marginal humans—is availing. Nature has no particular skills of its own, nor is it sentient. This means that concepts of dignity rights, as well as fundamental fairness and equality, are equally unavailing, no matter how capacious those rights might be. Even if animals eventually prevail, it is difficult to perceive how nature could benefit from their success.²⁷⁵ Although both animals and nature are alive and corporations are not; animals are sentient, while trees and streams are not. Thus animals are simply too different in their capabilities from the rest of nature to offer much theoretical help. If nature is to

270. Cupp, *supra* note 39, at 45.

271. *Id.*

272. *Id.* at 50.

273. Mahlmann, *supra* note 117, at 374 (commenting that these differences exist “not only between but *within* various legal systems and cultures, as any dissenting court opinion illustrates. Human dignity is of course no exception in this respect. The interesting question is, however, whether all these conceptions are of equally normative plausibility.”).

274. *Id.* at 384 (“Another question of ongoing discussions concerns the question whether dignity is to be extended to animals or even nature in general. Some constitutional law and cases exist in this respect.”). Mahlmann cites as examples the Swiss Federal Court that “applied the ‘dignity of the creature’ (Swiss Federal Constitution, Art 120(2)) in a leading case on research with primates restricting this research, although not ruling it out in principle. It held that there is a difference between the ‘dignity of the creature’ of Art. 120(2) and human dignity of the Swiss Federal Constitution Art 7, without clearly stating the difference.” *Id.* at 384 n.104.

275. Sunstein argues, “All or most legal rights qualify as such not for any mysterious reason, but because of their beneficial effects on welfare, however understood; in this view, legal rights are instrumental to well-being, suitably defined.” Sunstein, *supra* note 33, at 1365. Perhaps a welfare maximizing theory that envisions nature as beneficial to overall societal welfare might support granting nature legal rights, depending on how capaciously welfare is defined. However, as nature can be detrimental as well as beneficial to welfare, this theory may not support granting nature legal rights.

gain sufficient legal personhood to achieve standing in an Article III court, then the capacity of the Constitution to expand to give legal personhood to artificial entities under a concept of embodied personhood, as it has with corporations, appears to offer the best platform.

Nonetheless, comparative analysis, as done here, can be useful. It can act as “an effective antidote against judicial parochialism” and can stimulate judicial imagination.²⁷⁶ Comparative analysis can also help insure that persuasive normative ideas developed under different legal regimes “to solve a similar problem” will not be overlooked and might “supply arguments for doctrinal developments if the positive laws leave room for it.”²⁷⁷ Even if the extant legal framework “excludes certain conceptions that seem reasonable,” these concepts may still have utility with respect to critically assessing that legal framework and could help to shape future legal development.²⁷⁸ Thus, the concept of legal personhood and the embodied person, the touchstone for granting nonhumans legal rights, as well as notions of fairness, equality, and judicial integrity embedded in the constitutional concept of dignity rights, which have to date eluded proponents of animal legal rights, persist despite the controversy that surrounds them, warranting this Article’s examination of them.

The challenges of finding interpretative and theoretical support for granting nature access to Article III courts are not the only ones capable of preventing the activation of Stone’s concept, as discussed in Part V. But unlike the prior discussion, these problems are easier to overcome.

V. PROBLEMS WITH GIVING NATURE LEGAL RIGHTS AND HOW THEY MIGHT BE OVERCOME

*The future will not be ruled; it can only possibly be persuaded.*²⁷⁹

Advocates of granting nature independent access to courts face both practical and institutional barriers. While these barriers are not inconsiderable, Part V, after describing them, suggests ways in which they might be significantly lowered or perhaps even overcome completely.

A. Institutional Barriers to Granting Nature Standing

The requirement that plaintiffs have both a genuine interest and personal stake in the controversy is supported by the notion that this helps sharpen the debate before the court, and promotes separation of powers as well as judicial economy and fairness.²⁸⁰ Accordingly, litigants should have “such a personal

276. Mahlmann, *supra* note 117, at 394.

277. *Id.*

278. *Id.* (“Comparative research has thus rightly become a constitutive element convincing legal heuristics.”).

279. BICKEL, *supra* note 146, at 98.

280. Babcock, *supra* note 25, at 9.

stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.”²⁸¹ This requirement prevents flooding the courts with nonmeritorious claims, wasting scarce judicial resources, and guards against what Professor Jackson calls “bystanders,”²⁸² specifically “those lacking so direct a connection to a matter, from litigating in place of those more directly affected.”²⁸³ Additionally, “[b]y limiting courts to the adjudication of cases of actual harm to actual litigants, courts are deterred from stepping on the political branch’s role of shaping broad policies for the future.”²⁸⁴

There is a perception that granting nature direct access to the courts might flood them with questionable cases and encroach upon the work of the other two branches of government because there is no injured person. However, when nature is injured as a result of some action by a person or business, there is no problem establishing that nature has both a genuine interest and a personal stake in the outcome of the controversy.²⁸⁵ It is less obvious that judicial economy and fairness will be served by its presence as a party. However, one might argue, as Professor Jackson does,²⁸⁶ that closing the door to legitimate claims of injury is essentially unfair and counterproductive. Further, to the extent that nature is the right claimant, in other words the directly injured party, repeated creative efforts by third parties to argue on nature’s behalf will be forestalled, even avoided altogether under principles of *res judicata*, if nature can appear in its own right.²⁸⁷

Perhaps the problem is less that nature cannot demonstrate actual or threatened injury, and more that it may be very easy for nature to make these showings compared to third party plaintiffs, enabling a multitude of otherwise dubious claims to reach the courts.²⁸⁸ One way to respond to the potential

281. *Baker v. Carr*, 369 U.S. 186, 204 (1962).

282. Jackson, *supra* note 22, at 152.

283. *Id.* at 131 n.17

284. Adam Kolber, Note, *Standing Upright: The Moral and Legal Standing of Humans and Other Apes*, 54 STAN. L. REV. 163, 193 (2001) (citing *Lewis v. Casey*, 518 U.S. 343, 349 (1996) (Scalia, J.)).

285. See *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 566 (1992) (requiring that plaintiff organizations provide the court with “a factual showing of perceptible harm”).

286. Stone (Univ. of S. Cal. 1972), *supra* note 2, at 471; see also *supra* Part II.

287. See Stone (Univ. of S. Cal. 1972), *supra* note 2, at 470 (discussing the problem of repeat litigation and how the appointment of a guardian might ameliorate that problem).

288. A “third party has standing when there is (1) some injury to the party litigating the right, (2) a close relationship to the nonparty whose rights are directly being litigated, and (3) some obstacle to that nonparty litigating, such that fundamental rights might otherwise go unprotected.” Garrett, *supra* note 57, at 147–48. Garrett identifies some examples where third-party standing is acceptable, such as the “special nature of the doctor-patient relationship, an advocacy relationship combined with a strong assurance that the third party is ‘fully, or very nearly’ as effective an advocate for the constitutional right, or some reason why a claim by the individual party would evade review.” *Id.* at 148. Neither of these examples would apply to nature as a litigant in her own behalf because, as the injured party, she is a more effective advocate for her interests than a third-party and no review would be evaded, if she brought a case on her own behalf.

problem of flooding the courts with nonmeritorious claims²⁸⁹ is to limit the cases nature may bring to those involving important and/or irreplaceable natural resources put in jeopardy by government inaction.²⁹⁰ Thus, not every lawsuit involving an injury to nature would be cognizable to an Article III court; “only those involving resources of ‘unusual importance’”²⁹¹ or at risk of catastrophic/irreversible harm in the face of government inaction would qualify under this criterion. Little Mahoning Creek might be able to appear in court because, even though it is a resource of substantial importance only to the local community, it is irreplaceable and will suffer irreversible harm if PGE’s proposal to dewater it goes forward. The concept of irreplaceability as an action standard is not new.²⁹²

A second limiting criterion that would avoid flooding courts with nonmeritorious claims is to allow only specially qualified lawyers to bring cases on nature’s behalf.²⁹³ This idea has its seeds in Justice Blackmun’s concept of allowing organizations with a longstanding commitment to, and expertise in, the environment to gain standing.²⁹⁴ As Justice Blackmun said

289. *But see* *Sierra Club v. Morton*, 405 U.S. 727, 758 (1972) (Blackmun, J., dissenting) (“We need not fear that Pandora’s box will be opened or that there will be no limit to the number of those who desire to participate in environmental litigation. The courts will exercise appropriate restraints just as they have exercised them in the past.”).

290. Stone notes that the concept of irreparable injury “subsumes questions both of degree of damage and of value,” and decisions about what is irreparable damage to the natural environment, be it “to the ionosphere because of its importance to all life, or to the Grand Canyon, because of its uniqueness,” or, as this article suggests, to Little Mahoning Creek because of its place in the life of a small community, “is going to rest upon normative judgments that ought to be made explicit.” Stone (Univ. of S. Cal. 1972), *supra* note 2, at 486. His solution is to create a constitutional list of “preferred objects,” like perhaps resources of national and international significance, any threat of injury to which would be reviewed by all branches of government, including the courts, “with the highest level of scrutiny.” *Id.*

291. Babcock, *supra* note 25, at 15–16 (citing *Massachusetts v. EPA*, 549 U.S. 497, 506 (2007)).

292. Sax suggests that among the principles that should guide “a commitment not to impoverish the world,” is the need to avoid “irreversible contamination of soil, water and air,” and “where damage has occurred, a concerted effort to repair the damage inflicted in the past should be undertaken so as to restore diminished capital.” Sax, *supra* note 9, at 104–105; *see also id.* at 103 (urging that people should refrain “from those acts that impoverish by leaving less opportunity for freedom of action and thought by those who follow us,” and “practices that are heedless of biological and cultural diversity, whether in agriculture forestry, or urbanization, reduce choice through impoverishment”); *see* Babcock, *supra* note 25, at 15 (discussing as a limiting principle that the subject of the litigation must be important where the failure of government action risks irreparable harm).

293. From 1992 to 2011, the Swiss canton of Zurich has publicly paid a lawyer to represent animals in court. Sykes, *supra* note 58, at 309–10 (2011) (“[The lawyer] had no authority to file complaints directly, but he was charged with making sure judges, often unfamiliar with animal law, take the cases seriously by explaining the animal protection code, reviewing files and suggesting fines based on precedent. Importantly, [he] also had the power to appeal verdicts.” (internal citations and quotations omitted)). The position disappeared when the Swiss defeated a referendum that would have given all cantons animal lawyer because of funding concerns during an economic downturn. *Id.* at 310–11.

294. *Sierra Club*, 405 U.S. at 757–58. *See* *Animal Lovers Volunteer Ass’n, Inc., v. Weinberger*, 765 F.2d 937, 939 (9th Cir. 1985) (per curiam) (suggesting that organizations can gain standing if they have a longstanding commitment to preventing harm to animals); *see* Babcock, *supra* note 25, at 15

about his proposal, “[c]ertainly, it should be no cause for alarm. It is no more progressive than was the decision in *Data Processing* itself. It need only recognize the interest of one who has a provable, sincere, dedicated and established status.”²⁹⁵ The same might be said of restricting the lawyers who might advocate for nature to those with a longstanding commitment to the resource in question and/or special expertise and the means to represent it in court.²⁹⁶

Another potential problem is that opening the courts to direct action by nature could intrude into the work of the political branches of government. “Litigants should not ask courts to play the role of Congress, even when Congress has not responded to critical issues of national concern in a timely manner.”²⁹⁷ While critics of the Court’s current standing jurisprudence “speak in glowing terms about the desirability of allowing private citizens to litigate public rights. . . . Our governmental institutions, however, have developed upon a different premise: the unique advantage of the court lies in protecting private rights, not in representing the public more wisely than the political branches can.”²⁹⁸ But, regarding separation of powers concerns, since the first criterion requires government inaction before nature can appear in her own right in court, there can be no interference with an actual exercise of power by one of the political branches. In such a situation, a court is truly the branch of last resort and still retains discretion under the political question doctrine not to hear matters it deems better left to one of the political branches for

(proposing that plaintiffs who could demonstrate commitment, expertise, agenda and resources to prosecute the matter, should not be required to establish particularized injury).

295. *Sierra Club*, 405 U.S. at 757–58 (Blackmun, J., dissenting).

296. In *Sierra Club*, the eponymous plaintiff’s attorney offered this view of what a qualified organization might be: “Has the organization been in existence, and has it taken a stand over an extended period of time that’s consistent with its stand? Has it done anything that gives it special expertise in the area that it tries to argue about? Does it have an educational program? Does it write on the subject? Do its members use the area? Is it adequately staffed, so that it can present a case in a way that a court can understand it?” Transcript of Oral Argument at 11, *Sierra Club*, 405 U.S. 727 (No. 70-34) (quoted in Manus, *supra* note 7, at 508).

297. *Abate*, *supra* note 62, at 241; *but see id.* at 244 (“[T]he creative use of common law remedies was an important precursor to raise awareness of the need for comprehensive federal and state statutory-based schemes to address these problems, and the need to allow citizens to play meaningful roles in enforcing new legislative schemes through citizen suit provisions.”); *id.* (“Public nuisance litigation to seek recovery for climate change impacts . . . would help raise awareness of the need for a comprehensive federal response, which would ultimately help the victims of climate change impacts.”).

298. Woolhandler, *supra* note 62, at 732; *see also* Transcript of Oral Argument at 11, *Sierra Club*, 405 U.S. 727 (No. 70-34) (Solicitor General answering his own question as to “[w]hy should not the courts decide any question that any citizen wants to raise?” by saying “Ours is not a government by the Judiciary.” (quoted in Manus, *supra* note 7, at 508 n.363)); *but see Sierra Club v. Morton*, 405 U.S. at 745 (Douglas, J., dissenting) (“The Solicitor General . . . considers the problem in terms of ‘government by the Judiciary.’ With all respect, the problem is to make certain that the inanimate objects, which are the very core of America’s beauty, have spokesmen before they are destroyed.” (quoted in Manus, *supra* note 7, at 434 n.75)).

resolution.²⁹⁹ However, courts rarely apply the political question doctrine to bar adjudication of an issue, so that may not be a sufficient limitation.³⁰⁰

But courts do not duplicate the work of the legislative and executive branches; “their special provenance is the protection of rights.”³⁰¹ The fact that courts have to decide claims presented to them within the scope of “their mandatory jurisdiction” makes them distinct particularly from legislatures, in addition to the different procedures they follow and their obligation to explain their decisions.³⁰² “[C]ourts are made independent in part so that they can respond, fairly, to minoritarian claims of right, in a way that majoritarian processes may not.”³⁰³ Nature’s claims are more frequently minoritarian than majoritarian and, therefore, under Professor Jackson’s reasoning, should be responded to by an Article III court. Further, as a partial rejoinder to Article III separation of powers concerns, Professor Jackson notes that “the Court does not necessarily protect itself institutionally by not deciding; there are cases it ought to decide—allow to be decided in the lower courts—in order to legitimate the substantial power and independence federal courts enjoy under the Constitution.”³⁰⁴ Thus, the Court harms its “own role in the U.S. Constitutional system” when it declines to hear a case on standing grounds.³⁰⁵

Concerns about flooding the courthouse with frivolous claims if nature is allowed to appear in her own right can be controlled. Separation of powers concerns are of less import than maintaining the integrity of the courts and are

299. “The political question doctrine requires federal courts to avoid deciding matters that are better left to the political branches to resolve.” Abate, *supra* note 62, at 215. In *Baker v. Carr*, 369 U.S. 186 (1962), the Supreme Court established six independent criteria for determining the existence of a political question:

[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217. According to Abate, these criteria do not amount to a “stand-alone definition of a ‘political question[.]’” but rather serve as guidance to a court “in deciding whether a question is entrusted by the Constitution or federal laws exclusively to a federal political branch for its decision.” Abate, *supra* note 62, at 216.

300. *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 321 (2d Cir. 2009); *but see California v. Gen. Motors Corp.*, No. C06-05755-MJJ, 2007 WL 2726871, at *6, *13 (N.D. Cal. Sept. 17, 2007) (granting motion to dismiss in state action against automobile manufacturer for contributing to the alleged public nuisance of global warming, applying the third and fourth factors from *Baker*).

301. Jackson, *supra* note 57, at 135.

302. *Id.* at 177 (emphasis in original) (“In this sense, courts provide a site within government that invites forms of participation foreclosed to many in legislative spheres”).

303. *Id.*

304. *Id.* at 135.

305. *Id.*

off the mark, as the third branch of government does not duplicate the work of the other two so long as it stays focused on the protection of rights.

B. *Practical Concerns*

Beyond the theoretical, nature's appearance in court raises practical concerns as well, some of which Stone anticipated. For example, since nature is speechless, it needs someone to speak on its behalf. Stone's solution was to have a court appoint a guardian—an environmental organization or a government agency—to represent nature.³⁰⁶ While this Article agrees with Stone that humans must at some level be interlocutors for nature to give it a voice in court, it moves away from his reliance on court-appointed guardians to represent nature in court, as that will take time and impose administrative costs on the plaintiff. Instead, the Article suggests 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. Qualified lawyers could be from nationally or regionally recognized environmental organizations or even from local ones who can make the necessary showings noted above if challenged.³⁰⁷ While this approach has roots in Stone's proposal, it eliminates the need for a court to appoint a guardian and the reliance on a human plaintiff to complain about nature's injuries.³⁰⁸ Similarly, figuring out what is in nature's best interest, given nature's silence, is not difficult. As Stone says "natural objects can communicate their wants (needs) to us, and in ways that are not terribly ambiguous"³⁰⁹ like the disappearance of a species from an area because of a lack of suitable habitat. Indeed, Stone says nature can do this more clearly than a director of a corporation can declare that the corporation wants dividends declared, noting that the interests of "others" like corporations "are far less verifiable, and even more metaphysical in conception, than the wants of rivers, trees, and land."³¹⁰

Stone acknowledged that one of the problems with his guardianship proposal arises from the fact that, frequently, the injuries and interests of discrete segments of the environment are different and sometimes conflict. For example, a community's focus on the injury to a small segment of a larger watershed might lead it to ignore the health of the larger watershed (or vice versa), while the protection of a small section of forest because of its importance to a local community might undermine management measures important to the larger system (again, the reverse might be true). In these

306. Stone (Univ. of S. Cal. 1972), *supra* note 2, at 464–73.

307. With regard to local environmental lawyers, state environmental agencies might keep lists of lawyers from various parts of the state that the agency considers qualified to represent nature in court.

308. See *Sierra Club v. Morton*, 405 U.S. 727, 752 (1972) (Douglas, J., dissenting).

309. Stone (Univ. of S. Cal. 1972), *supra* note 2, at 471.

310. *Id.*

situations, Stone might ask, should divisible segments of natural systems have individual rights? If the representatives of those divisible systems cannot agree on a holistic solution then the answer is probably yes; an answer that is no different than when an individual member of a larger group seeks separate relief from what the group wants so long as the individual can meet the requisite standing showings.

Another question Stone raises is that if nature is granted rights, like the ability to appear in court as a plaintiff, why should liability not attach to it for the harms it causes like wildfires, floods, landslides, and droughts?³¹¹ In other words, why should nature not also be required to appear as a defendant? Stone actually agrees that nature should pay for the harm it causes and proposes that judgments against nature should be paid from trust funds established for court ordered damages to the environment.³¹² However, this would be a mistake. The complexity and improbability of attributing harm to nature and ruling out any causative human factors like global warming, building in flood prone and/or landslide vulnerable areas, or careless camping, makes this a much more complicated and resource intensive effort than identifying a specific human cause for nature's harm and should not be entertained by the courts. The last question, also raised by Stone, is the matter of determining appropriate remedies for injuries to nature.³¹³ Although still a complex and difficult process, doing this has become more routine under laws like the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)³¹⁴ and the Oil Pollution Act.³¹⁵

In short, if a viable theory (or better yet, theories) can be mustered to justify granting nature direct access to the courts, then the most predictable institutional and practical problems seem surmountable.

CONCLUSION

This Article has shown that while it is difficult to find theoretical support for granting nature direct access to Article III courts, it is not impossible. Indeed, this Article has argued that footholds may be found in Article III itself and in the Court's willingness to accord constitutional standing and protections to nonhumans like corporations. Theories of personhood, which support granting corporations legal status and constitutional rights, might be transferrable to nature, as well as the concept of human dignity, based on

311. *Id.* at 481.

312. *Id.* Stone proposed that the determination and consideration of damage to natural objects would be done independently of any other factors involved in litigation involving harm to natural resources, and that natural objects could be the beneficiaries of legal awards usually in the form of restitution or remediation or by the deposit of damages in a trust fund administered by a guardian. *Id.*

313. *Id.* at 476–80 (discussing how to calculate costs for environmental harms and the complexity and social costs of doing so).

314. 42 U.S.C. § 9607(a)(4)(C) (2012) (liability for natural resource damages).

315. 33 U.S.C. § 2706 (2012) (liability for natural resource damages).

notions of fairness and equality. Here some strength might be drawn from theories that support granting animals legal status.

This Article's proposal to limit the types of cases to those where the natural resource at issue is important and/or irreplaceable and harm is likely in the face of government inaction should counter concerns about flooding Article III courts with nonmeritorious legal claims. A second institutional concern, that permitting the courts to take jurisdiction over cases brought in nature's name would intrude into the workings of the political branches of government, fares no better in the face of Professor Jackson's arguments against the Court's current restrictive standing jurisprudence. Stone himself convincingly answered many of the practical concerns raised by this approach. The only small step this Article takes away from Stone's proposal is to transfer the guardian function from environmental organizations or the government to lawyers who can demonstrate sufficient expertise, commitment, and resources to undertake the role. This would lessen the administrative costs and time it takes to appoint a guardian and should resolve some of the concerns Stone had about using guardians.

So where does this leave environmental plaintiffs who are finding it increasingly difficult, even close to impossible, to prosecute harms to the natural environment? Are the arguments propounded in this Article sufficiently strong to warrant making them in court? Maybe—there is no guarantee of success, but then there never is. But what other choices remain? Perhaps the lawsuits might goad one of the political branches to become more proactive in protecting nature, such as Congress enacting a law granting special standing to a defined category of natural resources like wilderness or wetlands. Enacting such a law might be something one might expect of a guardian.³¹⁶

316. Stone suggests that "some (relatively) absolute rights be defined for the environment by setting up a constitutional list of 'preferred objects,'" any injury to which he then suggests "should be reviewed with the highest level of scrutiny at all levels of government, including our 'counter-majoritarian' branch the court system." Stone (Univ. of S. Cal. 1972), *supra* note 2, at 486.