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An Indivisible and Living Whole: Do We Value Nature Enough to Grant It Personhood?

Allison Katherine Athens*

In 1972, in his dissent to the majority's decision in Sierra Club v. Morton, Justice Blackmun posed a question: "Must our law be so rigid and our procedural concepts so inflexible that we render ourselves helpless when the existing methods and the traditional concepts do not quite fit and do not prove to be entirely adequate for new issues?" Forty years later, Aotearoa New Zealand's parliament answered in the negative. Responding to the New Zealand Crown government's historic failure to meet their treaty responsibilities with Māori iwi (tribes) and current fears of environmental degradation, the New Zealand Crown government found flexibility in their legal system to accommodate Māori views of nature as a living entity that cannot be owned and used as property. By transforming a former national park and an economically important river from property to legal persons under the guardianship of the interested Māori tribe, the New Zealand Crown government eschewed rigidity in order to meet their treaty obligations while also safeguarding the best interest of each natural feature as an ecological system.

In the following Note, I borrow from feminist theory and environmental philosophy to examine how the categories of nature and personhood function within a cultural context to support the status quo of nature as property. I conduct a detailed examination of the case of Lavinia Goodell, a woman denied admittance to the bar in 1875, in order to show how cultural attitudes determine categorical boundaries, indicating that nature can gain legal personhood based on changing cultural norms. After considering different models of valuing and protecting nature in the United States and around the world, I argue that nature, like Lavinia Goodell, has intrinsic value and thus should be entitled to legal

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* J.D. Candidate 2019, University of California, Berkeley School of Law. Ph.D. 2013, University of California, Santa Cruz. I dedicate this Note to *Iizhik Gwats'an Gwandaii Goodlit*, the Sacred Place Where Life Begins. I would like to thank my colleagues in the Environmental Law Writing Seminar, especially Professor Bob Infelise and Elissa Walter, for your support, encouragement, and insightful comments. I would also like to thank the editorial staff of *Ecology Law Quarterly*. Finally, a special thank you to Dan and Nitsii, because every adventure begins at home.

personhood. I end with the proposition that granting the Columbia River Watershed legal personhood so that it may participate in the renegotiation of the Columbia River Treaty alongside interested and affected Columbia River Tribes would prove our legal system flexible enough to address the challenges of modern ecosystem protection.

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INTRODUCTION

*The river . . . is the living symbol of all the life it sustains or nourishes
The river as plaintiff speaks for the ecological unit of life that is part of it.¹*

In 1875, Miss R. Lavinia Goodell petitioned the Supreme Court of Wisconsin for admittance to the bar. She was of “good moral character, and possessed of sufficient legal knowledge and ability,” yet her application was denied.² In an opinion whose notoriety would far outlive him, Chief Justice Ryan

1. *Sierra Club v. Morton*, 405 U.S. 727, 743 (1972) (Douglas, J., dissenting).
2. *In re Goodell (Goodell I)*, 39 Wis. 232, 232 (1875).

confronted the unthinkable in the form of Lavinia Goodell: a woman lawyer. Writing almost one hundred years later, Professor Christopher Stone used the sad case of Lavinia Goodell to highlight eras of absurdity in legal history, moments in time when an entity that was once legally invisible to the courts stepped across an imaginary line and became a person with the capacity to “sue and be sued.”³ Stone calls this liminal phase the “unthinkable,” the time before a “rightless” entity is extended rights that confer access to the courts.⁴ “Throughout legal history,” Stone argues, “each successive extension of rights to some new entity has been, theretofore, a bit unthinkable.”⁵ And not just unthinkable but absurd, even proposing the idea of conferring rights on a new entity seems “odd or frightening or laughable.”⁶ “We are inclined to suppose,” Stone continues, “the rightlessness of rightless ‘things’ to be a decree of Nature, not a legal convention acting in support of some status quo.”⁷

Chief Justice Ryan appealed to this “decree of Nature” when he opined that the “law of nature” governed in Lavinia Goodell’s case and such law held that women’s role in the natural order of things was to bear and nurture children within the confines of the home.⁸ Goodell, as an accomplished individual—smart, ambitious, well educated, irrefragable—was utterly invisible to Chief Justice Ryan; he could not see the woman in front of him for he was staring at her as a category of thing, an “‘idealized’ version of an object [the court] needed.”⁹ And it was not just an object the court needed; women were a social instrument upon whose invisibility the rights holders of the nineteenth century—men—completely relied.¹⁰

Lavinia Goodell’s story has a happy ending. In response to Chief Justice Ryan’s inability to conceive that a masculine pronoun in a statute might also be applied to women, the Wisconsin state legislature passed a statute that made it explicit that qualified persons, regardless of sex, could be admitted to the bar.¹¹ The Supreme Court of Wisconsin then duly admitted her, with one lone dissent.¹²

Goodell’s case, along with the emancipation of American slaves, forms the foundation for Professor Stone’s proposition that nature, too, can make the categorical leap from “rightless” thing (or property) to rights holder, a legal entity

3. *Id.* at 244–46.

4. Christopher D. Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450, 453 (1972).

5. *Id.*

6. *Id.* at 455. Writing in the early 1970s, Stone reflects on another important movement of his era: “Why do people make jokes about the Women’s Liberation Movement? Is it not on account of—rather than in spite of—the underlying validity of the protests, and the uneasy awareness that a recognition of them is inevitable?” *Id.* at 455 n.23a.

7. *Id.* at 453.

8. *Goodell I*, 39 Wis. at 245.

9. Stone, *supra* note 4, at 456.

10. *See Goodell I*, 39 Wis. at 245.

11. *In re Goodell (Goodell II)*, 81 N.W. 551, 551 (1879).

12. *Id.* The lone dissent was Chief Justice Ryan. *Id.* (Ryan, C.J., dissenting).

fully visible to the courts. What if, like the Wisconsin Supreme Court did for Lavinia Goodell, the American legal system freed “nature” from the status quo? Given that as a society we grant legal personhood to what we find valuable, can we value nature enough to grant it legal personhood? This categorical shift recently occurred in Aotearoa New Zealand, when a parliamentary act changed the status of a former national park and an economically important river from property to legal person.

A. *The Expansion of Legal Rights to Nature*

*[A]bove all remember [this] is a living place, more than just forests, rivers and land.*¹³

Professor Stone wrote his influential essay on the rights of nature at the beginning of a decade-long push for laws to protect the environment, but not nature. Laws passed during this time such as the National Environmental Protection Act, the Clean Air Act, and the Clean Water Act addressed the effects of industry and development on shared human resources such as water and air. However, Congress did not intend for these laws to protect “nature” as an integrated and living system; rather, it intended to protect the “environment” as a space in which humans live, work, and play.¹⁴ The creation of national parks, monuments, and forests, the promulgation of regulations such as the Roadless Rule, and legislation such as the Wilderness Act complemented these environmental statutes by attempting to protect areas of special interest or value from rampant development and destruction. But these were flimsy safeguards, subject to the whims of politics (as exemplified by the Trump administration’s gutting of the newly created Bears Ears National Monument by 85 percent).¹⁵

13. *Te Urewera*, TŪHOE, <http://www.ngaituhoe.iwi.nz/te-urewera> (last visited Mar. 3, 2018).

14. The National Environmental Policy Act’s purpose is “[t]o declare a national policy which will encourage productive and enjoyable harmony between man and his environment.” 42 U.S.C. § 4321 (2012). The Clean Water Act states:

In the development of such comprehensive programs due regard shall be given to the improvements which are necessary to conserve such waters for the protection and propagation of fish and aquatic life and wildlife, recreational purposes, and the withdrawal of such waters for public water supply, agricultural, industrial, and other purposes.

33 U.S.C. § 1252(a) (2012). The purpose of the Clean Air Act is “to protect and enhance the quality of the Nation’s air resources so as to promote the public health and welfare and the productive capacity of its population.” 42 U.S.C. § 7401(b)(1). Each environmental protection statute reserves consideration for “productive,” or economic, capacities and is not about a nature that exists outside of human use per se.

15. Julie Turkewitz, *Trump Slashes Size of Bear Ears and Grand Staircase Monuments*, N.Y. TIMES (Dec. 4, 2017), <https://www.nytimes.com/2017/12/04/us/trump-bears-ears.html>; see also Natalie A. Landreth & Matthew L. Campbell, *Protecting Bears Ears National Monument*, NATIVE AM. RTS. FUND, <https://www.narf.org/cases/protecting-bears-ears-national-monument/> (last updated Feb. 21, 2018). Bears Ears protection was hard fought by Indigenous people and is the only major national monument where federal agencies explicitly incorporated Indigenous knowledge of the land into land management planning, protecting sacred spaces of Indigenous value. Angelo Baca, *Bears Ears is Here to Stay*, N.Y. TIMES (Dec. 8, 2017), <https://www.nytimes.com/interactive/2017/12/08/opinion/bears-ears->

While most courts refused to extend Professor Stone's call for extending legal rights to nature, some judges and legal advocates have heeded his call for extending these rights.¹⁶ Lawyers are now going to court and arguing for nature's rights based on Stone's theories and his ideas are cited wherever nature, wilderness, animal rights, or even soybeans' legal interests are mentioned.¹⁷ On September 25, 2017, attorney Jason Flores-Williams filed a lawsuit on behalf of the Colorado River Ecosystem, with advocacy group Deep Green Resistance listed as "next friends."¹⁸ Flores-Williams and Deep Green Resistance's strategy to place the Colorado River as the rightful party in the lawsuit about protecting its interests directly applies Stone's proposition that potential "friends" could act in a natural feature's best interest in a court of law.¹⁹ Stone suggests that such friends be drawn from groups that have "manifested unflagging dedication to the environment" and can also marshal the requisite technical experts and lawyers.²⁰ The Community Environmental Legal Defense Fund (CELDF), the nonprofit legal advocacy group helping communities in the United States and other countries draft rights-for-nature legislation (and, in the case of Grant Township in Pennsylvania, enforcing those rights), also cite Stone's article as influencing their attempt to change how nature appears in court.²¹

monument.html. National Monument protection means nothing if it cannot protect such places from future destruction due to resource development and the changed priorities of a different administration.

16. See generally *Sierra Club v. Morton*, 405 U.S. 727 (1972) (containing separate dissents by both Douglas and Blackmun arguing in favor of rights for nature).

17. On Westlaw, a search for "Christopher Stone, Should Trees Have Standing-Toward Legal Rights for Natural Objects" retrieves 264 secondary sources. WESTLAW, [https://1.next.westlaw.com/Search/Home.html?transitionType=Default&contextData=\(sc.Default\)](https://1.next.westlaw.com/Search/Home.html?transitionType=Default&contextData=(sc.Default)) (search "Christopher Stone, Should Trees Have Standing-Toward Legal Rights for Natural Objects"; then select secondary sources tab in the left-hand column) (last visited Mar. 17, 2018).

18. Brent Gardner-Smith, *Colorado Moves to Dismiss Complaint Seeking 'Person' Status for Colorado River Ecosystem*, ASPEN JOURNALISM (Oct. 21, 2017), <https://www.aspenjournalism.org/2017/10/21/colorado-moves-to-dismiss-request-seeking-person-status-for-colorado-river/>. In early December 2017, the case was dismissed with prejudice and Flores-Williams withdrew it under threat of sanctions and disbarment from the Colorado Attorney General's Office. Chris Walker, *Attorney to Withdraw Colorado River Lawsuit Under Threat of Sanctions*, WESTWORD (Dec. 4, 2017), <http://www.westword.com/news/colorado-river-lawsuit-to-be-withdrawn-due-to-potential-sanctions-9746311>. Colorado Attorney General Cynthia Coffman issued a statement that reads in part: the "case itself unacceptably impugned the State's sovereign authority to administer natural resources for public use, and was well beyond the jurisdiction of the judicial branch of government." *Id.*

19. Stone, *supra* note 5, at 465-66; see Complaint for Declaratory Relief at 7, *Colorado River Ecosystem v. Colorado*, No. 1:17-cv-02316 (D. Colo. Sep. 25, 2017), 2017 WL 4284548.

20. Stone, *supra* note 5, at 466.

21. Justin Nobel, *How a Small Town Is Standing Up to Fracking*, ROLLING STONE (May 22, 2017), <http://www.rollingstone.com/politics/news/how-a-small-town-is-standing-up-to-fracking-w482577> ("The disconnect [of liberal environmentalists enforcing existing environmental regulations that lead to approvals of toxic waste incinerators] led [CELDF co-founder Tom] Linzey to recall a landmark 1972 paper he read in law school: 'Should Trees Have Standing? Toward Legal Rights for Natural Objects.'").

B. Rights for Nature is a Human Right

While Professor Stone's ideas resonated both in the U.S. and across the world, recent legislation in Aotearoa New Zealand granting two natural features legal personhood demonstrates an alternate method of providing rights for nature within an English common-law system. The two historic settlements with Māori tribes, which granted a river and a former national park legal personhood, drew their inspiration from Māori values of stewardship of a natural feature that is considered an ancestor rather than the western value of property ownership.²² Although the legal recognition of these natural features as rights-bearing entities resonates with Stone's expansion of legal rights for nature and ultimately brings us to the same conclusion—nature protected because it has intrinsic value²³—each approach takes a different path and has a different impact on such stakeholders as environmental groups, Indigenous tribes, and non-Indigenous communities.

In his dissent in *Sierra Club v. Morton*, Justice Blackmun queried, "Must our law be so rigid and our procedural concepts so inflexible that we render ourselves helpless when the existing methods and the traditional concepts do not quite fit and do not prove to be entirely adequate for new issues?"²⁴ Aotearoa New Zealand's parliament answered in the negative. Responding to fears of environmental degradation and the failure to meet their treaty responsibilities, the New Zealand Crown government found flexibility in their legal system to account for Māori views of nature as a living entity that cannot be owned as property, all the while safeguarding the best interests of nature as an ecological system.²⁵

While advocacy groups such as CELDF have been helping communities around the world change their attitudes towards nature through expanding legal rights, Aotearoa New Zealand's grant of personhood shows us how an English-common-law-derived legal system can be flexible enough for the new issue of nature having value in and for itself. This Note takes this new development in Aotearoa New Zealand's legal system to explore the extension of rights to nature,

22. For the Ngāi Tūhoe, the mountains of Te Urewera are the final resting place of their ancestors. Rangi McGarvey, *Story: Ngāi Tūhoe*, TE ARA, <https://teara.govt.nz/en/ngai-tuhoe/page-3> (last updated Mar. 22, 2017). For the Whanganui iwi, the mountains where the Whanganui River originates and the river itself are ancestors of the people and are deeply rooted in the iwi's cultural identity. See David Young, *Story: Whanganui Tribes*, TE ARA, <https://teara.govt.nz/en/whanganui-tribes/page-1> (last updated Mar. 22, 2017).

23. See RODERICK FRAZIER NASH, *THE RIGHTS OF NATURE: A HISTORY OF ENVIRONMENTAL ETHICS* 9–10 (1989) ("[N]ature has intrinsic value and consequently possesses at least the right to exist. This position . . . accords nature ethical status at least equal to that of humans.").

24. *Sierra Club v. Morton*, 405 U.S. 727, 755–56 (1972) (Blackmun, J., dissenting).

25. The Te Urewera Act codifies this explicitly: "Tūhoe and the Crown share the view that Te Urewera should have legal recognition in its own right, with the responsibilities for its care and conservation set out in the law of New Zealand. To this end, Tūhoe and the Crown have together taken a unique approach, as set out in this Act, to protecting Te Urewera in a way that reflects New Zealand's culture and values." Te Urewera Act 2014, s 3(9) (N.Z.).

the possibilities of conceiving nature as an entity, and the various ways arguments form around nature, including arguments that depend on the very “laws of nature” that would keep nature without legal rights.

The American legal system has been flexible enough to expand rights and legal personhood to slaves, women, children, and corporations. American social attitudes and political will have led to various legal experiments in conserving the environment and special natural features, including the enactment of legislation like the Clean Air Act or the creation of Yosemite National Park. It is time to combine both together—legal protection for natural features under the model of expanding rights for nature through legal personhood.

In the following Note, I will borrow from feminist theory and environmental philosophy to examine how the categories of nature and personhood function within a cultural context to support the status quo. Cultural attitudes determine what is within and what remains outside of a category, indicating that nature can gain legal personhood based on changing cultural norms, especially given the fact that courts continue to defend the category of person by opposing it to the category of nature. In Part I, after considering different models of valuing and protecting nature in the United States, I argue that nature, like a woman, has intrinsic value and thus should be entitled to legal personhood.

In Part II, I conduct a detailed examination of the case of Lavinia Goodell, focusing on the problematic use of “the laws of nature” in deciding her fate. I then look at the nineteenth century corollary to “naturalized woman” by interrogating the common practice of “feminizing nature” in writings of the time period. By putting these two practices side-by-side, I show that the unthinkable extension of rights to women is no more, and no different, than extending rights to nature. In Part III, I examine how the Wilderness Act of 1964 damaged an understanding of nature as a personified, living entity with a life force equal to, or greater than, that of humans. Although feminized, and therefore still other to the masculine holder of rights, the Wilderness Act and other cultural projects demonstrate that nature has been completely emptied of all relational qualities and now functions as an object. Instead of aiding environmental protection efforts, labeling natural spaces as wilderness only allows for other spaces to be degraded, polluted, or made irredeemable. These unnatural places, in opposition to wilderness, cannot hold rights because they have lost their “primeval character and influence.”²⁶ In Part IV, I discuss current efforts to expand environmental protection for nature through: 1) a rights-for-nature paradigm, and 2) the granting of legal personhood for nature. Rights-for-nature ordinances are gaining in popularity both domestically and globally, and have achieved some notable successes in protecting natural features. Other efforts, however, such as Grant Township’s struggle to keep a fracking waste well out of their community, have not been able to change the court’s categorical thinking. Legal personhood, such

26. Wilderness Act § 2(c), 16 U.S.C. § 1131(c) (2012).

as found in Aotearoa New Zealand, does not grant specific rights but has allowed guardians to oversee the best interests of the natural feature “person.” Both of these paradigms offer pathways to extend rights to nature. Finally, in Part V, I use the previous discussion to facilitate a shift in categorical thinking around the Columbia River Watershed, whose dams are “the consequence of bad medicine threatening every living thing on the planet,” in order to reevaluate how the river system might one day become its own living legal person.²⁷

I. “PARADIGM OF CONVENTIONAL THINKING”

*[A]fter all, land, like woman, was meant to be possessed.*²⁸

A. *Women and the Laws of Nature*

Wisconsin Supreme Court Chief Justice Ryan was so incredulous that a woman could be a successful lawyer that four years after he issued his opinion rejecting Lavinia Goodell’s admittance to the bar, he was the lone dissenter of five justices rehearing her case.²⁹

His original opinion, described as a “paradigm of conventional thinking about women,”³⁰ noted not only that there was “no statutory authority for the admission of females to the bar of any court of this state,” but also that women’s characteristics disqualified them from being lawyers.³¹ Relying on what philosopher and cultural theorist Kate Soper terms the “doubly distorting picture” of women confined to the sphere of reproduction (and nature) while men enjoy the freedom of production (and culture),³² Chief Justice Ryan proclaims:

We cannot but think the common law wise in excluding women from the profession of the law. . . . *The law of nature* destines and qualifies the female sex for the bearing and nurture of the children of our race and for the custody of the homes of the world and their maintenance in love and honor. And all life-long callings of women, inconsistent with these radical and sacred duties of their sex, as is the profession of the law, are departures from *the order of nature*; and when voluntary, treason against it. . . . The peculiar qualities of womanhood, its gentle graces, its quick sensibility, its tender susceptibility, its purity, its delicacy, its emotional impulses, its subordination of hard reason to sympathetic feeling, are surely not qualifications for forensic strife.

27. Gloria Bird, *Illusions*, in *FIRST FISH, FIRST PEOPLE: SALMON TALES OF THE NORTH PACIFIC RIM* 56, 56 (1998).

28. Stone, *supra* note 5, at 455 n.23 (quoting CURT BERGER, *LAND OWNERSHIP AND USE: CASES, STATUTES, AND OTHER MATERIALS* 139 (1st ed. 1968) (“The relationship between our attitudes toward woman, on the one hand, and, on the other, the more central concern of this article—land—is captured in an unguarded aside of our colleague, Curt Berger: ‘. . . after all, land, like woman, was meant to be possessed’”)).

29. *Goodell II*, 81 N.W. 551, 551 (1879).

30. *Swenson v. N. Crop Ins., Inc.*, 498 N.W.2d 174, 187 n.1 (N.D. 1993) (Levine, J., concurring).

31. *Goodell I*, 39 Wis. 232, 244–45 (1875).

32. KATE SOPER, *WHAT IS NATURE?: CULTURE, POLITICS AND THE NON-HUMAN* 101 (1995).

Nature has tempered woman as little for the juridical conflicts of the court room, as for the physical conflicts of the battle field.³³

Nature, in the sense the Chief Justice uses, is the “essential character and quality of something.”³⁴ Woman, in his description, is known by her specific qualities: her “gentle graces” and “quick sensibility.”³⁵ But Chief Justice Ryan’s opinion also indicates another meaning for nature, that of the “inherent force which directs either the world or human beings or both.”³⁶ Here, the Chief Justice is no longer speaking about Goodell, an individual, but has turned an abstract meaning of nature, a singular, unified, “essential quality” into a universal cover of an abstract category, womankind.³⁷

Four years after her initial encounter with Chief Justice Ryan, Goodell once again attempted to gain admittance to the bar, following passage by the state legislature of a measure that provided “no person shall be denied admission or license to practice as an attorney in any court of this state on account of sex.”³⁸ In a short opinion that does not meditate on the nature of womanhood, the Wisconsin Supreme Court somewhat tersely stated that because this new provision, “removes the objection founded upon a want of legislative authority to admit females to practice,” Goodell could therefore be admitted.³⁹

Chief Justice Ryan’s decision in Goodell’s first attempt at admittance to the bar demonstrated the court’s conception of a regressive dichotomy between men and women. Relying on the opening facts (prepared by Goodell), the court writes:

But even if she were married, the recent legislation of Wisconsin, giving to married women the right to control their own property and earnings and to sue and be sued, removes their disabilities to contract . . . and so removes the barrier supposed to have existed, to her admission to legal practice.⁴⁰

Before legislation gave women the ability to contract, women, especially married women, were nonlegal entities. The authors of *Animal Law: Cases and Materials* point out that “[a]lthough a husband could sue a third party over injury to his wife, at common law the right of a wife ‘was apparently no more than the capacity to sustain the injury.’”⁴¹ At common law, “[t]he wife, by her coverture [marriage], ceased to have control of her actions or her property In short,

33. *Goodell I*, 39 Wis. at 244–45 (emphasis added).

34. RAYMOND WILLIAMS, *KEYWORDS: A VOCABULARY OF CULTURE AND SOCIETY* 219 (rev. ed. 1983).

35. *Goodell I*, 39 Wis. at 245.

36. WILLIAMS, *supra* note 34, at 219.

37. *See Goodell I*, 39 Wis. at 245; WILLIAMS, *supra* note 34, at 219.

38. *Goodell II*, 81 N.W. 551, 551 (1879).

39. *Id.* The opinion is also quick to point out the court’s reluctance to be told who can practice law in the state, given that authority should remain a “necessary and inherent part of [the court’s] powers [with] full control over the subject.” *Id.*

40. *Goodell I*, 39 Wis. at 237.

41. BRUCE A. WAGMAN ET AL., *ANIMAL LAW: CASES AND MATERIALS* 58 (4th ed. 2010) (quoting *Wait v. Pierce*, 209 N.W. 475, 480 (Wis. 1926)).

she lost entirely all the legal incidents attaching to a person acting in her own right.”⁴² Before state legislatures started enacting so-called “Married Women’s Property Acts,” wives were little more than “chattel” under common law. Instead of being the owners of property, they themselves were, essentially, the property being owned.⁴³ But even after acknowledging Wisconsin’s changes to this common law perspective, Chief Justice Ryan then decided Goodell’s case on the legal question of whether or not there was statutory authority for admitting a woman to the Wisconsin bar. He chose to read the masculine pronoun in the statute that specifies qualifications for the bar as gender specific rather than as indicating the “masculine gender may be applied to females,” a common enough occurrence even over a hundred years ago.⁴⁴ He rationalized his interpretation of the statute by appealing to the “law of nature” that relegates women to reproduction rather than production.⁴⁵

Soper terms the “antithetical equivalence” of such constructed oppositions (man/woman, production/reproduction, culture/nature) “doubly distorting,” because it “invites us to suppose that ‘production’ proceeds without reliance on nature . . . [and] because it presents ‘reproduction’ as if it were unaffected by cultural mediation and innured against the impact of socio-economic conditions.”⁴⁶ Feminist scholars do not deny the procreative biology of women. Rather, in pointing out the coding of nature as feminine and the allocation of women to the “side of nature,” feminist theorists highlight how in Western thought women suffer from a “devaluation and de-historization of the natural relative to the cultural and its ‘productivity’.”⁴⁷ This devaluation of women in this “paradigm of conventional thinking” is not natural, but as Soper explained, makes glaringly obvious the “impact of socio-economic conditions” on women in the cultural and political-legal spheres.⁴⁸

In the nineteenth century, men knew where women were placed in the natural order of things. The practice of coverture (which turned women into legal nonentities), the inability of women to vote, and laws that kept women from professional careers all acted to keep women on the side of nature, women as

42. *Burdeno v. Amperse*, 14 Mich. 91, 92 (1866).

43. See generally Margaret Thornton, *Loss of Consortium: Inequality Before the Law*, 10 SYDNEY L. REV. 259 (1984).

44. The National Environmental Policy Act, written almost one hundred years later, refers to maintaining “conditions under which man and nature can exist in productive harmony.” 42 U.S.C. § 4331(a) (2012). Would Chief Justice Ryan then have us read this as now excluding women from nature? See *Goodell I*, 39 Wis. at 233.

45. *Goodell I*, 39 Wis. at 245.

46. SOPER, *supra* note 32, at 101–02. According to Soper and some anthropologists, the association of women with nature may have some claim to universality, although it affects women in other cultural contexts differently and perhaps without quite such pernicious and degrading results. See *id.* at 102–103.

47. *Id.* at 99. Recall Chief Justice Ryan’s comparison of the courtroom to a battlefield, both of which are unsuitable for women in action. See *Goodell I*, 39 Wis. at 245.

48. *Swenson v. N. Crop Ins., Inc.*, 498 N.W.2d 174, 187 n.1 (N.D. 1993) (Levine, J., concurring); SOPER, *supra* note 32, at 102.

things.⁴⁹ Prior to the social upheavals of the late nineteenth and early twentieth centuries that challenged the “naturalness” of women kept out of professional and political life, it was a division so inculcated that to even ask the question—could a woman be a lawyer—was to go against every natural inclination of the social order that depended on women remaining outside of men’s productive space, whether that be the courtroom, the battlefield, the university, or a place of business. Women were not simply governed by the laws of nature, they were a wilderness needing to be contained.

B. Nature and the Ideas of Man

Nature, the influential social and cultural historian Raymond Williams writes, “is perhaps the most complex word in the [English] language.”⁵⁰ The corollary to “naturalized woman” is “feminized nature.”⁵¹ The two go together, mutually supporting conditions that describe the value of each entity. While Chief Justice Ryan was prognosticating about the natural virtues of women, or at least those who had not forsaken “the ways of their sex for the ways of ours,” other great male minds were moving across the American landscape, turning virgin forests and fields towards productive industry.⁵²

The great purveyor of nineteenth century culture and history, Hubert Howe Bancroft, amassed an extensive collection of books on history, geography, and natural history, a collection that later formed the foundation of Bancroft Library at the University of California, Berkeley. His own extensive documentation of the American West was published in a volume on California in 1888. His reflections are not at all unique for the time in their breathless voyeurism.⁵³ He writes:

Fair California! . . . voluptuous in thy half-tropic bed, in thy sunlit valley warmed with the glow of bronze and rosy lustre, redolent with wild flowers, and billowy with undulating parks and smooth corrugated mounds and swelling heights, with waving grass and fragrance-breathing forests, captivating the mind, and ravishing the senses with thy bewitching charms, and smiling plenty in alternate seasons of refreshing rains and restful dryness . . . thrilling the blood with ocean’s stimulants and giving new life,

49. Writing for the majority in *United States v. Virginia*, Justice Ginsburg summarized the long history of denying women rights by statute and common law, including the right to vote, the right to choose a profession (bartending, executor of an estate), and the right to own property when married. 518 U.S. 515, 531-32 (1996).

50. WILLIAMS, *supra* note 34, at 219.

51. SOPER, *supra* note 32, at 98.

52. *Goodell I*, 39 Wis. at 241.

53. Bancroft’s extensive collection was donated to the University of California, Berkeley and became the foundation of the Bancroft library. *History of the Bancroft Library*, U. OF CAL., BERKELEY LIBR., <http://www.lib.berkeley.edu/libraries/bancroft-library/history> (last visited Feb. 14, 2018). Bancroft Street, which runs right by the University of California, Berkeley School of Law, is also named for him. *See Campus Map*, U. OF CAL., BERKELEY, <https://www.berkeley.edu/pdf/campusmap.pdf> (last visited Mar. 22, 2018).

not stifling it; with thy native men and beasts, and birds and fishes, and fields of native grain, all hitherto unmarred by man . . . crimson purple and violet in thy blushing beauty veiled in misty gauze that rises fresh and glistening from the sun-beaten ocean.⁵⁴

In Bancroft's portrayal of nature as a composite "female," Soper finds in this idealization "a metaphoric register in her feminization of the same divisions and anxieties that have characterized male attitudes to women themselves, who are, of course, both mothers and sexual partners, and who have been cherished and abused in both these roles."⁵⁵

The trope, or literary commonplace, of feminized nature is often found in colonial writing, especially if the story, poem, or natural history features exploration.⁵⁶ However, it is a ubiquitous rhetorical style in Western letters, what Louise Westling describes as "the strange combination of eroticism and misogyny that has accompanied men's attitudes toward landscape and nature for thousands of years."⁵⁷ Bancroft's natural and social history of California represents an attitude of reflection; he sees the landscape as a person, feminizing it as natural and available, in the same register as Chief Justice Ryan naturalized Lavinia Goodell. Both nature in Bancroft's formulation and women in Chief Justice Ryan's opinion are part of a category that is other to themselves. This category is available to them and is useful, even needed—women reproduce the social order by bearing and raising children and keeping the home; California's lavish forests and abundant streams are the economic underpinning of that idealized home. Bancroft's view is indicative of a nature that is open to exploitation, is available and ready for men to make something of her. She is a resource.

II. UNTRAMMELED BY MAN

*I learned from living in the wilderness, our natural world.*⁵⁸

If the word "nature" is the most complex word in the English language, then "wilderness" is the most "potent construction of nature available to New World environmentalism."⁵⁹ Rising to prominence in the eighteenth century, the

54. HUBERT H. BANCROFT, CALIFORNIA INTER POCULA 23–24 (1888).

55. SOPER, *supra* note 32, at 105. Soper traces metaphors of feminized nature, frequently written in similes that compare natural features to parts of the female body, and the exploration of new lands or the practice of scientific inquiry in terms of ravishment and conquest, the ultimate seduction of a protesting virgin, finding such metaphors in the writings of Thomas Jefferson, William Wordsworth, and Thomas Morton to name a few. *Id.* at 103–06.

56. *See id.* at 104.

57. LOUISE H. WESTLING, THE GREEN BREAST OF THE NEW WORLD: LANDSCAPE, GENDER, AND AMERICAN FICTION 5 (1996).

58. Sarah James, *We Are the Ones Who Have Everything to Lose* (2001, 2009), in ARCTIC VOICES: RESISTANCE AT THE TIPPING POINT 260, 260 (Subhankar Banerjee ed., 2013).

59. GREG GARRARD, ECOCRITICISM 59 (1st ed. 2004).

concept of wilderness flourished as a way for settler societies to narrate their experiences in what they viewed as untamed, naturally savage landscapes.⁶⁰ In the United States, the history of the concept of wilderness is most closely associated with the American West, which was assumed to be an “untrammelled realm to which the Euro-American ha[d] a manifest right.”⁶¹

A century after Bancroft reveled in the copious delight of California’s abundance, “voluptuous in [her] half-tropic bed . . . [with] fields of native grain, all hitherto unmarred by man,” Congress recognized a new truth about the profound “impact of man’s activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances.”⁶² The Wilderness Act of 1964, like the National Environmental Protection Act, originated from this new ecological era after western expansion of American settlement had thoroughly reshaped the landscape and the last wild places of the United States seemed to be disappearing at an increasing rate.

After the melodramatic excesses of the open and inviting landscape from the century before, nature became a new type of thing, under threat but still available to those who can appreciate its value and manage its failing systems. The Wilderness Act’s Statement of Policy opens:

In order to assure that an increasing population, accompanied by expanding settlement and growing mechanization, does not occupy and modify all areas within the United States and its possessions, leaving no lands designated for preservation and protection in their natural condition, it 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.⁶³

Nature, as it appears in the Wilderness Act, has lost her personality; she is no longer playful, vengeful, inviting, or indifferent. Nature is now a type of resource, a landscape with aesthetic *and* economic value.

A. A Place Where No One Lives

*Not only did somebody forget to tell us we were Russian and then America[n], which we have been able to ignore or to deal with, but now, they have made us into a wildlife refuge, which we cannot ignore [because] they then decided, without telling us, that most of that refuge was something called wilderness, meaning, as we read the dictionary, that nobody lives there. And since we do, we were apparently declared nonexistent.*⁶⁴

60. *See id.* at 60.

61. *Id.*

62. 42 U.S.C. § 4331(a) (2012); BANCROFT, *supra* note 54, at 23–24.

63. Wilderness Act § 2(a), 16 U.S.C. § 1131(a) (2012).

64. The People of Kaktovik, Alaska, In This Place: A Guide for Those Who Would Work in the Country of the Kaktovikmiut (2001) (unpublished), <https://www.bsee.gov/sites/bsee.gov/files/spill-summary/inspection-and-enforcement/kaktovik-guide.pdf>. Moreover, the Kaktovikmiut write:

The fact that the Wilderness Act chose its definition of wilderness to exclude humans from its boundaries (except as a recreational visitor) is a choice with a history.⁶⁵ From wilderness' earliest appearance in Western literature it has been viewed with ambivalence.⁶⁶ As noted by Greg Garrard, in the ancient poem the *Epic of Gilgamesh*, the wilderness is a threat that must be overcome and tamed; in the Old Testament, the wilderness is a place of exile, as well as what must be traveled through for a people to become a nation; and in the New Testament tradition, the wilderness is associated with Satan, but is also the place where early Christians went to escape persecution.⁶⁷ The American concept of wilderness is influenced by this Judeo-Christian backstory, which combines "connotations of trial and danger with freedom, redemption and purity."⁶⁸

The Wilderness Act defines wilderness "in contrast with those areas where man and his own works dominate the landscape."⁶⁹ It elaborates, moreover, that a wilderness:

is hereby recognized as an area where the earth and its community of life are untrammelled by man, *where man himself is a visitor who does not remain*. An area of wilderness is further defined to mean in this Act an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature, with the

Since wilderness is defined as a place without people, we are deeply insulted by those who proclaim any of this country wilderness, as if we were not considered to be real people. Indeed, that is what our name, Inupiat, means. The real people. Although we now recognize, some of us, that there are other 'real people', we surely do not give up the notion that we are people nor that we are real!

Id. The Arctic National Wildlife Refuge, like Bears Ears National Monument, is another example of the precarious state of designated areas for nature that become less convenient to keep around in time. Most recently, Senator Murkowski from Alaska has used the pure, primeval, and untouched character of wilderness to declare an area exempt from this protection in order to open a section of the Arctic Refuge to oil drilling. In her rider to the Tax Bill of 2017, she added a section that "opens a small portion of the non-wilderness 1002 Area of the Arctic National Wildlife Refuge (ANWR) for responsible energy development." Press Release, U.S. Senator for Alaska- Lisa Murkowski, Senate Passes Comprehensive Tax Reform Bill (Dec. 2, 2017), <https://www.murkowski.senate.gov/press/release/senate-passes-comprehensive-tax-reform-bill>. The 1002 area is where most of the Porcupine caribou herd's pregnant cows give birth in the spring. Joel K. Bourne, Jr., *Arctic Refuge Has Lots of Wildlife — Oil, Maybe Not So Much*, NAT'L GEOGRAPHIC (Dec. 19, 2017), <https://news.nationalgeographic.com/2017/12/arctic-wildlife-refuge-tax-bill-oil-drilling-environment/>. After becoming part of the Arctic Refuge under the Alaska National Lands Act of 1980, 1002 was subjected to seismic testing and a one-time test drill in 1986. *Id.* Other than one former drilling site, 1002, or as the Gwich'in Athabaskans call it, *Iizhik Gwats'an Gwandaii Goodlit*—the Sacred Place Where Life Begins—has never been anything but primeval nature, untouched by man's resource development. *Id.*

65. The definition of nature in the Wilderness Act operates similarly to Raymond Williams's third sense of the term nature: "the material world itself, taken as including or not including human beings." WILLIAMS, *supra* note 34, at 219.

66. See GARRARD, *supra* note 59, at 61.

67. *Id.*

68. *Id.*

69. Wilderness Act § 2(c), 16 U.S.C. § 1131(c) (2012).

imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation⁷⁰

Under this definition, a wilderness is somewhere one goes for physical and spiritual renewal, whether by trials of exertion or through quiet contemplation. A wilderness is a place where man does not live and where other men cannot see that other men have been there. John Muir, the great wilderness advocate who helped achieve the preservation of many of the country's most scenic and awe-inspiring regions, sums up this point when he praised California's Sierra Range: "In general views no mark of man is visible upon it; nor anything to suggest the wonderful depth and grandeur of its sculpture."⁷¹ The Kaktovikmuit of Kaktovik, Alaska, however, have been perplexed by the idea of wilderness since 1960, when Congress established the Arctic National Wildlife Refuge. The Kaktovikmuit have subsisted off the land, animals, and seacoast of the Arctic Refuge for thousands of years and take umbrage at the "hikers and hunters and others who come to exploit [their] land and bother [them]."⁷² Gwich'in Athabaskan elder Sarah James from Arctic Village, on the southern side of the Refuge, also questions the idea of wilderness as a place for recreation only: "I learned from living in the wilderness, our natural world."⁷³ James's family's seasonal camps along the Sheenjok River, which runs through the Refuge, were obliterated to make room for wilderness when the Arctic National Wildlife Range (the precursor to the Refuge) was created in 1960.⁷⁴

B. Expelled from the Wilderness

In telling the story of wilderness, especially the wilderness areas that helped shape what would become the guiding principles of the Wilderness Act, it is important to recognize that wilderness has often functioned as an exclusive and discriminatory descriptor based on the values of, as Professor Stone would say, the "holder of legal rights."⁷⁵ Yosemite National Park (Yosemite)—the grand, awe-inspiring epitome of American wilderness, with its spires of mountains, its valleys and rivers carefully meandering in perfect contrast—is a holy shrine, dedicated to the wilderness enthusiast. Muir was both one of Yosemite's greatest admirers and the force behind the expansion of the park in the late 1800s that led to the expulsion of grazing sheep and woodcutting from within the new park

70. *Id.* (emphasis added).

71. GARRARD, *supra* note 59, at 69 (quoting JOHN MUIR, THE EIGHT WILDERNESS—DISCOVERY BOOKS 614 (1992)).

72. The People of Kaktovik, Alaska, *supra* note 64.

73. James, *supra* note 58, at 67.

74. Subhankar Banerjee, *Long Environmentalism: After the Listening Session*, in ECOCRITICISM AND INDIGENOUS STUDIES: CONVERSATIONS FROM EARTH TO COSMOS 62, 67 (Salma Monani & Joni Adamson eds., 2016).

75. Stone, *supra* note 4, at 458.

boundaries.⁷⁶ Along with the signs of a working landscape, so too were Yosemite's first inhabitants eradicated from the sight of tourists, so that Muir could say, with no irony, "No foot seems to have neared it."⁷⁷ Less than twenty years before Muir traveled into Yosemite Valley, a military battalion nearly wiped out the Ahwahnechee people of the Sierra Mountains' Yosemite Valley in a scorched earth campaign that was meant to eradicate the Indigenous people from the lands they had lived in and successfully managed for thousands of years.⁷⁸ In Governor Burnett's address to the California legislature, he stated, "a war of extermination would continue to be waged until the Indian race should become extinct, and that it was beyond the power or wisdom of men to avert the inevitable destiny."⁷⁹

What would become Muir's "great cathedral," the wilderness "untrammelled by man," where man is but a visitor and the general appearance is affected only by the forces of nature, was not and had never been only wilderness.⁸⁰ It was a landscape that had been systematically emptied of its first inhabitants through a targeted campaign of extermination. Lake Tenaya was once called Pyweack by the Ahwahnechee; it was later renamed after Chief Tenaya by the very soldiers who had hunted his people mercilessly until he surrendered by its shore and agreed to move out of the mountains.⁸¹ The lake could then be described approvingly by Muir, less than two decades later, as an empty place with no sign of man.⁸² The land was emptied in a "blithe administrative way" to open the land up for economic activity, mostly for gold mining.⁸³ Although Muir hardly mentions the presence of the valley's remnant native inhabitants, he gives even less space to the fact that Yosemite was not and had never been a land "retaining its primeval character and influence."⁸⁴ Wilderness is a category that has to be made up, its borders policed and enforced because it does not exist naturally. In order for Yosemite to fit the definition of wilderness that came to describe the area of the national park and then to furnish the ethos of the Wilderness Act, a lot of work had to go into making it and keeping it empty.⁸⁵

76. See REBECCA SOLNIT, *SAVAGE DREAMS: A JOURNEY INTO THE HIDDEN WARS OF THE AMERICAN WEST* 287 (1999).

77. *Id.* at 220.

78. *See id.* at 219–20.

79. *Id.* at 271.

80. Wilderness Act § 2(c), 16 U.S.C. § 1131(c) (2012); Kevin DeLuca & Anne Demo, *Imagining Nature and Erasing Class and Race: Carleton Watkins, John Muir, and the Construction of Wilderness*, in *THE WILDERNESS DEBATE RAGES ON: CONTINUING THE GREAT NEW WILDERNESS DEBATE* 189, 202 (Michael P. Nelson & J. Baird Calcott eds., 2008).

81. *See SOLNIT, supra* note 76, at 219–20.

82. *See id.* at 220.

83. *Id.*

84. Wilderness Act § 2(c), 16 U.S.C. § 1131(c).

85. Regarding the relationship of Muir and Ansel Adams to Yosemite and how their efforts were instrumental in the campaigns to preserve Yosemite, Solnit writes, "It is hardly an exaggeration to say that no place on earth is more central to landscape photography and landscape preservation. What has been

The eradication of the Ahwahnechee of Yosemite was a calculated administrative move to further economic gain by white settlers. Every decision affecting the valley after that, whether within the color of the law or outside it, was a particular categorical move to ensure the boundaries of spaces, those that would be “saved” as the valuable resource “wilderness,” and those that were already fallen.⁸⁶ Legal scholar Jedidiah Purdy argues that:

Law is a circuit between imagination and the material world. Laws choreograph human action in a thousand ways: governing the construction of highways and the electricity grid, allowing and regulating mining and drilling, setting the price of gasoline . . . Such legal strictures channel our lives, providing the implicit blueprints of the landscape architecture that we impose on the world.⁸⁷

But his formulation presumes a neutral law, a force that comes naturally, arising organically to manage the material world. The law, however, is neither neutral nor organic. After the Mariposa Battalion’s forced removal of Yosemite’s Ahwahnechee, and the subsequent “scientific” management of the valley by the military and later the National Park Service, the garden lost its “Edenic” character and became overgrown and bushy and the lakes and rivers were stocked with non-native species.⁸⁸

Under the concept of wilderness behind the setting aside and protection of Yosemite, is the notion that the “ideal wilderness space is wholly pure by virtue of its independence from humans.”⁸⁹ Paradoxically, this independence requires a viewing human subject to find his most authentic self within it.⁹⁰ Environmental literary scholar Greg Garrard argues that this “model not only misrepresents the wild, but also exonerates us from taking a responsible approach to our everyday lives.”⁹¹ The concept of “wilderness,” which is “ideological in the sense that it erases the social and political history that gives rise to it”

left out of the picture, then, says a lot about how we understand landscape.” SOLNIT, *supra* note 76, at 222.

86. Like the corollary of “naturalized woman” is “feminized landscape,” the corollary to wilderness is degraded, or polluted landscapes. Of the proposed permanent high-level nuclear waste storage facility at Yucca Mountain in Nevada, Solnit states, “The government, which hasn’t been able to make any conventional use of public, or Shoshone, land in Nevada, seems hell-bent on making it useless for everyone and everything for all time.” *Id.* at 77. For every protected Yosemite, there will be a Yucca Mountain to “open up and use.” *Id.* at 246.

87. JEDEDIAH PURDY, *AFTER NATURE: A POLITICS FOR THE ANTHROPOCENE* 22 (2015).

88. See SOLNIT, *supra* note 76, at 301–02. When early visitors to Yosemite such as John Muir, Ansel Adams, and Lafayette Bunnell (of the Mariposa Battalion) compared the valley and surrounding mountains to Eden, to a garden, they were right. It was a highly managed, worked, and lived-in landscape.

89. GARRARD, *supra* note 59, at 70–71.

90. *Id.* at 71.

91. *Id.*

mystifies, if not downright erases, the violent work that went into making wilderness “untrammelled by man.”⁹²

III. RIGHTS FOR NATURE AND LEGAL PERSONHOOD

*Introducing the notion of something having a ‘right’ (simply speaking that way), brings into the legal system a flexibility and open-endedness that no series of specifically stated legal rules . . . can capture.*⁹³

Professor Stone and Professor Hope Babcock have each looked to judicial hooks upon which to hang rights-for-nature beyond wilderness designations.⁹⁴ In almost all cases of countries granting nature rights or the capacity to sue and be sued, the change has come from a law-making authority. In 2008, catalyzed by Ecuadorian nature activists and assisted by CELDF, Ecuador’s Constitutional Assembly added new provisions meant to “provide extremely strong and expansive environmental protections.”⁹⁵ Ecuador’s Constitution now ensures that the rights of nature will be recognized in a court of law by allowing “[a]ll persons, communities, peoples or nations [to] call upon public authorities to enforce the rights of nature” and giving “incentives to natural persons and legal entities and to communities to protect nature.”⁹⁶ In Aotearoa New Zealand, the Crown government entered into a settlement agreement with respective Māori tribes that changed the legal status of natural features from property to legal persons; parliament then ratified these settlements to make them into law.⁹⁷

Although a strong protective measure, governmental recognition of the rights of nature and grants of personhood status (for purposes of litigating for

92. Wilderness Act § 2(c), 16 U.S.C. § 1131(c) (2012); GARRARD, *supra* note 59, at 71. Furthermore, “[a]t best, the wilderness experience and its deep ecological philosophy risks identification with privileged leisure pursuits that sell authenticity.” GARRARD, *supra* note 59, at 71.

93. Stone, *supra* note 5, at 488.

94. See generally Hope M. Babcock, *A Brook with Legal Rights: The Rights of Nature in Court*, 43 ECOLOGY L.Q. 1 (2016) (analyzing whether Article III of the Constitution gives “nature” standing in a lawsuit and analogizing between corporations and nature); Stone, *supra* note 5.

95. Kyle Pietari, *Ecuador’s Constitutional Rights of Nature: Implementation, Impacts, and Lessons Learned*, 5 WILLAMETTE ENVTL. L.J. 37, 41 (2016).

96. CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR 2008, art. 71, translated in *Republic of Ecuador*, GEO. U. POL. DATABASE OF THE AM., <http://pdba.georgetown.edu/Constitutions/Ecuador/english08.html> (last updated Jan. 31, 2011). In the original Spanish:

La naturaleza o Pacha Mama, donde se reproduce y realiza la vida, tiene derecho a que se respete integralmente su existencia y el mantenimiento y regeneración de sus ciclos vitales, estructura, funciones y procesos evolutivos. Toda persona, comunidad, pueblo o nacionalidad podrá exigir a la autoridad pública el cumplimiento de los derechos de la naturaleza. Para aplicar e interpretar estos derechos se observarán los principios establecidos en la Constitución, en lo que proceda. El Estado incentivará a las personas naturales y jurídicas, y a los colectivos, para que protejan la naturaleza, y promoverá el respeto a todos los elementos que forman un ecosistema.

Id.

97. See Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, ss 3, 14 (N.Z.); Te Urewera Act 2014, ss 4, 11 (N.Z.).

nature's interests and protection of those rights) are difficult to secure. In other rights of nature cases, courts have stepped into the gap left by paralyzed or indifferent lawmakers. In Argentina, a court granted a chimpanzee and an orangutan the status of "nonhuman legal persons" because "an animal is an individual with rights, and therefore non-human individuals (animals) are possessors of rights, such that they are protected according to the appropriate measures."⁹⁸

Although laws that recognize the rights of nature and laws that expand legal personhood to nature share the same goals, rights for nature and legal personhood for nature are not the same thing. Rights-for-nature laws generally grant positive rights (such as the right to flourish and the right to be restored) and require someone else to enforce those rights, usually by granting standing to anyone to bring a suit on nature's behalf.⁹⁹ Rights-for-nature laws allow environmental groups and interested parties access to the courts, where they might otherwise be blocked because of lack of standing or other legal barriers in place to restrict access to the courts. Fundamental to each recognition of the rights of nature or a natural feature is that nature has value in its own right, separate from the economic or aesthetic value given to it by humans.¹⁰⁰ Linda Sheehan, founder of the Earth Law Center, suggests that this turn towards extending rights to nature stems from the failure of environmental protection laws and policies, which "are grounded in the assumption that the elements of the natural world are resources to be used to fuel unending economic growth."¹⁰¹ Furthermore, "while these laws may slow the rate of environmental degradation, they cannot ultimately reverse it" as long as humans continue using Earth's resources to fuel economic growth on a finite planet.¹⁰² In declaring that Colombia's Atrato River Watershed has rights, including the right to restoration, the Colombia Constitutional Court explained that "[p]olicies and legislation have emphasized access to economic use and exploitation to the detriment of the protection of the rights of the environment and of the communities."¹⁰³ Aotearoa New Zealand legal scholar Abigail Hutchison has noted: "[t]he fact that the environment in most legal systems does not have legal personhood status, but that corporations

98. Markus Zimmer, *Extending Court-Protected Legal Person Status to Non-Human Entities*, INT'L J. CT. ADMIN., May 2017, at ii, ii.

99. See Mihnea Tanasescu, *When a River Is a Person: From Ecuador to New Zealand, Nature Gets Its Day in Court*, CONVERSATION (June 19, 2017), <http://theconversation.com/when-a-river-is-a-person-from-ecuador-to-new-zealand-nature-gets-its-day-in-court-79278>.

100. See *Interview: Linda Sheehan on the Rights of Waterways*, WATER CANADA (June 14, 2013), <http://watercanada.net/2013/interview-linda-sheehan-on-the-rights-of-waterways/>.

101. *Id.*

102. *Id.*

103. Press Release, Cmty. Env'tl. Legal Def. Fund, Colombia Constitutional Court Finds Atrato River Possesses Rights (May 4, 2017), <https://celdf.org/2017/05/press-release-colombia-constitutional-court-finds-atrato-river-possesses-rights/>.

do, is indicative of the fact that contemporary western societies see the natural world as being for profit.”¹⁰⁴

At the heart of the concept of legal personhood is that an entity exists for its own interests and not for the value it contains for others. Under such a designation, a river and its watershed have an interest in their own healthy existence over and above their use for hydropower, shipping, or recreation. While Ecuador and Bolivia have been in the vanguard for protecting nature through recognizing its independent existence and by giving all parties the right to sue on its behalf, Aotearoa New Zealand’s Whanganui River and Te Urewera—once property subject to exploitation—are novel legal beings with all the “rights, powers, duties, and liabilities of a legal person.”¹⁰⁵ Unlike positive rights given to nature in Ecuador and Bolivia, where nature has the rights *to* something, such as system integrity, with standing granted to anyone to enforce those rights, in the Aotearoa New Zealand context, the natural feature has standing to appear in court, although appointed guardians determine the content of the natural feature’s rights.¹⁰⁶ The Aotearoa New Zealand model potentially offers stronger and more flexible protections given that the Whanganui River does not have the right to a particular designated course, but has the right to argue for a change in course if future climate conditions make change necessary for the river’s survival.¹⁰⁷

The idea of legal personhood represents a potentially fundamental shift in the legal system’s understanding of rights by expanding legal rights to a new entity. In making the argument for extending legal personhood, most scholars retrace the history of the expansion of personhood for humans, such as those granted to Lavinia Goodell.¹⁰⁸ Others draw attention to the imaginative function, or fiction, of legal personhood. Hutchison writes: “[w]ho is considered a legal person is determined by society’s values and the influential and powerful. . . . [L]egal personality defines what matters to society and allows us to decide whether something is of value and is an appropriate entity to possess rights and duties.”¹⁰⁹ Hutchinson compares the rights of nature, or the specific rights granted to the Whanganui River and Te Urewera, to those of a corporation, which also has its own legal personality. She explains:

[c]entral to understanding the new category of legal personhood of the [Whanganui River] is the corporation. The corporation remains the only

104. Abigail Hutchison, *The Whanganui River as a Legal Person*, 39 ALTERNATIVE L.J. 179, 180 (2014).

105. Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, s 14(1) (N.Z.).

106. Tanasescu, *supra* note 99.

107. *See id.*

108. *See, e.g.,* WAGMAN ET AL., *supra* note 41 (recounting Lavinia Goodell’s attempts to include women in the Wisconsin state bar); Hutchison, *supra* note 104, at 180 (discussing the expansion of legal personhood to new persons such as slaves); Stone, *supra* note 5, at 450–53 (recounting the history and extension of legal rights to children).

109. Hutchison, *supra* note 104, at 180.

other non-human entity recognised by the law as a legal person with its own rights and liabilities. While a company is an artificial entity, it has the same legal capacity and powers as a human being.¹¹⁰

Hutchison and Professor Stone each discuss how legal personhood is an invention of law to argue for the extension of personhood to animals and the environment.¹¹¹ Stone points to the historical transformation of former “things” (or property) into “persons” with legal rights, such as slaves, women, Native Americans, children, and fetuses.¹¹² The Earth Law Center’s focus on extending human rights to nature, especially water systems, is not the only push for extending legal rights. Animal rights activists have long been on the forefront of the effort to have more inclusive rights holders.¹¹³ On the 245th anniversary of the case that transformed a human being from a legal thing (property) to a legal person, thus ending slavery in England, the Nonhuman Rights Project published an annotated takedown of all the “straw man” legal arguments the court used in dismissing their writ of habeas corpus for two captive chimpanzees.¹¹⁴

A. *Rights for Nature: Grant Township*

In 2014, a Pennsylvania court dismissed the right of intervention to Little Mahoning Creek in a dispute between Grant Township and oil and gas companies.¹¹⁵ At the time, the motion to intervene on the part of the creek was seen as a major step forward for environmental protection: a community was standing up to business interests that would destroy the local watershed and the community had decided to defend itself and “the streams, the salamanders, the hemlock trees, the very soil underground.”¹¹⁶ It wasn’t just business interests that the community was fighting against; it was also the state and federal environmental protection agencies that approved the permits that allowed businesses to dump toxic waste in communities “for free.”¹¹⁷ Legal scholars such as Professor Babcock read the attempt at intervention as the fulfillment of Stone’s prophecy of the liberalizing of standing requirements to Article III courts he envisioned over forty years ago.¹¹⁸ Finally, a natural feature was asserting its

110. *Id.* at 181.

111. *See id.* at 180; Stone, *supra* note 5, at 456–59.

112. Stone, *supra* note 5, at 451. “Thus it was that the Founding Fathers could speak of the inalienable rights of all men, and yet maintain a society that was, by modern standards, without the most basic rights for Blacks, Indians, children and women. There was no hypocrisy; emotionally, no one *felt* that these other things were men.” *Id.* at 455 n.24.

113. *See* Steven Wise, *Why the First Department’s Decision in our Chimpanzee Rights Cases Is Wildly Wrong*, NONHUMAN RTS. BLOG (June 22, 2017), <https://www.nonhumanrights.org/blog/first-department-wildly-wrong/>.

114. *Id.*

115. Nobel, *supra* note 21.

116. *Id.*

117. *Id.*

118. *See* Babcock, *supra* note 94, at 2–3.

rights along the lines of Justice Douglas's famous rebuke and the actual injured party—nature—was representing her own interests in court.¹¹⁹

Ultimately, the intervention was not successful, and the lower court held—and the court of appeals affirmed—that the interest of the main party, Grant Township, was adequately represented.¹²⁰ While the Court of Appeals did not reach a decision as to whether the Little Mahoning Watershed had standing in the dispute because intervention was denied, in a footnote the court discussed its misgivings with the watershed being a party to the suit because it could not “sue or be sued.”¹²¹ The court reasoned that the only proper parties under Rule 17 of the Federal Rules of Civil Procedure are “individuals, corporations and others permitted by state law to sue or be sued.”¹²² If Little Mahoning could “sue and be sued,” could it then be a proper party to a lawsuit? The court did not dare to venture this far. While Professor Babcock looked to Article III itself in order to determine who might be able to enjoy the privileges of standing in a court of law, perhaps the court here offered another route.¹²³

The court, despite its misgivings as to the watershed's “propriety,” left a creative lawyer another avenue towards intervention. With reasoning that cannot more clearly exemplify Justice Blackmun's fretful concern in *Sierra Club* about the law's rigidity and procedure's inflexibility, Judge Nygaard explained:

Fatal to the Appellants' request for intervention is the substantial overlap between their interests and those of the Township. This overlapping of interests begins with the parties' legal representation. The proposed intervenors have the same legal counsel, from the same environmental organization, as does the Township. As another Court of Appeals has explained, albeit in the context of Rule 19 joinder, any prejudice to Appellants “approaches the vanishing point when the remaining parties are represented by the same counsel.”¹²⁴

Neither the Federal Magistrate of the lower court decisions nor the panel of judges of the appeals court expressed antipathy towards nature being a party in litigation on moral grounds, suggesting that the “idea” of nature is not unthinkable as to preclude it someday having rights. However, as is clear in the case history of Grant Township's efforts to deny a permit to inject fracking waste into a defunct operational oil well in its borders, procedurally, the court would not allow a natural feature, or the hypothetical rights of nature, to be a party to litigation that intimately involves it. The court in this case effectively denied nature's participation by using procedural arguments rooted in the Federal Rules

119. See *Sierra Club v. Morton*, 405 U.S. 727, 741–52 (1972) (Douglas, J., dissenting).

120. *Pa. Gen. Energy Co. v. Grant Twp.*, No. 14-209ERIE, 2015 WL 6002163, at *5 (W.D. Pa. 2015), *aff'd*, 658 F. App'x 37, 42 (3d Cir. 2016).

121. *Pa. Gen. Energy Co.*, 658 F. App'x at 38 n.2.

122. *Id.*

123. See Babcock, *supra* note 94, at 26–33.

124. *Pa. Gen. Energy Co.*, 658 F. App'x at 41 (quoting *Marvel Characters, Inc. v. Kirby*, 726 F.3d 119, 134 (2d Cir. 2013)).

of Civil Procedure. Yet, these decisions, while not helping Grant Township govern the degradation and assault on its water system, still moved the court—and creative lawyers—closer to court accepted arguments for nature being a party to the adjudication of her own injuries.

Besides stipulating that a proper party is one that can “sue and be sued,” Rule 17 also describes how an incompetent person or a minor might access the courts.¹²⁵ Rule 17(c) allows for representation in court by a general guardian, a committee, a conservator, or a like fiduciary.¹²⁶ Moreover, the rule also allows for a “next friend” or guardian ad litem to represent a child’s or incompetent person’s interests in court and allows for the court to appoint such representation if needed.¹²⁷ While the appeals court above focused on the “sue and be sue” requirement of 17(b), discussing the capacity in terms of individuals, corporations, and others permitted by state law, the court could have just as easily authorized the East Run Hellbenders Society, a grassroots environmental group organized to address the “democracy problem” of the authorization of the injection well, as a “next friend” to the watershed. This was a tactic used in the recently filed (and shortly thereafter dismissed) complaint, *Colorado River Ecosystem v. Colorado*.¹²⁸

The Third Circuit’s emphasis on 17(b) highlights an avenue of state statutory protection for those wishing to give more legal rights to nature. 17(b) allows for an entity given the capacity to “sue or be sued” by the state to be a party in a lawsuit.¹²⁹ Relying on this procedural requirement, of course, takes the responsibility out of the court’s hands and places it within the law-making hands of state legislatures, as it did for Lavinia Goodell. However, this does little to help Grant Township and the Little Mahoning Watershed, given that as Judge Baxter has so unequivocally stated, “the development of oil and gas . . . is a legitimate business activity and land use” in the state of Pennsylvania.¹³⁰ Law making is a lengthy, uncertain process. Compromises are written into final laws that could pull the teeth of whatever protection or rights are given to nature. The Clean Water Act and the Clean Air Act each reserve some measure of economic feasibility to the calculation of their implementation that reduces the protection for nature and natural systems.¹³¹ Commentators have noticed that when it comes to fracking, “the EPA has been especially business-friendly, declaring

125. FED. R. CIV. P. 17(c).

126. *Id.*

127. *Id.*

128. See Nobel, *supra* note 21; see also Complaint for Declaratory Relief, *supra* note 19, at 7.

129. FED. R. CIV. P. 17(b).

130. Pa. Gen. Energy Co. v. Grant Twp., 139 F. Supp. 3d 706, 718 (W.D. Pa. 2015).

131. See Clean Water Act, 33 U.S.C. § 1311(b)(2)(A) (2012) (requiring “economically achievable” technology standards to eliminate pollutant discharges); Michigan v. EPA, 135 S. Ct. 2699, 2704 (2015) (finding that the CAA requires cost-benefit analysis due to “appropriate and necessary” language under the hazardous-air-pollutants program); Chevron, U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 863–66 (1984) (finding that the bubble concept for stationary sources under the Clean Air Act “accommodate[s] progress in reducing air pollution with economic growth”).

injection ‘a safe and inexpensive option for the disposal of unwanted and often hazardous industrial byproducts,’ and has approved thousands of wells across the country.”¹³² For these reasons, Professors Stone and Babcock looked to the courts and judicial procedure to fill the gaps in environmental laws and regulations that are only meant to “slow the rate of destruction,” but not end it altogether.

Given the absence of federal or state legislation that would grant rights to nature and standing to whomever will argue for those entitlements or give legal personhood and the right to “sue and be sued,” what can an advocate for nature and clean environments, like Grant Township, do?

B. Legal Personhood Through Legislative Acts

The Te Urewera (2012) and Te Awa Tupua (2017) Settlement Acts do not solve historical colonial relations between the New Zealand Crown government and Māori, but for the protection of nature these acts provide a new model beyond extractive or pleasure use values.¹³³ The New Zealand Crown government had strong interests in retaining conservation values in the natural features at the heart of each settlement agreement. For the Māori iwi (tribes), there were equally strong interests in having their cultural relationships and obligations to the natural features unequivocally recognized. The granting of legal personhood as part of the settlement agreements therefore had to ensure that the parties in each agreement co-manage the areas to nature’s benefit, but under both New Zealand Crown and Māori principles. The granting of personhood for these two natural features is intended to settle historical claims between the New Zealand Crown and Tūhoe iwi (on behalf of Te Urewera) and between the New Zealand Crown and the Whanganui iwi (on behalf of Te Awa Tupua, which includes the Whanganui River). The settlement agreements address the historical appropriation of land by the British Crown and the failure to fulfill treaty obligations as set forth in the Treaty of Waitangi (1840), which extinguished all customary title to land in exchange for certain protected interests that Māori would retain after colonization.¹³⁴

132. Nobel, *supra* note 21.

133. The New Zealand government is a constitutional monarchy with the Head of State and Sovereign corresponding to the Sovereign of the United Kingdom. Although the New Zealand government is often simply called the “Crown,” the Governor-General, who represents the Queen of England in New Zealand, has limited powers and authority. Almost all governmental functions are carried out by the parliament and the ministers that make up the Government. *Foreign Law Guide: New Zealand-Government*, BRILLONLINE REFERENCE WORKS, <https://perma.cc/7XST-S6PV> (last visited Mar. 30, 2018).

134. See Mick Strack, *Land and Rivers Can Own Themselves*, 9 INT’L J.L. BUILT ENV’T 4, 5 (2017).

1. *Te Awa Tupua*

*[W]e are defined by our ancestral mountain, our ancestral rivers and our ancestral land. They are the source of our wellbeing—spiritually, intellectually and physically. We do not separate our wellbeing from [their] wellbeing. . . Nor can we possess them. They do not belong to us—we belong to them.*¹³⁵

The Whanganui is the longest navigable river in Aotearoa New Zealand and is located on the North Island, flowing from the center of the island to the West coast.¹³⁶ The river has been subjected to water diversion for hydropower, gravel extraction, and dredging for navigability.¹³⁷ For many years, the Whanganui iwi strenuously objected to these economic uses of the river and these objections have taken the form of the longest running lawsuit in New Zealand's history.¹³⁸ The Crown granting legal personhood to the river seeks to compensate the Whanganui iwi for broken treaty responsibilities and other grievances related to the British colonization of the islands.¹³⁹ It also addresses the iwi's and other New Zealanders' concern for the present health and future preservation of the river.¹⁴⁰

For the Māori, the river and other natural features are ancestors and the iwi are direct genealogical descendants that flow from them, making the Māori's beliefs about nature distinct from, but related to, the Western concept of legal personhood for nature. In recognizing *Te Awa Tupua*, a living entity, the New Zealand Crown codifies in law that “*Te Awa Tupua* is an indivisible and living whole, comprising the Whanganui River from the mountains to the sea, incorporating all its physical and metaphysical elements.”¹⁴¹ Moreover, the New Zealand Crown recognizes and supports the Whanganui iwi in their “inalienable”

135. Catherine J. Iorns Magallanes, *Nature as an Ancestor: Two Examples of Legal Personality for Nature in New Zealand*, VERTIGO, Sept. 2015, at 1, 2, <http://journals.openedition.org/vertigo/16199?lang=en> (quoting Turama Hawira of the Māori tribe Ngati Rangi providing evidence in *Ngati Rangi Trust v. Manawatu Wanganui Regional Council*). Magallanes argues that for Indigenous people, the construction of nature effectively reverses the western hierarchy: humans are guardians of nature that exists outside of human control, and humans do not have a right to dominate or, most importantly, even own, nature. *Id.* at 1.

136. *Id.* at 3–4. One story that tells how the Whanganui was made: The Whanganui River was formed when one of the mountain brothers was made to leave the family to avoid causing strife, because his brother's wife loved him. The river formed from two carved valleys along the path it took to the sea as he walked backwards away from the other mountains, gazing at his home in sadness. See Sorrel Hoskin, *The Journey of Mount Taranaki*, PUKE ARIKI (Apr. 12, 2005), <http://pukeariki.com/Learning-Research/Taranaki-Research-Centre/Taranaki-Stories/Taranaki-Story/id/578/title/the-journey-of-mount-taranaki>.

137. Magallanes, *supra* note 135, at 4.

138. *Id.* at 4–5.

139. The settlement agreement is both legislation that recognizes the legal personhood of *Te Awa Tupua* and an apology from the Crown government. *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017*, ss 14, 69, 70 (N.Z.).

140. Hutchison, *supra* note 104, at 179.

141. *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017*, s 12 (N.Z.).

relationship with the river. The settlement with the Whanganui iwi stipulates in section 13 that:

Te Awa Tupua is a spiritual and physical entity that supports and sustains both the life and natural resources within the Whanganui River and the health and well-being of the iwi, hapū, and other communities of the River. . . . The iwi and hapū of the Whanganui River have an inalienable connection with, and responsibility to, Te Awa Tupua and its health and well-being. . . . Te Awa Tupua is a singular entity comprised of many elements and communities, working collaboratively for the common purpose of the health and well-being of Te Awa Tupua.¹⁴²

Although the Tūhoe and Whanganui iwi have moved the New Zealand Crown into a seemingly new legal space of granting legal personhood to these landscape features, legal scholars have noted that “[l]egal personality’ is a Western legal concept. It comes close to expressing some fundamental ideas from within Māori legal traditions . . . [b]ut it does not, in itself, recognize the value of Māori legal traditions.”¹⁴³ Furthermore, while a “key aspect of the Māori worldview in relation to the natural environment is that landscape features such as rivers have their own *mauri* (life force) and their own mana, this is not the equivalent of a legal personality.”¹⁴⁴

Hutchison points out that by granting the Whanganui River legal personhood, the New Zealand Crown government is demonstrating that they “value[] the river enough to make room for it in their legal system.”¹⁴⁵ Scholars have pointed out that the creation of a legal personality for the river is intended to reflect the Māori view that the river is a living entity in its own right and is incapable of being owned as property in an absolute sense.¹⁴⁶ Throughout negotiations with the New Zealand Crown, the Whanganui iwi continually stressed: “*Ko au te awa. Ko te awa ko au,*” (“*I am the river. The river is me*”).¹⁴⁷ This view of the river, as an indivisible, living whole that cannot be owned, is preserved in the final settlement agreement between the New Zealand Crown and the iwi, which does not grant the Māori ownership of the river, but grants ownership of the river in itself as a legal person.¹⁴⁸

142. *Id.* s 13.

143. CARWYN JONES, *NEW TREATY, NEW TRADITION: RECONCILING NEW ZEALAND AND MĀORI LAW* 98 (2016).

144. *Id.*

145. Hutchison, *supra* note 104, at 180.

146. *See id.* at 179. Magallanes terms this an “alternative relationship between humans and nature.” Magallanes, *supra* note 135, at 2.

147. Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, ss 13(c), 71(1)(a) (N.Z.) (“The Crown acknowledges that Whanganui Iwi have an inalienable interconnection with Te Awa Tupua and its health and well-being.”). For the whole chant, see Young, *supra* note 22.

148. Hutchison, *supra* note 104, at 179. Although the Settlement stresses the indivisibility of the river, there are still portions of the river that are privately owned and the water of the river and all aquatic life remains the possession of the Crown. *Id.* at 181–82. Moreover, all public access and recreational uses of the river remain. Like the corporation, the river has a dual personality of person and property. *Id.*

2. *Te Urewera*

*Deliberatively, we are resetting our human relationship and behaviour towards nature. Our disconnection from Te Urewera has changed our humanness. We wish for its return.*¹⁴⁹

Although settlement negotiations for Te Urewera began after Te Awa Tupua, the New Zealand Crown government and Tūhoe iwi reached an agreement first and a national park in Aotearoa New Zealand became the first natural feature to become a legal person.¹⁵⁰ For the Tūhoe iwi, Te Urewera is the birthplace of the Tūhoe people and is a place of great spiritual, cultural, and historical value.¹⁵¹ It is a place with its own *mana* (spiritually sanctioned authority) and *mauri* (life force).¹⁵² For the Tūhoe, Te Urewera has always been a living entity, an ancestor, a person.¹⁵³ For the non-Māori and New Zealand Crown government, however, recognizing that nature can have ownership in itself and that natural features can become something other than property owned by a single person or a collective—the rights holder in the relationship—was a seemingly radical departure from centuries of legal precedent.¹⁵⁴

Te Urewera is not just any natural feature in the Aotearoa New Zealand landscape. It is not a piece of farmland, a mining district, or an urban area. Te Urewera is special; it would easily fall within the purview of the Wilderness Act if it were in the United States. Te Urewera, as the Te Urewera Settlement Act 2014 sets forth, is “treasured by all for the distinctive natural values of its vast and rugged primeval forest, and for the integrity of those values; for its indigenous ecological systems and biodiversity, its historical and cultural heritage, its scientific importance, and as a place for outdoor recreation and spiritual reflection.”¹⁵⁵ Prior to receiving its new legal designation, Te Urewera was protected as a national park by the New Zealand Crown for its ecological value (conservation protection of biodiversity) and for its wilderness value (Māori and non-Māori recreational visitors to the Park enjoyed the Park’s natural beauty and serenity).¹⁵⁶

Like the Whanganui River, Te Urewera is located in the North Island. Before gaining personhood, Te Urewera was the largest national park on the

149. TŪHOE, TE KAWA O TE UREWERA 8, <http://www.ngaituhoe.iwi.nz/te-kawa-o-te-urewera> (last visited Mar. 18, 2018).

150. Te Urewera Act 2014, s 11 (N.Z.).

151. *Id.* s 3. For the Tūhoe iwi, Te Urewera is “Te Manawa o te Ika a Māui; it is the heart of the great fish of Maui, its name being derived from Murakareke, the son of the ancestor Tūhoe.” *Id.*

152. *Id.*; see also JONES, *supra* note 143, at xvi, 100 (providing a glossary of Māori terms and translation discussion).

153. *Id.*

154. Kiana Herold, *The Rights of Nature: Indigenous Philosophies Reframing the Law*, INTERCONTINENTAL CRY (Jan. 6, 2017), <https://intercontinentalcry.org/rights-nature-indigenous-philosophies-reframing-law/>.

155. Te Urewera Act 2014, s 3 (N.Z.).

156. See *id.* s 4.

Island.¹⁵⁷ It contains virgin forest, or original bushland from before British colonization, and was created in 1954 on the traditional lands of the Tūhoe without their consultation.¹⁵⁸ The Tūhoe had refused to sign the Treaty of Waitangi in order to retain control of their sovereign lands.¹⁵⁹ The New Zealand government confiscated their land anyway and removed Tūhoe authority to control and manage the land and their own affairs.¹⁶⁰ During the settlement process, the Tūhoe refused any settlement offer that did not include Te Urewera, the place where they could “exercise their spiritual authority through guardianship” of the natural environment.¹⁶¹ Initially, the New Zealand Crown refused to give the Tūhoe control of the national park, but through the legal personhood model that gives no one ownership of the land (except itself) and a co-management strategy, the land remains protected with public use remaining an important feature.¹⁶² Te Urewera will maintain a separate identity with a different management strategy, but will have significant Tūhoe input about how the management strategy can better respect Tūhoe cosmology and cultural relationship with the land.¹⁶³

This view radically changes the legal system from respecting property rights of a single person to respecting property rights of nature in itself. This settlement agreement codifies Te Urewera as a living entity with value in itself and the Tūhoe’s relationship with the natural feature without turning the natural feature into Tūhoe property or making it a “wilderness,” empty of people and history. The Tūhoe and the New Zealand Crown reached this conclusion through negotiation as part of the settlement process: “Tūhoe and the Crown share the view that Te Urewera should have legal recognition in its own right.”¹⁶⁴ Scholars have noted that the settlement is not a completed step towards recognition of Māori law and full reconciliation between Māori and the New Zealand Crown, although they “make significant advances in terms of establishing a framework that reflects a Māori perspective on human relationships with the natural environment and specific landscape features.”¹⁶⁵ While the national park plan for the landscape is still in effect, modifications have already been introduced, such as limited hunting and cultural resource gathering within park boundaries, activities that had been expressly forbidden under Crown government

157. Magallanes, *supra* note 135, at 7.

158. *Id.* at 7–8.

159. *Id.* The Tūhoe did not sign the Treaty of Waitangi because they wanted nothing more to do with the invading British who waged a scorched earth campaign against them, imprisoning and killing many of the tribe and destroying homes, cultivated areas, and livestock. See Vincent O’Malley, *Historical Background to the Tūhoe-Crown Settlement*, MĀORI L. REV. (Oct. 2014), <http://maorilawreview.co.nz/2014/10/tuhoe-crown-settlement-historical-background/>.

160. Magallanes, *supra* note 135, at 7–8.

161. *Id.* at 8.

162. *Id.*

163. *Id.*

164. Te Urewera Act 2014, s 3 (N.Z.).

165. JONES, *supra* note 143, at 98.

management in order to protect it as a “wilderness,” with no mark of man upon it.¹⁶⁶ Legal scholar Catherine Iorns Magallanes explains that both New Zealand and Māori settlement agreements that give rights to nature “were not designed in order to give more rights to nature or in order to uphold the environmentalists’ claims of according legal personality to nature. Instead, they were devised as a way to better uphold the human rights of the indigenous Māori of New Zealand.”¹⁶⁷

C. Legal Personhood Through the Courts: The Ganges and Yamuna Rivers

*Day by day, river by river, forest by forest, mountain by mountain, missile by missile, bomb by bomb - almost without our knowing it, we are being broken.*¹⁶⁸

In regards to the Indian High Court decision, *Salim v. State of Uttarakhand & Others*, Indian attorney Priyasha Corrie notes that the decision is part of a trend of Indian Courts “gradually taking up a role of a law-maker rather than a mere interpreter of law.”¹⁶⁹ In the decision to recognize the legal personhood of the rivers (and later their watersheds, including the glaciers that give rise to the rivers), the court had no trouble analogizing nature to other nonhuman legal persons who have human avatars for legal matters:

Legal personality may be granted to entities other than individual human beings, e.g. a group of human beings, a fund, an idol. Twenty men may form a corporation which may sue and be sued in the corporate name . . . and, of necessity, the law recognizes certain human agents as representatives of the idol or of the fund. We may, therefore, define a person for the purpose of jurisprudence as any entity (not necessarily a human being) to which rights or duties may be attributed . . . the entity acts like a natural person but only through a designated person, whose acts are processed within the ambit of law.¹⁷⁰

Corrie credits the success of public interest litigation in the sphere of environment protection in India with the High Court’s decision; she notes that the success of public interest litigation has also led to greater protections for animals around India.¹⁷¹ The High Court that ruled for the rivers as “legal

166. See *Permission for Hunting*, TŪHOE, http://www.ngaituhoe.iwi.nz/permission_for_hunting (last visited Mar. 18, 2018); TŪHOE, *supra* note 149, at 51 (giving permission for “cultural, recreational, or educational activity” without need of further authorization); see also *Te Urewera Management Plan*, TŪHOE, <http://www.ngaituhoe.iwi.nz/te-urewera-management> (last visited May 23, 2018).

167. Magallanes, *supra* note 135, at 2.

168. Arundhati Roy, *The Greater Common Good*, FRIENDS OF RIVER NARMADA (Apr. 1999), <http://www.narmada.org/gcg/gcg.html>.

169. Kevin Schneider, *Why You Should Be Excited About India’s “Rivers with Rights” Ruling*, NONHUMAN RTS. BLOG (Mar. 28, 2017), <https://www.nonhumanrights.org/blog/rivers-with-rights/>.

170. *Id.* (quoting Writ Petition at 9, *Salim v. State of Uttarakhand* (Mar. 20, 2017) (PIL) No.126 of 2014 (India), <https://perma.cc/KZS8-PP3E>).

171. See *id.*

entities” is in the State of Uttarakhand, which poses jurisdictional problems as the rivers flow through multiple states.¹⁷² Given that the Uttarakhand High Court ruling affects multiple states and poses a profound Constitutional question, the highest court in India will have to review the ruling.¹⁷³

Although Aotearoa New Zealand granted personhood to the natural features in a settlement process that went through legislative channels and the Uttarakhand High Court used its legal authority to rule that the rivers are “legal entities,” both institutions overlap in their reasoning for extending the legal status of personhood to natural features. For the respective Māori tribes that negotiated for the river and the national park, these features are cosmologically linked to the tribes’ identities. Each natural feature is considered the origin of the Māori tribe and are regarded as living beings, with their own life forces. They are not property; they cannot be owned. In settling historical grievances, the New Zealand Crown government chose to expand current New Zealand legal doctrine to recognize the “liveliness” of the natural features, the fact that they are living entities for the effected Māori tribes. Legal personhood, while a Western concept and designation, is the closest that the New Zealand Crown government could come to recognizing traditional Māori relationships to nature and customs for engaging with nature.

Similarly, the Uttarakhand High Court took into consideration the fact the two rivers are worshipped by Hindus as sacred and the justices referred to the case *Yogendra Nath Naskar v. Commission of Income-Tax, Calcutta*, where an Indian court held that a Hindu idol “is a juristic entity capable of holding property and of being taxed through its Shebait who are entrusted with the possession and management of its property.”¹⁷⁴ Corrie points out there is an “inherent inclination to treat the environment as a ‘person’ in India” because the earth and

172. See Pia Peterson & Thea Piltzecker, *India’s Yamuna River Now Enjoys Legal Personhood. Will That Be Enough to Clean It Up?*, SIERRA (Sept. 14, 2017), <https://www.sierraclub.org/sierra/india-s-yamuna-river-now-enjoys-legal-personhood-will-be-enough-clean-it>.

173. Arundhati Roy points out the limits of the court’s activism in her searing review of the political-judicial-financial nexus of Big Dam construction in India:

‘If you are to suffer, you should suffer in the interest of the country.’ - Jawaharlal Nehru, speaking to villagers who were to be displaced by the Hirakud Dam, 1948. I stood on a hill and laughed out loud. I had crossed the Narmada by boat from Jalsindhi and climbed the headland on the opposite bank from where I could see, ranged across the crowns of low, bald hills, the tribal hamlets of Sikka, Surung, Neemgavan and Domkhedi. I could see their airy, fragile, homes. I could see their fields and the forests behind them. I could see little children with littler goats scuttling across the landscape like motorised peanuts. I knew I was looking at a civilisation older than Hinduism, slated - sanctioned (by the highest court in the land) - to be drowned this monsoon when the waters of the Sardar Sarovar reservoir will rise to submerge it.

Roy, *supra* note 168.

174. Schneider, *supra* note 169 (quoting *Yogendra Nath Naskar v. Comm’n of Income-Tax, Calcutta*, (1969) 1 SCC 555 (India)).

nature are equated with “mother” and “life-giver” in Indian spirituality and philosophy.¹⁷⁵

The Uttarakhand High Court’s drift into policy making in the efforts to protect two of the most polluted—but economically and culturally important—rivers reflects Justice Blackmun’s lament about an ossified judicial system that will only watch as nature is ever more degraded.¹⁷⁶ In recognizing the rivers as legal entities, the Uttarakhand High Court bypassed “issues of ‘standing’ and other procedural obstacles that have thwarted the protective purpose of many environmental laws.”¹⁷⁷ Ecuador chose to give any person or collective standing in order to sue for the rights of nature, which include the right not to be polluted and the right to be restored. The Uttarakhand High Court chose to make a committee to advocate for the rivers’ interests in court. The New Zealand parliament has enacted a co-management strategy for both the river and the former national park to include Māori and Crown representatives who will work for the natural features’ best interest. For the Aotearoa New Zealand natural features and the rivers in India, the granting of legal personhood has given the natural features the capacity to sue and be sued. In the case of Ecuador, nature is not given any liabilities and instead has only been granted positive rights with standing granted to anyone who wishes to advocate for natural features in Ecuador.

IV. VALUING NATURE BEYOND WILDERNESS: LEGAL PERSONHOOD FOR THE COLUMBIA RIVER WATERSHED?

*[The Columbia River Treaty] didn’t incorporate tribal rights, tribal management or concerns in the dialogue at all on either side of the border. It didn’t incorporate thinking about ecosystem health, especially around salmon passage up and down the river. And it didn’t incorporate any semblance of public participation. In the intervening years, all three of those became more powerful, both separately and collectively.*¹⁷⁸

Traveling in the Upper Columbia River Basin in 1842, George Simpson, the governor of the Hudson Bay Company, described the area as resembling a

175. *Id.*

176. *Sierra Club v. Morton*, 405 U.S. 727, 755–56 (1972) (Blackmun, J., dissenting) (“But this is not ordinary, run-of-the-mill litigation. The case poses—if only we choose to acknowledge and reach them—significant aspects of a wide, growing, and disturbing problem, that is, the Nation’s and the world’s deteriorating environment with its resulting ecological disturbances. Must our law be so rigid and our procedural concepts so inflexible that we render ourselves helpless when the existing methods and the traditional concepts do not quite fit and do not prove to be entirely adequate for new issues?”).

177. *Schneider*, *supra* note 169.

178. Matt Weiser, *Salmon, Tribal Interests at Stake in Columbia River Treaty Update*, WATER DEEPLY (July 26, 2017), <https://www.newsdeeply.com/water/community/2017/07/26/salmon-tribal-interests-at-stake-in-columbia-river-treaty-update>.

“fine park.”¹⁷⁹ Enjoying the wilderness area’s fine vista, he was nevertheless unable to see that thousands of years of intermittent low-intensity forest fires (which were often the result of controlled burning by Indigenous people) that had created the expansive ponderosa pine savannah.¹⁸⁰ Instead, he felt pleasantly at home in the “grand avenues” formed by the trees that seemed “almost as if they had been planted that way.”¹⁸¹ Simpson perceived his environment in one way, as an agreeable park, yet this same environment also existed independently of how he viewed it; it was in fact a highly managed and lived-in natural system. Our perception of an entity affects how that entity exists. If we think of the Columbia River Basin as an entity deserving of rights—as a legal person—treaty making involving the river might allow a focus on the interests of all species that use the river. Specifically, including the interests of the Columbia River Basin as an integrated and living system at the renegotiations of the Columbia River Treaty supports the interests of many different species, human and salmon among them. Shifting the river’s category from a rights-less thing to a rights-holding person requires us to see the land differently, and it requires planting a more expansive legal terrain.

The Columbia River is the fourth-largest river in North America based on its average discharge and volume, and runs for 1240 miles.¹⁸² The river links the west slope of the Continental Divide with the Pacific Ocean and it flows through a watershed that encompasses seven states and one Canadian province, roughly equaling the landmass of France.¹⁸³ About 15 percent of the entire watershed is located in Canada, but this small portion drives anywhere from 40 to 50 percent of the river’s volume.¹⁸⁴ Since the Columbia River Treaty was signed between the United States and Canada in the early 1960s, the river has been intensely managed for hydroelectric power and flood control.¹⁸⁵

Fifteen different tribes live along the Columbia River in the United States, including Cowlitz, Salish and Kootenai, Upper Columbia United Tribes, and Upper Snake River Tribes (Columbia River Tribes).¹⁸⁶ Prior to European arrival, these tribes were widely dispersed along the river and relied on a wide diversity of food, but salmon was especially integral to their diet, religion, and economy.¹⁸⁷ The Columbia River Tribes moved freely up and down the river to

179. EILEEN DELEHANTY PEARKES, *A RIVER CAPTURED: THE COLUMBIA RIVER TREATY AND CATASTROPHIC CHANGE* 100 (2016).

180. *See id.*

181. *Id.*

182. *Id.* at 12–13.

183. *Id.*

184. *Id.* at 13.

185. *Id.*

186. *See* Jack McNeel, *Water Power: 15 Tribes Have a Say in Modernizing the Columbia River Treaty*, INDIAN COUNTRY TODAY (July 25, 2013), <https://indiancountrymedianetwork.com/news/politics/water-power-15-tribes-have-a-say-in-modernizing-the-columbia-river-treaty/>.

187. David A. Bell, *Columbia River Treaty Renewal and Sovereign Tribal Authority Under the Stevens Treaty “Right-to-Fish” Clause*, 36 PUB. LAND & RESOURCES L. REV. 269, 273 (2015) (“The life

seasonal hunting and fishing areas, with the fisheries being held in common with no single tribe or individual claiming ownership.¹⁸⁸ Prior to European settlement, salmon runs up from the Pacific Ocean were an estimated sixteen million fish per year, which enriched the watershed with food and organic matter.¹⁸⁹ After the dams went in and other infrastructure projects were developed along the river system, these great runs are now reduced to about 1.5 million fish, of which 75 percent come from hatcheries.¹⁹⁰

A. *The Columbia River, Two Origin Stories*

Some have noted how closely the Columbia River Tribes' creation stories match the turbulent geologic history of the Columbia River Basin.¹⁹¹ John Harrison, of the Columbia River History Project, presented a composite story of Coyote's involvement in the river's creation:

Realizing that salmon were in the ocean and that people in the interior needed food, Coyote fought a battle with the giant beaver god Wishpoosh, backing him through the Cascade Mountains to the ocean and then killing him. It was the back-and-forth slashing action of the great beaver's tale that scraped out the Columbia River Gorge and opened the channel to the sea. This made salmon available to the people. Coyote cut the beaver to pieces and distributed the pieces on the land, and they became humans. Later, Coyote tricked the five swallow sisters, who had built a dam across the river to block salmon, into leaving him alone there. While the sisters were away, he destroyed the dam, again freeing the way for salmon. The rocks of Celilo Falls were the remnants of the dam.¹⁹²

In the other story of the origins of the Columbia, between six and sixteen million years ago, the greatest outpouring of lava in the history of North America spread across western Idaho and eastern Washington, flowing towards the Pacific Ocean.¹⁹³ The "ancient Columbia" River was forced north and west by these flows into a path between "a lobe of ancient granite and a bulging plain of lava."¹⁹⁴ Encroaching glaciers created new barriers and repeated thawing and freezing cycles created a large dam across the river's flow west across the

cycle of the salmon, the fluctuations in fish populations, and the seasons were all factors that impacted the pre-European lifestyle of the tribes; the tribes literally followed the fish and waited for them to return in a yearly cycle.").

188. *Id.* at 274.

189. *Id.* at 270.

190. *Id.*

191. See, e.g., *Columbia River: Description, Creation, and Discovery*, NORTHWEST POWER & CONSERVATION COUNCIL, <https://www.nwcouncil.org/history/ColumbiaRiver> (last visited May 24, 2018).

192. *Id.*

193. *Id.*

194. PEARKES, *supra* note 179, at 32; *Columbia River: Description, Creation, and Discovery*, *supra* note 191.

Columbia Plateau.¹⁹⁵ The giant inland sea, Glacial Lake Missoula, eventually broke through the ice dam and flooded the plateau, leaving behind the rich glacial silt that would eventually lure Euro-American farmers to settle in the area.¹⁹⁶ After hundreds of repeated flooding cycles, the climate warmed and the Columbia River returned to its original path.¹⁹⁷ The great ravine scoured into the lava fields that once channeled the flooding waters became a dry gorge, the Grand Coulee, hosting only a “dry river of sage, bunchgrass and bitterroot.”¹⁹⁸

B. *The Stevens Treaties*

In 1846, the United States claimed the Oregon Territory, which encompassed the entire U.S. portion of the Columbia River Basin, carved out the northern portion into the Washington Territory, and appointed Isaac Stevens the governor.¹⁹⁹ Less than ten years later, Stevens was granted authority to make treaties with the tribes in the Territory in order to secure land and resources. Important treaty provisions for the Columbia River Tribes included access to fishing and their continued ability to gather food in their “usual and accustomed places.”²⁰⁰ All nine “Stevens Treaties” include the following language (or something substantially similar): “[t]he right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing.”²⁰¹

Although fishing rights were reserved in the treaties, the influx of European settlers and the opening of commercial fisheries significantly impacted and diminished the Columbia River Tribes’ ability to continue to practice their treaty rights to fish.²⁰² Both Oregon and Washington (as territories and later as states) sought to regulate and substantially limit any fishing by tribal members occurring off the reservations.²⁰³ Additionally, the building of dams, shipping channels, and other infrastructure, led to the destruction of entire river tributaries and significantly degraded fish habitat and the river’s ecosystem, further

195. PEARCKES, *supra* note 179, at 32; *Columbia River: Description, Creation, and Discovery*, *supra* note 191.

196. PEARCKES, *supra* note 179, at 32–33; *Columbia River: Description, Creation, and Discovery*, *supra* note 191.

197. PEARCKES, *supra* note 179, at 33.

198. *Id.*

199. Bell, *supra* note 187, at 274.

200. *Id.* at 274–75.

201. *Id.* at 275.

202. *Id.*

203. *See id.* at 284–90. A series of “right to fish” cases upheld the language of the Stevens Treaties guaranteeing Columbia River Tribes the right to fish in usual and accustomed places, even if these places were off the reservations. *See* *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 659 (1979); *United States v. Winans*, 198 U.S. 371, 384 (1905); *United States v. Washington*, 520 F.2d 676, 682, 688–89 (9th Cir. 1975).

circumscribing the Columbia River Tribes' treaty rights.²⁰⁴ The Grand Coulee Dam, the largest of the Columbia River Dams and one of the earliest built, is the largest concrete structure on the continent, rising 380 feet above the riverbed, spreading nearly a mile wide and 500 feet thick at its base.²⁰⁵ There is no fish passage at the Grand Coulee Dam.²⁰⁶

C. *The Columbia River Treaty*

The Columbia River Treaty (CRT) is lauded as a model of cooperation between the United States and Canada.²⁰⁷ The CRT “tightly govern[s]” the management of the upper Columbian watershed in order to one, make greater, more efficient use of the annual surge of water from the melting snowpack, and two, protect urban and agricultural communities from annual flooding as the result of the melting snowpack.²⁰⁸ The CRT was designed to provide flood control and hydropower generation for both Canada and the United States with the building of three new dams in Canada and another dam in Montana (the Libby Dam on the Kootenai River).²⁰⁹ The CRT was negotiated to last for sixty years, with either party allowed to terminate with ten years' notice.²¹⁰ 2014 was the earliest date for termination or renegotiation.²¹¹

Given that the CRT “completely failed to pre-determine the impacts on salmon, a healthy Columbia River and tributaries, and the treaty fishing rights and cultural rights of the Tribes” protected by U.S. law and Stevens Treaty obligations, the Columbia River Tribes are now pushing for inclusion in the negotiations between the United States and Canada for the renewal of the CRT.²¹² The CRT was a flawed treaty from the beginning. It failed to honor the Treaty rights of affected Columbia River Tribes and it “failed to account for the value and necessity of an intact ecosystem and has, since 1964, further degraded salmon fishing, river ecology, and the lives of the Columbia River Indian residents.”²¹³

204. See Bell, *supra* note 187, at 276.

205. PEARKE, *supra* note 179, at 39.

206. *Id.*; see also *Grand Coulee Dam/About Us/Frequently Asked Questions: Why Aren't Fish Ladders Used at Grand Coulee Dam?* RECLAMATION, PACIFIC NORTHWEST REGION, <https://www.usbr.gov/pn/grandcoulee/about/faq.html#fish> (last visited July 6, 2018).

207. PEARKE, *supra* note 179, at 13.

208. *Id.*

209. Bell, *supra* note 187, at 276. According to the U.S. Army Corps of Engineers, there are eighteen dams on the mainstem of the Columbia River and its main tributary, the Snake River. There are dozens of other dams located on other tributaries to the Columbia. See *Columbia River Basin Dams*, U.S. ARMY CORPS OF ENGINEERS, <http://www.nwd.usace.army.mil/Media/Fact-Sheets/Fact-Sheet-Article-View/Article/475820/columbia-river-basin-dams/> (last visited Mar. 22, 2018). It really is a river captured.

210. Bell, *supra* note 187, at 278.

211. *Id.*

212. *Id.* at 277, 279; see McNeel, *supra* note 186.

213. Bell, *supra* note 187, at 271.

D. Beyond Wilderness

*There are no illusions to be had
in the aftermath of flooding dams,
like love. My vision of that silver leaping
and flesh so red it appeared raw
and bleeding was the consequence
of bad medicine threatening
every living thing on the planet,
manifesting itself today in mental
images of man-made concrete
blocks, cold and infertile.*²¹⁴

The Columbia River system is a highly managed system of rivers, reservoirs, dams, and hatcheries.²¹⁵ Before European arrival, the great salmon fishery “formed a hub in an indigenous wheel that extended east to the Rocky Mountains, west to the Okanagan River basin, south into the Columbia Plateau and north to the Big Bend of the Columbia River.”²¹⁶ The paths traveled by the Columbia River Tribes each season were well worn.²¹⁷ The Columbia River Basin has never been a wilderness, empty of the tracks of man, and it will never be valued as such. While some recreation areas along the river’s path might be labeled wilderness after the loggers and ranchers have left and second growth trees have grown high, this is a lived-in landscape.²¹⁸

The earliest Euro-Americans to venture up the river mouth encountered sophisticated tribes, rich in resources, with cooperative management of nature’s abundance between upper and downstream tribes.²¹⁹ While the stories of the Columbia River Tribes are called myth, they encode exacting practices for the healthy management of the ecosystem, telling about variations in water level, flooding capacity, and the migratory movement of fish and other animals who moved up and down the river basin.²²⁰ But after the introduction of dams and the industrialization of the river, the ecosystem of the Columbia River Basin has shifted. Dams in the U.S. and Canada have created a new ecosystem classification.²²¹ Now, there are several zones of “dead” water on the river where only introduced hatchery fish swim—fish that have to be restocked every year because they cannot follow migratory spawning patterns to the ocean and

214. Bird, *supra* note 27, at 56.

215. See PEARKES, *supra* note 179, at 19–20, 48–49.

216. *Id.* at 24.

217. *Id.*

218. See *id.* at 172–74.

219. See *id.* at 22–23.

220. See *id.* at 57–58; cf. *Columbia River: Description, Creation, and Discovery*, *supra* note 191 (discussing the similarities between myths and the geology of the Columbia River).

221. See PEARKES, *supra* note 179, at 29 (“no visible vitality”).

back.²²² These changes show that the long-term economic management of the river was the value that guided negotiations rather than ecosystem health.

The renegotiation of the Columbia River Treaty allows for new priorities to enter treaty negotiation discussions. The American management group responsible for implementing the CRT, the “U.S. Entity,” recognized that renegotiation should include Columbia River Basin tribes and organized a Sovereign Review Team to provide recommendations to the Entity.²²³ However, Columbia River Tribes are not invited to actual treaty negotiations.²²⁴ Meanwhile, the Columbia River Tribes, as sovereign nations, are insisting on government-to-government status in order to shape the renegotiation with protections for tribal culture and resources, to protect and promote ecological processes that will result in healthy fish, wildlife, and plant communities.²²⁵ The Columbia River Tribes’ ecosystem-based approach recognizes the area as a living entity in and of itself, with multiple interconnected and reliant systems, of which both Columbia River Tribes and settlers are a part.

But what if the river was also allowed to negotiate alongside the tribes who care so deeply for it?²²⁶ New Zealand’s Crown government initiated settlements with Māori tribes because it failed to uphold treaty obligations and the Treaty of Waitangi, the founding document of the country, promises different obligations and relationships depending on which language is considered to be official.²²⁷ In settling with the Tūhoe iwi and the Whanganui iwi for the natural features that would become persons, the novel approach allowed for comanagement with conservation at the core but under the ethos of Māori relationships to lived-in nature, nature that cannot be owned by individual humans. In India, the granting of personhood forces the national government’s hand for river restoration for two of the most polluted—yet sacred—rivers in the country. These two examples in which personhood for nature has incorporated Indigenous relationships with the natural feature—and also understand that the feature is polluted, abused, and dying—might not bring the Grand Coulee down, but perhaps incorporating these perspectives into new CRT negotiations could help create an ecological legal framework to protect the river, and help the salmon jump a little higher.²²⁸

222. *Id.*

223. Bell, *supra* note 187, at 278–79.

224. *See id.* at 281 (“Tribes have been given significant authority to make . . . recommendation[s] Nonetheless, because it is limited to a solely advisory capacity, such power can only be regarded as a diminished or token authority.”).

225. *Id.* at 279.

226. *See generally* UPPER COLUMBIA UNITED TRIBES, <https://ucut.org/> (last visited Mar. 22, 2018) (showing the immersive relationship tribes have with the river and the tribes’ commitment to protecting the river).

227. *See* Claudia Orange, *Story: Treaty of Waitangi*, TE ARA (June 20, 2012), <https://teara.govt.nz/en/treaty-of-waitangi>.

228. Currently, Columbia River Tribes have been allowed to participate in regional negotiations, culminating in a letter given to officials who will be carrying out the negotiations with Canada. Appeals to be a part of the actual negotiations to ensure river health, salmon health, and tribal cultural concerns have gone unheeded. *See* Bell, *supra* note 187, at 279–82.

CONCLUSION

In 2017, the American Bar Association determined that women make up 36 percent of lawyers in the United States.²²⁹ Almost half of all incoming first-year law students are women, 45 percent of associates in private practice are women, and three women sit on the Supreme Court.²³⁰ In 1875, it was unthinkable that a woman could be a lawyer. In order to be admitted to the Wisconsin bar, Lavinia Goodell had to have I.C. Sloan, Esq. argue her petition before the court because she had no rights to stand before the court on her own.²³¹ In the last part of the nineteenth century and the early years of the twentieth, lawyers, judges, and lawmakers began to realize that what was unthinkable was for women to remain invisible to the courts, dependent on having their rights, if they were at all to be acknowledged, adjudicated through the proxy of a man.²³² What if nature, like women before her, were to leave her category as the invisible and undervalued entity, upon which all else depends, in order to argue for herself and her rights? What if nature were given the same or even greater rights as other legal persons? What if nature were the next Lavinia Goodell, what would the landscape look like then?

Professor Sheila Jasanoff asks the question slightly differently: what would it take to bring about a “radical change in the way people have constructed unsustainable preferences”?²³³ Using the example of *Brown v. Board of Education*, Jasanoff describes the story of how Justice Frankfurter’s careful opinion confronted “entrenched social expectation[.]” in order to “forge a new constitutional consensus under conditions of conflict and uncertainty.”²³⁴ In Justice Frankfurter’s well-known habit of having his law clerks read poetry in the morning before spending the afternoon crafting opinions, Jasanoff finds an almost forgotten lynchpin to the famous decision.²³⁵ She argues that the “power of shared language” painfully carved from “prior cultural work, linguistic work,

229. COMM’N ON WOMEN IN THE PROFESSION, AM. BAR ASS’N, A CURRENT GLANCE AT WOMEN IN THE LAW- JANUARY 2017, at 2 (2017), https://www.americanbar.org/content/dam/aba/marketing/women/current_glance_statistics_january2017.authcheckdam.pdf.

230. *Id.* at 2–5.

231. *See Goodell I*, 39 Wis. 232, 232 (1875). Mr. Sloan’s prepared argument was written by Miss Goodell and he made sure that fact was recorded in the court record. *Id.* at 232 n.1.

232. *See Goodell II*, 81 N.W. 551, 551 (1879). The first women members of the ABA joined in 1918, Mary B. Grossman in Cleveland, Ohio and Mary Florence Lathrop in Denver, Colorado. COMM’N ON WOMEN IN THE PROFESSION, *supra* note 229, at 7.

233. Sheila Jasanoff, *A World of Experts: Science and Global Environmental Constitutionalism*, 40 B.C. ENVTL. AFF. L. REV. 439, 443 (2013).

234. *Id.* at 442.

235. *See id.* at 441–42 (“The day the law clerks were advising Justice Frankfurter in wording the Court’s opinion, they read *The Hound of Heaven*, written in 1893 by the English poet Frances Thompson. Speaking in the first person, Thompson describes his dread as he flees the feet of the divine hound pursuing him. The poem reads, in part: Adown Titanic glooms of chasmèd fears, / From those strong Feet that followed, followed after. / But with unhurrying chase, / And unperturbèd pace, / Deliberate speed, majestic instancy, / They beat—and a Voice beat / More instant than the Feet— / ‘All things betray thee, who betrayest Me.’” (footnotes omitted)).

and conceptual work” manifested in the weighty mandate, “deliberate speed.”²³⁶ In the opinion, the Court was willing to take a risk for a situation that had become untenable, no matter the settled societal expectations that relied on the current status quo of maintaining “separate but equal.”²³⁷ The Court’s decision reflected a change in values—of who and what was being valued in the 1950s—and of types of people changing both the social and legal terrain at the time. Jasanoff finds in *Brown* an example of the law facilitating and responding to creative thinking and the power of legal discourse to “move” people.²³⁸ While she means “move” as an emotional affinity that causes a person to act altruistically, the Supreme Court decision also physically and categorically moved people—African-American children moved schools and changed categories, they were no longer “separate.” Rigid legalistic thinking, however, can undermine the capacity for change that is inherent in all of our human institutions, the law included.²³⁹

When judges, like Chief Justice Ryan or the Third Circuit’s Judge Nygaard, decide that procedures, formalities, and the status quo have tied their hands, then where does that leave Lavinia Goodell and Grant Township? While our lawmakers may be paralyzed, the mounting concern for the natural systems upon which the world depends—clean water for Grant Township, running water for the Columbia River’s salmon, whole forests and mountains that have not had their tops removed, prairies and healthy oceans—has reached critical mass.

Straw man arguments abound in opposition to giving nature and animals rights. They all boil down to this one fear: our human lives depend on the continued exploitation of nature and animals as things to be used, and to be used up if needed.²⁴⁰ But giving nature rights does not take nature outside the realm of use. Chief Justice Ryan was concerned that women should be raising and nurturing children. Women lawyers still have and raise children and sometimes men lawyers do too. The quality of the legal system has not been eroded; if anything, having three women on the Supreme Court has elevated the quality and kind of justice. The Whanganui iwi have not taken Te Awa Tupua away from the public; instead, they simply added another public’s concern to the conversation of best management practices. The Tūhoe iwi have not prohibited any human access to Te Urewera; instead, they have developed a management

236. *Id.* at 442.

237. *See id.*

238. *Id.* at 452.

239. *Id.*

240. The wedge argument is also lobbied against expanding rights to nature; in effect, saying that legal personhood is an ever-expanding designation that if given to nature will soon expand to absurdity, including cars, lawn mowers, mosquitoes, and goldfish. While animal rights advocates would view the sentience of the mosquito and the goldfish as a basis to confer some rights in the way that mosquitoes and goldfish might best have their interests served, this argument is reductive and not serious to the issue. Natural features and systems (and animals) have value in themselves outside of their value to humans. If the intrinsic value argument is unpersuasive and a human-centered one must be put forth, then it should be that humans rely on functioning ecosystems and a rights-for-nature paradigm is a new creative strategy for preserving the systems upon which we all depend.

plan that allows—even encourages—human interaction with the former national park. The Whanganui and Tūhoe iwi are not managing the natural features as wilderness, as separate categories where man is but a visitor. Giving nature rights does not make the world a wilderness.

At the same time, acknowledging that nature has value in and for itself requires us to move beyond traditional concepts and legal procedures that keep the status quo—nature as property—in order to safeguard the future of ecosystem health, which is our future too. In visualizing a world where the Columbia River is its own legal person with the right to participate in the treaty negotiation that affects its wellbeing, this is not a world in which humans are forbidden to go, and are “separate but equal.” Recognizing the legal personhood of nature, that nature has rights, is a conceptual move that says ecosystems matter and, in the case of the Columbia River, that salmon have intrinsic value. Extending legal personhood to nature also asks us to believe that culture, science, and the law are collaborative processes capacious and flexible enough to help us recognize—and value—the trees in front of us, not simply the forest of conflict and uncertainty we left behind when we humans last walked out of the wilderness.²⁴¹

241. In 1980, Congress passed the Alaska National Interest Lands Conservation Act (ANILCA), one of the most significant conservation achievements in United States’ history. This legislation is not only significant for protecting 104 million acres of public lands and waters in Alaska, it was negotiated with active input from Indigenous communities in Alaska and the resulting Act protected Native ways of life by granting subsistence rights inside federally protected lands, including those designated as wilderness. See Banerjee, *supra* note 74, at 69. ANILCA arguably provides the closest to a rights-for-nature paradigm enacted in the United States that also recognizes Indigenous relationships with nature (like the recent legislation in Aotearoa New Zealand) and is an example of transforming a wilderness-as-object mentality back towards a wilderness-as-relationship mentality. Congress and the courts could do a lot worse than look to this already in place and functioning model going forward.

We welcome responses to this Note. If you are interested in submitting a response for our online journal, Ecology Law Currents, please contact cse.elq@law.berkeley.edu. Responses to articles may be viewed at our website, <http://www.ecologylawquarterly.org>.