

# Environmental Personhood

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## I. INTRODUCTION

Parks are people too, my friend. So quipped an August 2016 headline making reference at once to Mitt Romney's flip commentary on corporations and to recent developments in New Zealand law enabling landscapes to be named as legal persons—that is, as entities possessing juridical rights akin to those of corporations.<sup>1</sup> In the wake of this and other developments of the concept, legal personhood has struck observers as a promising tool for protecting nature—an idea overdue given the now seemingly unexceptional nature of corporate personhood in protecting corporate rights.<sup>2</sup> Far from being the settled, stolid doctrine that its long tenure might have it appear to be, however, corporate personhood is quicksilver; it seems an endlessly adaptable concept. How might we come to understand the environment as a similarly flexible rights-holder in a way that is robustly protective of environmental interests? This Article argues that, as an example of how we came to see a non-human entity as a rights holder, corporate personhood may be a useful tool in moving toward understanding the environment as a rights holder.

Legal personhood is not binary; it is not a yes-or-no proposition. The differentiation of legal rights and responsibilities starts, not ends, at the question of whether something may or may not be considered a person in the meaning of a statute.<sup>3</sup> The real issue here is what, *given* the legal personhood of corporations or the environment, that means for how much that legal, practical, rhetorical entity—that category-for-legal-convenience—should be allowed to claim the rights of other shades of personhood. There

1. Devon O'Neil, *Parks Are People Too*, OUTSIDE ONLINE (Aug. 3, 2016), <https://www.outsideonline.com/2102536/parks-are-people-too> [https://perma.cc/BE4B-CMCF]; Philip Rucker, *Mitt Romney Says 'Corporations are People'*, WASHINGTON POST (Aug. 11, 2011), [https://www.washingtonpost.com/politics/mitt-romney-says-corporations-are-people/2011/08/11/gIQABwZ38L\\_story.html?utm\\_term=.c3d71cf32655](https://www.washingtonpost.com/politics/mitt-romney-says-corporations-are-people/2011/08/11/gIQABwZ38L_story.html?utm_term=.c3d71cf32655) [https://perma.cc/Z2Q5-CULB].

2. See, e.g., *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

3. ERIC W. ORTS, *BUSINESS PERSONS: A LEGAL THEORY OF THE FIRM* xv (2013); see also John Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655 (1926); Elizabeth Pollman, *Reconceiving Corporate Personhood*, 2011 UTAH L. REV. 1629 (2011); Steven Walt & Micah Schwartzman, *Morality, Ontology, and Corporate Rights*, 11 LAW & ETHICS HUM. RTS. 1, 19 (2017) (stating that “‘person’ is not a normative category with content independent of the moral theory that defines its content.”).

is, after all, no such thing as a plain-old person; it is law that defines the categories of persons.<sup>4</sup>

The development of a concept of corporate personhood in American law was anything but inevitable. Although we are familiar now with “the idea of a corporation having ‘its’ own rights, and being a ‘person’ and ‘citizen’ for so many statutory and constitutional purposes,” the idea was perhaps as unsettling to contemporary jurists as that of environmental personhood might sound today.<sup>5</sup> Just as “[t]hroughout legal history, each successive extension of rights to some new entity has been . . . a bit unthinkable,”<sup>6</sup> so too does their *contingency* become practically unthinkable after they are normalized. Before environmental personhood becomes unremarkable, and thus unremarked-upon, we would do well to consider some of the contingencies in the development of the personhood concept as applied to corporations.

Even among the very few jurisdictions that have developed concepts of environmental personhood, conceptions of that “personhood” are diverse. In 2014, Te Urewera, formerly a New Zealand national park, was declared to be a legal entity.<sup>7</sup> The act making this designation transformed the land from government-owned national park to freehold land owned by itself.<sup>8</sup> The country’s Whanganui River<sup>9</sup> followed suit in 2017.<sup>10</sup> Years prior to

4. ORTS, *supra* note 3, at 27–28; Dewey, *supra* note 3, at 656. Similarly, notes Eric Orts, relating a wider point made by Polanyi and others specifically to the question of the corporate person, “[f]irms as well as markets are created by law.” ORTS, *supra* note 3, at 28.

5. Christopher Stone, *Should Trees Have Standing?—Toward Legal Rights For Natural Objects*, 45 S. CAL. L. REV. 450, 452 (1972).

6. *Id.* at 453.

7. Te Urewera Act 2014 (N.Z.).

8. *Id.* ss 12-13; see also Jacinta Ruru, *Tūhoe-Crown Settlement—Te Urewera Act 2014*, MAORI L. REV. (October 2014), <http://maorilawreview.co.nz/2014/10/tuhoe-crown-settlement-te-urewera-act-2014/> [<https://perma.cc/8JES-9LPF>] (discussing the significance, purpose, and history of the Act for both New Zealand and globally).

9. Kate Shuttleworth, *Agreement Entitles Whanganui River to Legal Entity*, N.Z. HERALD (Aug. 30, 2012, 5:56 PM), [http://www.nzherald.co.nz/nz/news/article.cfm?c\\_id=1&objectid=10830586](http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10830586) [<https://perma.cc/EES9-G9B6>].

10. Hinerangi Barr, *World-Leading Te Awa Tupua Bill Passes First Reading*, MAORI PARTY (May 25 2016), [http://www.maoriparty.org/world\\_leading\\_bill\\_te\\_awa\\_tupua\\_passes\\_first\\_reading](http://www.maoriparty.org/world_leading_bill_te_awa_tupua_passes_first_reading) [<https://perma.cc/GK9V-XNLS>]; see also *Te Awa Tupua (Whanganui River Claims Settlement) Bill*, N.Z. PARLIAMENT: PĀREMATA AOTEAROA, [https://www.parliament.nz/en/pb/bills-and-laws/bills-proposed-laws/document/00DBHOH\\_BILL68939\\_1/te-awa-tupua-whanganui-river-claims-settlement-bill](https://www.parliament.nz/en/pb/bills-and-laws/bills-proposed-laws/document/00DBHOH_BILL68939_1/te-awa-tupua-whanganui-river-claims-settlement-bill) [<https://perma.cc/GM8T-R49F>] (showing the progress of the proposed bill within New Zealand’s Parliament).

the movement in New Zealand law, Ecuador proclaimed under its constitution the rights of nature “to exist, persist, maintain and regenerate its vital cycles.”<sup>11</sup> Nature here, instead of being named as a legal person directly, instead is given these rights by analogy to “persons and people.”<sup>12</sup> In Bolivia, nature is defined as a juridical entity that “takes on the character of collective public interest.”<sup>13</sup> In the United States, a number of local governing bodies promulgated ordinances recognizing the rights of nature.<sup>14</sup>

These new global legal developments arrive alongside what appears to be a wholesale re-evaluation of the place of human interests in relation to nature. New Zealand’s Te Urewera Act in particular is seen to be novel for its changes to the very nature of property ownership. It is an unequivocal rejection of a human-centered rights regime for protecting nature as property.<sup>15</sup>

In the end, our capacity to imagine a politics capable of encompassing things and places far outside of human lives or business interests has more to do with how well legal personhood will protect the environment than does any particular deployment of legal arguments for environmental personhood—just as has been the case in the development of the doctrine of corporate personhood in American law. To show why this is so, the Article is arranged as follows. Part II describes recent advances made in the concept of environmental personhood in locations as varied as Bolivia, Ecuador, India, and New Zealand. Part III examines the usefulness of corporate personhood doctrine as an analogy for proponents of the protection of the environment by means of the concept of personhood. Part IV examines the terms of the debate

11. Constitución Política de la República del Ecuador, art. 71 (Ecuador), *translated in Rights of Nature Articles in Ecuador’s Constitution*, <https://therightsofnature.org/wp-content/uploads/pdfs/Rights-for-Nature-Articles-in-Ecuador’s-Constitution.pdf> [https://perma.cc/R64M-QQXH] (last visited Nov. 19, 2017); *see also id.* art. 10, 72–74.

12. *Id.* art. 10.

13. *See* Ley de Derechos de la Madre Tierra [Act of the Rights of Mother], Law 071, ch. II, art. 5 (Dec. 2010) (Bol.) *translated in Act of the Rights of Mother Earth*, [http://f.cl.ly/items/212y0r1R0W2k2F1M021G/Mother\\_Earth\\_Law.pdf](http://f.cl.ly/items/212y0r1R0W2k2F1M021G/Mother_Earth_Law.pdf) [https://perma.cc/29YU-6F67] (last visited Dec. 22, 2017) (designating Mother Earth to be the titleholder of certain rights ensuring protection for her and her life-systems).

14. *Rights of Nature: Timeline*, COMMUNITY ENVTL. LEGAL DEF. FUND (Nov. 9, 2016), <http://celdf.org/rights/rights-of-nature/rights-nature-timeline/> [https://perma.cc/PJ7U-GSZ2].

15. *See* Alison Fairbrother, *New Zealand’s Whanganui River Gains a Legal Voice*, HUFFPOST (Sept. 18, 2012, 5:39 PM), [http://www.huffingtonpost.com/2012/09/18/new-zealand-whanganui-river\\_n\\_1894893.html](http://www.huffingtonpost.com/2012/09/18/new-zealand-whanganui-river_n_1894893.html) [https://perma.cc/RQ2C-KCSH].

in more detail, considering the development of rights of nature arguments and the stakes of ontological claims regarding divisions between nature and people. Part V considers the significance of holistic theories of environmental protection to discourses of personhood. Finally, the Article offers some conclusions regarding the development of environmental personhood. Legal personhood may come to be as protective for environmental interests as it has been for corporate interests; it can become so by referencing the latter's protean, politically fluid nature.

## II. THE MOVEMENT TO THE RIGHTS OF NATURE

The developments described above will be part of a movement toward the recognition of nature as a rights-holder, a change from a prevailing stance that protects nature by way of human interests.

### A. The Rights of Nature Across the World

Several jurisdictions have developed versions of rights of nature regimes, including Ecuador, Bolivia, New Zealand, India, and local jurisdictions in the United States.<sup>16</sup> Not all of these rights of nature regimes take nature as a whole to be a juridical person; in some cases parts of nature—a river, a species—become named as persons or otherwise equipped to litigate their own rights.

#### 1. Ecuador and Bolivia

In 2008, after a national referendum, Ecuador changed its constitution to reflect rights for nature. It was the first country ever to do so; its move was followed legislatively by Bolivia in 2010.<sup>17</sup> In both Ecuador and Bolivia, regard for the rights of nature coincided with a rise in political power for indigenous groups.<sup>18</sup> The

16. Te Urewera Act 2014 (N.Z.); Constitución Política de la República del Ecuador, art. 10, 71–74 (Ecuador), translated in *Rights of Nature Articles in Ecuador's Constitution*, *supra* note 11; see Ley de Derechos de la Madre Tierra [Act of the Rights of Mother Earth], Law 071 (Dec. 2010) (Bol.), translated in *Act of the Rights of Mother Earth*, *supra* note 13; *Rights of Nature: Timeline*, *supra* note 14; notes 35–38 *infra* and accompanying text.

17. Andrew C. Revkin, *Ecuador Constitution Grants Rights to Nature*, N.Y. TIMES: DOT EARTH (Sept. 29, 2008, 8:34 AM), <http://dotearth.blogs.nytimes.com/2008/09/29/ecuador-constitution-grants-nature-rights/> [<https://perma.cc/9F6Z-ETTS>]; John Vidal, *Bolivia Enshrines Natural World's Rights with Equal Status for Mother Earth*, GUARDIAN (Apr. 10, 2011, 1:17 PM), <https://www.theguardian.com/environment/2011/apr/10/bolivia-enshrines-natural-worlds-rights> [<https://perma.cc/43X3-CNS2>].

18. Vidal, *supra* note 17.

influence of indigenous peoples' worldviews was apparent in the central importance in both Ecuador and Bolivia of *Pachamama*—“nature” in the languages of the indigenous Quichua and Aymara groups.<sup>19</sup>

Under the Ecuadorian constitution, Pachamama has rights “to exist, persist, maintain and regenerate its vital cycles, structure, functions and its processes in evolution.”<sup>20</sup> Every person and every community has the right to advocate on its behalf. Pachamama here escapes direct personification. Instead, it is the bearer of rights as “nature,” as distinct from “persons, people, communities and nationalities” and “natural and judicial persons.”<sup>21</sup>

The Bolivian legal recognition of “Mother Earth” is in the nature of a “collective public interest.”<sup>22</sup> Rather than *directly* granting legal

19. See María Valeria Berros, *The Constitution of the Republic of Ecuador: Pachamama Has Rights*, ENVIRONMENT AND SOCIETY: ARCADIA (2015), <http://www.environmentandsociety.org/arcadia/constitution-republic-ecuador-pachamama-has-rights> [<https://perma.cc/3X34-NR-MH>] (describing indigenous influence upon Ecuadorian uptake of rights of nature); Cole Mellino, *Bolivia and Ecuador Grant Equal Rights to Nature: Is “Wild Law” a Climate Solution?*, THINKPROGRESS (Nov. 21, 2011, 3:22 PM), <https://thinkprogress.org/bolivia-and-ecuador-grant-equal-rights-to-nature-is-wild-law-a-climate-solution-7675f15b6869#emi3tkfm7> [<https://perma.cc/8M4J-79T8>] (“Bolivia amended its constitution after pressure from its large indigenous population who places the environment and the earth deity, Pachamama, at the center of all life.”); Cyril Mychalejko, *Ecuador’s Constitution Gives Rights to Nature*, OPEDNEWS (Sept. 27, 2008, 4:42 AM), <http://www.opednews.com/articles/Ecuador-s-Constitution-Giv-by-Cyril-Mychalejko-080925-102.html> [<https://perma.cc/D6VB-B3V8>] (“[T]he new constitution reflects the traditions of indigenous peoples living in Ecuador, who see nature as a mother and call her by a proper name, Pachamama.”); Vidal, *supra* note 17 (“The law, which is part of a complete restructuring of the Bolivian legal system following a change of constitution in 2009, has been heavily influenced by a resurgent indigenous Andean spiritual world view which places the environment and the earth deity known as the Pachamama at the centre of all life. Humans are considered equal to all other entities.”).

20. Constitución Política de la República del Ecuador, art. 71 (Ecuador), *translated in Rights of Nature Articles in Ecuador’s Constitution*, *supra* note 11.

21. *Id.* art. 10 (“Persons and people have the fundamental rights guaranteed in this Constitution and in the international human rights instruments. Nature is subject to those rights given by this Constitution and Law”); *id.* art. 71 (“Every person, people, community or nationality, will be able to demand the recognitions of rights for nature before the public organisms. The application and interpretation of these rights will follow the related principles established in the Constitution. The State will motivate natural and juridical persons as well as collectives to protect nature; it will promote respect towards all the elements that form an ecosystem.”); *id.* art. 72 (“natural persons and judicial persons”); *id.* art. 74 (“persons, people, communities and nationalities”).

22. Ley de Derechos de la Madre Tierra [Law of the Rights of Mother], Law 071, ch. II, art. 5 (Dec. 2010) (Bol.) *translated in Law of Mother Earth the Rights of Our Planet a Vision From Bolivia*, WORLD FUTURE FUND, <http://www.worldfuturefund.org/Projects/Indicators/mother>

personhood to nature, Bolivia's law instead strips human persons of their dominance over all of the other bits and pieces of nature. Instead, all of nature, including the human bits, has the ("human") rights the law enumerates.<sup>23</sup> This move is linked to the holistic foundation of the law—to protect nature as a system instead of as discrete forests, streams, lakes, etc.<sup>24</sup>

In the international arena, Bolivia has been instrumental in putting together the draft Universal Declaration of the Rights of Nature, and Ecuador has been instrumental in forming the International Rights of Nature tribunal.<sup>25</sup> While the tribunal has announced some remarkable decisions,<sup>26</sup> their practical impact in terms of the rights of nature remains to be seen.

## 2. New Zealand and India

In New Zealand, as in Ecuador and Bolivia, rights of nature became a reality due in large part to the influence of indigenous ways of seeing the relationship between human beings and the world.<sup>27</sup> For a Maori tribe (*iwi*), sub-tribe (*hapu*), or extended

earthbolivia.html [https://perma.cc/9WKT-NZ4L] (last visited Dec. 23, 2017) ("For the purpose of protecting and enforcing its rights, Mother Earth takes on the character of collective public interest.").

23. *Id.* ("Mother Earth and all of its components, including human communities, are entitled to all the inherent rights recognized in this Law.").

24. *Id.* ch. II, art. 3 ("Mother Earth is a dynamic living system comprising an indivisible community of all living systems and living organisms, interrelated, interdependent and complementary, which share a common destiny.").

25. See WORLD PEOPLE'S CONFERENCE ON CLIMATE CHANGE AND THE RIGHTS OF MOTHER EARTH, UNIVERSAL DECLARATION OF RIGHTS OF MOTHER EARTH (April 22, 2010); *Bolivia's Leadership*, GLOBAL ALLIANCE FOR RTS. NATURE, <http://therightsofnature.org/bolivia-experience/> [https://perma.cc/SWN6-M4RD] (last visited Oct. 31, 2017); *Ecuador Promotes the Rights of Nature at the First Assembly of the United Nations Environment*, GOV'T ECUADOR, <http://www.cancilleria.gob.ec/ecuador-promotes-the-rights-of-nature-at-the-first-assembly-of-the-united-nations-environment/> [https://perma.cc/M38J-HT5R] (last visited Oct. 31, 2017); *International Rights of Nature Tribunal*, GLOBAL ALLIANCE FOR RTS. NATURE, <http://therightsofnature.org/rights-of-nature-tribunal/> [https://perma.cc/V37R-IY26] (last visited Oct. 31, 2017).

26. See Robert Lovato, *COP21: International Rights of Nature Tribunal Finds Corporations, Governments Guilty of Crimes Against Nature*, ALTERNET (Dec. 10, 2015, 12:00 PM), <http://www.alternet.org/environment/cop21-international-rights-nature-tribunal-finds-corporations-governments-guilty-crimes> [https://perma.cc/2KAH-8K66].

27. See Abigail Hutchison, *The Whanganui River as a Legal Person*, 39 ALTERNATIVE L.J. 179, 180–81 (2014); Anne Salmond, *Tears of Rangi: Water, Power, and People in New Zealand*, HAU J. ETHNOGRAPHIC THEORY, Winter 2014, at 285; Linda Te Aho, *Ruruku Whakatupua Te Mana o te Awa Tupua—Upholding the Mana of the Whanganui River*, MAORI L. REV. (May 2014), <http://maorilawreview.co.nz/2014/05/ruruku-whakatupua-te-mana-o-te-awa-tupua-upho>

family group (*whanau*), a particular river or mountain might be an ancestor (*tupuna*).<sup>28</sup> This genealogy—or *whakapapa*—is crucial to Maori worldviews.<sup>29</sup>

Work done in the 1970s United States by law professor Christopher Stone was also influential for the development of rights of nature in New Zealand—his article, *Should Trees Have Standing?* argued for the recognition of environmental interests quite apart from any human claimant.<sup>30</sup> This work influenced James Morris and Jacinta Ruru, two Maori academics, to write about the possibility of granting personhood to rivers as a way of linking Maori and state conceptions of rivers. “The beauty of the concept,” they wrote, “is that it takes a western legal precedent and gives life to a river that better aligns with a Maori worldview that has always regarded rivers as containing their own distinct life forces.”<sup>31</sup> Instead of granting rights for the whole of nature, in New Zealand, particular natural features have been named as persons pragmatically. Thus while Morris and Ruru’s draft bill for the personification of rivers contemplated the vesting of personhood in all rivers across New Zealand,<sup>32</sup> that vision has not become reality.<sup>33</sup>

Nonetheless, their idea of environmental personhood was quickly taken up in decisions to grant personhood to the Whanganui River and the forest Te Urewera. In 2014, the bill based on the agreement between the government and a Maori tribe regarding the personification of Te Urewera became law, bringing into being

lding-the-mana-of-the-whanganui-river/ [https://perma.cc/NDF8-X6F3]; Ruru, *supra* note 8; Bryant Rousseau, *In New Zealand, Lands and Rivers Can Be People (Legally Speaking)*, N.Y. TIMES (July 13, 2016), <https://www.nytimes.com/2016/07/14/world/what-in-the-world/in-new-zealand-lands-and-rivers-can-be-people-legally-speaking.html> [https://perma.cc/26LJ-K9TX].

28. See James D.K. Morris & Jacinta Ruru, *Giving Voice to Rivers: Legal Personality as a Vehicle for Recognising Indigenous Peoples’ Relationships to Water?*, 14 AUSTL. INDIGENOUS L. REV., no. 2, 2010, at 49; Gwendolyn Gordon, *Bones, Breath, Body: The Life of an Indigenously Owned Corporation* (January 2014) (unpublished dissertation, Princeton University) (on file with author).

29. Gordon, *supra* note 28.

30. Stone, *supra* note 5.

31. Morris & Ruru, *supra* note 28, at 58.

32. *Id.* at 56.

33. *Id.* at 57. Cultural and political complexities might make universal personhood for rivers perhaps unattainable, and certainly difficult. Consider that the Whanganui River has long been acknowledged to be a “taonga,” a cultural treasure, for Maori people; quite apart from its newfound legal status, Maori groups call the river an ancestor. The same may not be said for every river in New Zealand, with consequences for the ways that such a river may be imagined as a rights-holder and the possibilities for choosing guardians through which the river’s rights may be asserted.



New Zealand's first environmental legal person. The status of the Whanganui River soon followed suit.<sup>34</sup>

Rights of nature developments in India resemble those in New Zealand, with discrete natural features being considered for rights, against a granular legal background supportive of the protection of nature, rather than a broad protection for nature as a whole. A 2012 Indian Supreme Court case established the legitimacy of the Court's consideration of non-anthropocentric views of the protection of nature.<sup>35</sup> *Animal Welfare Board of India v. A. Nagaraja* allowed that the Indian constitution's Article 21 right to life could be extended to non-human animals.<sup>36</sup> In 2013, India's Ministry of Environment and Forests declared cetaceans "non-human persons" in a bid to protect them from harm.<sup>37</sup> In March 2017, an Indian

34. See Tūtohu Whakatupua: Agreement Between Whanganui Iwi and the Crown, Aug. 30, 2012, <http://www.harmonywithnatureun.org/content/documents/193Wanganui%20River-Agreement---.pdf> [<https://perma.cc/487S-AQZ2>] (articulating the concept of Te Awa Tupua, which is the idea that the people and the Whanganui River are inextricable, as well as establishing the commitment of the Whanganui Iwi and the New Zealand government to protect the Whanganui River); see also Te Urewera Act 2014 (N.Z.) (disestablishing the land as Te Urewera National Park and replacing it with a legal entity entitled Te Urewera); Te Awa Tupua (Whanganui River Claims Settlement) Bill, N.Z. PARLIAMENT: PĀREMATA AOTEAROA, [https://www.parliament.nz/en/pb/bills-and-laws/bills-proposed-laws/document/00DBHOH\\_BILL68939\\_1/te-awa-tupua-whanganui-river-claims-settlement-bill](https://www.parliament.nz/en/pb/bills-and-laws/bills-proposed-laws/document/00DBHOH_BILL68939_1/te-awa-tupua-whanganui-river-claims-settlement-bill) [<https://perma.cc/ZY4E-JQPY>] (last visited Oct. 24, 2017) (depicting the progress of the Whanganui River Claims Settlement Bill in New Zealand's Parliament).

35. See T.N. Godavarman Thirumulpad v. Union of India, AIR 2012 SC 1254 (India). The Supreme Court started from conventional, anthropocentric provisions in India's Constitution (Articles 51A(g) (mandating citizen responsibility to protect the natural environment, including forests, birds, and wild animals) and 48A (mandating central and state government responsibility for same)) and the Wildlife (Protection) Act of 1972 to make a decidedly ecocentric statement on the nature of the protections provided by those provisions: "Environmental justice could be achieved only if we drift away from the principle of anthropocentric to ecocentric. . . . Ecocentrism is nature centered where humans are part of nature and non-human has intrinsic value. In other words, human interest do not take automatic precedence and humans have obligations to nonhumans independently of human interest." *Id.* at 1256–1259.

36. *Animal Welfare Board of India v. A. Nagaraja*, (2014) 7 SCC 547 (India); INDIA CONST, art. 21.

37. The Ministry's statement says that cetaceans are to be considered non-human persons. Less clear is what specific changes to legal status this declaration gave these species. POLICY ON ESTABLISHMENT OF DOLPHINARIUM—REGARDING, CIRCULAR F. NO. 20-1/2010-CZA(M)/2840, MINISTRY OF ENVIRONMENT & FORESTS: CENTRAL ZOO AUTHORITY 2 (2013) (India). While animal rights are mentioned here as part of the general tenor of the developments in India, this Article does not focus on them because environmental personhood can and does extend beyond animals—that is, beyond the entities closest to humankind.

court granted personhood rights to the Ganga River Basin—as environmentally beleaguered as it is environmentally important.<sup>38</sup>

### 3. United States

Developments in the United States may be considered the catalyst for these recent changes worldwide. In 2006, a small Pennsylvania community named Tamaqua Borough worked with a group called Community Environmental Legal Defense Fund (“CELDF”) to draft legislation that would protect the community, and the environment, from the dumping of toxic sewage. This development—the first-ever legal recognition of the rights of nature—served as the inspiration for the constitutional activity in Ecuador.<sup>39</sup> Since the events in Tamaqua Borough, local government bodies throughout the United States have taken up some form of rights for nature provision. These include ordinances in Pennsylvania,<sup>40</sup> Maine,<sup>41</sup> New Hampshire,<sup>42</sup> and

38. *Mod. Salim v. State of Uttarakhand*, Writ Petition No. 126 of 2014 in the High Court of Uttarakhand at Nainital (2017) (India), available at <http://lobis.nic.in/ddir/uhc/RS/orders/22-03-2017/RS20032017WPPIL1262014.pdf> [<https://perma.cc/E6L4-J3BG>]; see also Michael Safi, *Ganges and Yamuna Rivers Granted Same Legal Rights as Human Beings*, *GUARDIAN* (Mar. 21, 2017, 7:44 AM), <https://www.theguardian.com/world/2017/mar/21/ganges-and-yamuna-rivers-granted-same-legal-rights-as-human-beings> [<https://perma.cc/7Q9M-PYVK>]; see also *The Ganga Rights Act*, NAT’L GANGA RTS. MOVEMENT, <http://www.gangarights.org/ganga-right-act/> [<https://perma.cc/8JWV-N6ZG>] (last visited Oct. 24, 2017); *National Ganga Rights Act*, GANGA ACTION PARIVAR, <http://www.gangaaction.org/actions/ganga-rights/> [<https://perma.cc/L42U-698R>] (last visited Oct. 24, 2017); *Save the Ganga River. Support the National Ganga Rights Act*, AVAAZ, [https://secure.avaaz.org/en/petition/Save\\_the\\_Ganga\\_River\\_Support\\_the\\_National\\_Ganga\\_Rights\\_Act/?pv=2](https://secure.avaaz.org/en/petition/Save_the_Ganga_River_Support_the_National_Ganga_Rights_Act/?pv=2) [<https://perma.cc/VZ27-CKKE>] (last visited Nov. 18, 2017) (advocating promulgation of law granting rights to Ganga river basin).

39. Many of the international legal changes and most of the local ordinances establishing the rights of nature depend at least in part upon verbiage drafted by CELDF. See *Rights of Nature: Timeline*, *supra* note 14.

40. See *PITTSBURGH, PA.*, CODE § 618 (2010). Pennsylvania’s constitution was amended in 1971 to include a provision guaranteeing the “right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment” to the people of the state. PA CONST. art. 1, § 27. That provision was long taken to be toothless. Donald Gilliland, *Environmental Rights: 5 Facts About the Pennsylvania Constitution*, PENN LIVE (Apr. 3, 2014, 7:00 AM), [http://www.pennlive.com/midstate/index.ssf/2014/04/environmental\\_rights\\_5\\_shockin.html](http://www.pennlive.com/midstate/index.ssf/2014/04/environmental_rights_5_shockin.html) [<https://perma.cc/4DND-Z5MS>]. More than 40 years later, however, the amendment became the basis for the state’s supreme court to overturn a 2012 law protecting extractive interests from local ordinances undertaking to limit environmentally harmful activities like fracking. See *Robinson v. Commonwealth*, 83 A.3d 901 (2013). Thus while the rights of nature are not written into the Pennsylvania constitution, they are now, thanks to the momentum of the current moment, supported by it.

California,<sup>43</sup> and a proposed amendment to the constitution of the Ho-Chunk nation.<sup>44</sup>

Another overarching influence on the development of the rights of nature in the United States appears to have been recent high-profile cases concerning corporate rights. Rightly or wrongly decided, *Citizens United v. Federal Election Commission*<sup>45</sup> was a catalyst for public agitation against corporate rights in the United States.<sup>46</sup>

41. *Shapleigh, Maine, Residents Vote in Rights-Based Ordinance to Protect Their Water*, COMMUNITY ENVTL. LEGAL DEF. FUND (Feb. 28, 2009), <http://celdf.org/2009/02/shapleigh-maine-residents-vote-in-rights-based-ordinance-to-protect-their-water/> [<https://perma.cc/RN3N-EL48>]; *Water Privatization*, COMMUNITY ENVTL. LEGAL DEF. FUND (Aug. 4, 2015), <http://celdf.org/rights/issues/water-privatization/> [<https://perma.cc/5RUB-WKLA>].

42. Press Release, Cmty. Envtl. Legal Def. Fund, The People of Barrington, NH, Vote in Community Rights at Town Meeting (Mar. 8, 2016), available at <http://celdf.org/2016/03/press-release-the-people-of-barrington-nh-vote-in-community-rights-at-town-meeting/> [<http://perma.cc/RH6K-A548>]; *State Constitutional Change*, N.H. COMMUNITY RTS. NETWORK, <http://www.nhcommunityrights.org/state-constitutional-change.html> [<http://perma.cc/U69L-LRG8>] (last visited Oct. 30, 2017).

43. SANTA MONICA, CA., CODE ch. 4.75 (2013).

44. Gen. Council Res. 10-20-15P, Leg. (Ho-Chunk Nation 2015).

45. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

46. See e.g., David Cole, *How to Reverse Citizens United*, THE ATLANTIC (Apr. 2016), <http://www.theatlantic.com/magazine/archive/2016/04/how-to-reverse-citizenunited/471504/> [<https://perma.cc/4RRF-GFJD>]; DEMOCRACY IS FOR PEOPLE.ORG, <http://www.democracyisforpeople.org> [<https://perma.cc/CYL8-L9S5>] (last visited Nov. 18, 2017) (fighting for citizens' interests before the federal government in various issues such as health care reform and climate change); James Marc Leas, *The Supreme Court Supplied a Blueprint to Overcome "Citizens United"—We Just Need to Use it*, TRUTH-OUT (Jan. 25, 2017), <http://www.truth-out.org/opinion/item/39209-the-supreme-court-supplied-a-blueprint-to-overcome-citizens-united-we-just-need-to-use-it> [<https://perma.cc/BXQ7-EP8A>] (describing what steps are necessary to get *Citizens United* overturned); *Move to Amend "Citizens United" and Abolish Corporate Personhood*, ELECTION DEF. ALLIANCE, <http://electiondefensealliance.org/Move-to-Amend> [<https://perma.cc/7872-GCFU>] (last visited Nov. 18, 2017) (collecting resources critiquing *Citizens United* and seeking to limit corporate power); Peter Overby, *Presidential Candidates Pledge to Undo 'Citizens United.' But Can They?*, NPR (February 14, 2016, 6:00 AM), <http://www.npr.org/2016/02/14/466668949/presidential-candidates-pledge-to-undo-citizens-united-but-can-they> [<https://perma.cc/XX5S-D9KF>] (discussing the 2016 presidential election and where the various candidates stood on campaign finance laws); *We the People, Not We the Corporations*, MOVE TO AMEND, <https://movetoamend.org> [<https://perma.cc/DBP9-CTBA>] (last visited Nov. 18, 2017) (focusing on ending "corporate rule" and creating a democracy that is focused on citizens' interests versus corporate interests). While *Citizens United* did not turn on the question of the personhood of corporations, it brought the issue into the forefront of the public consciousness and public anger over the result of the case. Most of the American versions of rights of nature seem to have gotten their start in direct opposition to corporate power—to corporations that want to undertake fracking (in the Pittsburgh, PA example) or other activities harmful to local communities (like in Tamaqua Borough). *Rights of Nature: Timeline*, *supra* note 14. These communities appear to have taken up the rights of nature as a challenge to these corporate interests and as an assertion of the legitimacy of, if not a right to, local self-governance.

Part of the force of the negative public reaction to the opinion may have been based in the disjuncture between the Court's assertion of the obviousness of the corporation's status as a (legal) person and the public's perception of the patent ludicrousness of corporations as persons in lay terms<sup>47</sup>—as social persons.<sup>48</sup>

The case may further be seen as a catalyst for the spread of rights of nature regimes. Many of the local ordinances promulgating the rights of nature in the United States—including the Tamaqua Borough ordinance, which has served as a model for many of the others<sup>49</sup>—explicitly name corporate power as their foil.<sup>50</sup> If constitutional rights protect already-powerful corporate entities as “persons” (the argument goes), why not so protect things that actually, and desperately, need our protection? But throughout the world the environment has always needed our protection—so it is easy to overlook what is new here.

## B. What is Old and What is New Here

Various jurisdictions have offered protection to the natural environment through substantive environmental protection laws and the granting of standing to human beings who allege environmentally related harms. Most constitutions worldwide have provisions for the protection of features of the environment. Switzerland in particular has a constitutional provision recognizing the rights of certain natural entities (“animals, plants, and other

47. See, e.g., note 46.

48. See generally Gwendolyn Gordon, *Culture in Corporate Law or: A Black Corporation, a Christian Corporation, and a Maori Corporation Walk into a Bar...*, 39 SEATTLE U. L. REV. 353 (2015) (discussing the social personhood of corporations as related to their social responsibility).

49. See *Rights of Nature: Timeline*, supra note 14 (“In 2006, CELDF worked with the small community of Tamaqua Borough, in Schuylkill County, Pennsylvania, as it sought to ban waste corporations from dumping toxic sewage sludge in the community. CELDF assisted Tamaqua to draft a Rights of Nature law which banned sludging as a violation of the Rights of Nature. With the vote of the Borough Council, Tamaqua became the very first place in the United States, and the world, to recognize the Rights of Nature in law.”)

50. See, e.g., PITTSBURGH, PA., CODE § 618.04 (2010) (forbidding corporations from extracting natural gas in Pittsburgh and stating that corporations will not have the rights of ‘persons’ if they violate the law); SANTA MONICA, CA., CODE ch. 4.75.030 (2013) (codifying the city of Santa Monica’s commitment to sustainability through protecting and preserving the natural environment, creating sustainable systems, and putting environmental concerns over those of private, financial interests of corporations); Gen. Council Res. 10-20-15P, Leg. (Ho-Chunk Nation 2015). (resolving to amend the Ho-Chunk Constitution to grant constitutional rights to nature in art. x).

organisms”) as linked to “the dignity of the creature and the security of man, animal and environment” that predates Ecuador’s constitutional amendments regarding the rights of nature.<sup>51</sup> Ecuador’s constitution was the first to recognize nature itself as a subject of rights, independent of human interests.

Public trust doctrine already protects natural features, tasking the government with holding in trust these features in the interest of the public.<sup>52</sup> This doctrine, like the Swiss constitutional provisions, links protection of nature to human interests.

To some extent, however, legal interests for natural features in themselves are already recognized in the law. In the realm of property, land—not human persons—holds easements appurtenant. These are rights running with the land, not with human beings.<sup>53</sup> The doctrine of waste takes as its root the notion of intrinsic value in land—albeit value to human and other interests.<sup>54</sup> In civil procedure, property at issue in a forfeiture *in rem* is named as a defendant.<sup>55</sup> We usually imagine that a defendant may only be someone or something that has putatively breached a duty or otherwise putatively committed some legally cognizable harm.<sup>56</sup> Thus, while environmental personhood sounds radical, and is a new and robust way of protecting environmental interests outside those of human beings, the recognition of non-human and non-corporate interests and duties in law is not unheard of. It is certainly not revolutionary.

However, I focus in this Article on the novel idea of designating parts of nature—such as a forest or a river—as a legal person entitled to independent regard and consideration. Interests of these “environmental persons” are vigorously protected in a way that is not contingent on corresponding interests of human beings,

51. BUNDESVERFASSUNG [BV] [CONSTITUTION] Apr. 18, 1999, SR 101, art. 120, para. 2 (Switz.).

52. See generally Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970).

53. Charles E. Clark, *The Assignability of Easements, Profits and Equitable Restrictions*, 38 YALE L.J. 139, 139 (1928).

54. John G. Sprankling, *The Antiwilderness Bias in American Property Law*, 63 U. CHI. L. REV. 519, 533–36 (1996).

55. Matthew P. Harrington, *Rethinking In Rem: The Supreme Court’s New (And Misguided) Approach to Civil Forfeiture*, 12 YALE L. & POL’Y REV. 281, 285 (1994).

56. RUFUS WAPLES, A TREATISE ON PROCEEDINGS IN REM § 1 (1882) (“The legal fiction of the primary responsibility of property, under certain circumstances, is the basis of all proceedings *in rem*.”) (emphasis in original).

such as human interests in natural resource exploitation or harvesting or even human recreational or restorative interests in the enjoyment of natural beauty. In other words, “environmental persons” are given a robust and expansive legal footing that is independent of directly connected human interests.

The next Part outlines the ways in which just such an independent legal footing has proved crucial in the protection of corporate interests.

### III. THE ANALOGY TO CORPORATE PERSONHOOD

The current movement toward protecting the environment by means of legal personhood makes sense partly as a result of and a reaction to the seemingly unremarkable status of corporate personhood in protecting corporate rights.<sup>57</sup> But a right, we are reminded, “is not, as the layman may think, some strange substance that one either has or has not.”<sup>58</sup> The status of corporate personhood as a vector for asserting corporate rights has shifted over time and changes to political climates. At times, those wishing to avoid regulation of corporations have argued vociferously for the rights of corporations as persons. At other times, these interests have been best served by the avoidance of any such status. But these switches are not merely questions of ontology, of whether or not the corporation is a person.<sup>59</sup> The uses to which this personhood is put matter more.

The modern doctrine of corporate personhood sprung originally from contract and property concerns for shareholders, but the doctrine was developed over time “without a coherent explanation

57. See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751, 2769 (2014) (stating that corporate personhood is hardly even worth discussing); *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 336–41 (2010). On the other hand, for examples of scholars discussing the unsettled issue of corporate personhood, see Reuven S. Avi-Yonah, *The Cyclical Transformations of the Corporate Form: A Historical Perspective on Corporate Social Responsibility*, 30 DEL. J. CORP. L. 767 (2005); Dewey, *supra* note 3; H. L. A. Hart, *Definition and Theory in Jurisprudence*, 70 L. Q. REV. 37, 43–47 (1954); Gregory A. Mark, Comment, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441 (1987); Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L. J. 577 (1990); Larry E. Ribstein, *The Constitutional Conception of the Corporation*, 4 SUP. CT. ECON. REV. 95 (1995).

58. Stone, *supra* note 5, at 482.

59. Eric W. Orts, *Theorizing the Firm: Organizational Ontology in the Supreme Court*, 65 DEPAUL L. REV. 559 (2016); Walt & Schwartzman, *supra* note 3.

or consistent approach[,]” eventually becoming the incoherent, inconsistent wildebeest we know today.<sup>60</sup>

Of course, discourses of corporate personality have always varied over time and space;<sup>61</sup> corporate personhood as a metaphor has a particularly long tenure, dating back to ancient Roman law.<sup>62</sup> The corporation as a legal person distinct from the individuals involved with it developed during the Middle Ages. This corporation was a “person” in the sense that it had the ability to sue, to face liability, and to own property.<sup>63</sup> Thus at common law, the corporation was personified in a mostly metaphorical sense—a sense that differed in important ways from the way that the doctrine of corporate personhood has come to develop in modern law.<sup>64</sup>

From this poetic and pragmatic usage, however, the corporation was made in American law not merely a legal entity analogized to a person, but an actual person for the purposes of certain constitutional issues.<sup>65</sup>

60. Pollman, *supra* note 3, at 1630 (describing the weaknesses inherent in the Court’s piecemeal granting of rights to corporations). The mechanism behind this incoherence is the Court’s similarly disordered take on the nature of corporations. *See generally* Avi-Yonah, *supra* note 57; Reuven Avi-Yonah, *Citizens United and the Corporate Form*, 1 ACCT. ECON. & L., no. 1, 2011, at 1; Orts, *supra* note 59, at 561.

61. Ron Harris, *The Transplantation of the Legal Discourse on Corporate Personality Theories: From German Codification to British Political Pluralism and American Big Business*, 63 WASH. & LEE L. REV. 1421, 1426 (2006). Contra Dewey, Ron Harris notes that while discourse has varied, it has done so in ways not endlessly malleable but instead limited by legal, political, and material circumstances. Harris indicts Dewey as insufficiently concerned with the fabric of legal discourse—the context for debates over corporate personality. *Id.* at 1475.

62. Pollman, *supra* note 3, at 1631–32; *see also* Harris, *supra* note 61.

63. *See* ERNST KANTOROWICZ, *THE KING’S TWO BODIES: A STUDY IN MEDIEVAL POLITICAL THEOLOGY* 207–09 (1957); Avi-Yonah, *supra* note 57, at 770–71; Henry Hansmann et al., *Law and the Rise of the Firm*, 119 HARV. L. REV. 1335, 1364–86 (2006).

64. [P]ersonification of the corporation in the constitutional sense was different than the “legal personality” that courts, dating back to earlier English law, had already recognized in giving corporations certain business capabilities. Legal personality of corporations included the ability to contract, own property, sue and be sued in the corporate name. Specifically, the corporate ability to own property and to sue and be sued were considered incident to the corporate form at common law. Courts also recognized corporations as having the ability to contract in their own name, but historically treated this under the *ultra vires* doctrine as a capacity limited by the corporate charter . . . . Although these entity attributes do not directly implicate the doctrine of corporate personhood . . . early corporate personhood cases are nonetheless akin to the concept of legal personality insofar as the constitutional jurisprudence bolstered the corporation as a separate entity from its shareholders and protected the property interests of the shareholders in the corporate property.

Pollman, *supra* note 3, at 1638–39

65. *Id.* at 1631–32.

A number of theories of the corporate form have been mobilized, sometimes coexisting in time or even in single cases.<sup>66</sup> A broad outline of the parameters of these theories would identify a concession or artificial entity theory wherein the state was the grantor of corporate power, rendering the corporation a state invention; a contract theory wherein the corporation, rather than being an invention of the state, was the contractual coming together of people sharing natural economic interests; and a real entity theory wherein the corporation was its own creature with its own interests.<sup>67</sup>

When corporations were relatively rare and corporate charters granted sparingly, the corporation was seen as an entity granted existence by concession of the state—because the very ability to act as corporations was dependent upon the state’s charter.<sup>68</sup> This meant that corporations truly owed their lives to the state: the state brought the corporation into being, limited its number of shareholders and term of existence, and defined the limited set of objects that it could pursue.<sup>69</sup> This concession theory of the corporation underlay a legal regime that operated to make corporations purpose-limited and generally public works oriented enterprises.<sup>70</sup> In most types of early U.S. incorporated entities:

[T]he primary purpose for incorporating [was] to provide a mechanism for holding property for some public, charitable, educational, or religious use, so that such property would not be owned by the individuals managing the institution or making decisions about the use of the property. Because the property held by an incorporated entity was not owned by natural persons, it could not be passed to the heirs of such persons but would continue to be

66. Avi-Yonah, *supra* note 57; Avi-Yonah, *supra* note 60 (arguing that corporate theories have evolved in a cyclical fashion, with the real entity stance winning out during periods of stability); *id.* at 16 (“[A]ll three views of the corporation appear in *Hale v. Henkel*, decided by the Supreme Court in 1906.”).

67. Avi-Yonah, *supra* note 57, at 771; Avi-Yonah, *supra* note 60, at 3; Mark M. Hager, *Bodies Politic: The Progressive History of Organizational ‘Real Entity’ Theory*, 50 U. PITT. L. REV. 575, 579 (1989); Katsuho Iwai, *Persons, Things and Corporations: The Corporate Personality Controversy and Comparative Corporate Governance*, 47 AM. J. COMP. L. 583, 583–84 (1999); David Millon, *Theories of the Corporation*, 1990 DUKE L. J. 201, 202–03 (1990); ORTS, *supra* note 3, at 10–14.

68. See Hager, *supra* note 67, at 579–80; Avi-Yonah, *supra* note 60, at 5–6.

69. Harris, *supra* note 61, at 1424; Pollman, *supra* note 3, at 1634–35.

70. See Margaret M. Blair, *Locking in Capital: What Corporate Law Achieved for Business Organizers in the Nineteenth Century*, 51 UCLA L. REV. 387, 423, 428 (2003); Pollman, *supra* note 3, at 1634.



the property of the institution, even as its “managers” (mayors, bishops, or presidents, for example) came and went.<sup>71</sup>

It was in the context of these docile corporate creatures that the American doctrine of corporate personhood developed.<sup>72</sup>

Personhood, however, would come to make the corporation much more powerful. Entity status arguably was key to the capacity of corporations to “lock in” capital, a characteristic crucial to the nineteenth-century explosion in the use of the corporate form.<sup>73</sup> Commentators have challenged, however, the notion that entity status was necessary or sufficient for liquidation protection as against owners, arguing instead that the most important role of entity status in the explosive growth of the corporation was in liquidation protection as against creditors.<sup>74</sup> Thus entity status perhaps mattered most of all for protection of assets against creditors.

Corporate charters were infrequently granted prior to the mid-1800s,<sup>75</sup> when they began to grow in popularity.<sup>76</sup> At about the

71. Blair, *supra* note 70, at 423–24.

72. Pollman, *supra* note 3, at 1635. This was of course not the invention of corporate personhood; the concept developed from Roman law. *See generally* Avi-Yonah *supra* note 57 (tracing history of the corporate form from its origins in Rome); *see also* Avi-Yonah, *supra* note 60, at 10.

73. [O]ther organizational forms such as individual proprietorships, partnerships, and so-called “joint stock” companies (which were considered a species of partnership) were available to organizers of business enterprises and were commonly used at the beginning of the nineteenth century. But none of these forms created organizations with “entity” status, in the sense that property could be held in the name of the entity, rather than in the name of the individuals involved in the enterprise, and none established governance mechanisms that were clearly separate from the participants.

Blair, *supra* note 70, at 394. Blair notes that while today partnerships may be recognized as entities, in the nineteenth century the only business organization to which this status was available was the corporation. *Id.* Over the course of that century, business associations that had characteristics of partnerships and trusts began to grow to resemble today’s corporations. Blair, *supra* note 70, at 419; Morton J. Horwitz, *Santa Clara Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173, 182 (1986). Courts tended to treat these “proto-corporations” like partnerships; they were associations that likely lacked limited liability. Blair, *supra* note 70, at 419.

74. *See generally* Henry Hansmann & Reiner Kraakman, *The Essential Role of Organizational Law*, 110 YALE L.J. 387 (2000); Hansmann et al., *supra* note 63, at 1336.

75. *See* Avi-Yonah, *supra* note 60, at 5–6; Blair, *supra* note 70, at 415; Pollman, *supra* note 3, at 1633–35, 40. Reuven Avi-Yonah notes the unevenness of these developments as between England and the United States. Whereas the industrial revolution passed in England without much influence from the corporate form or limited liability, in the United States the shift from harsh restrictions on corporate charters to an “explosion” in the use of the corporate

same time, limited liability became the default rule, though not a universal one, and came to be seen as a main motivator in that popularization.<sup>77</sup>

Cases like *Trustees of Dartmouth College v. Woodward*,<sup>78</sup> which concerned contract interests, strongly influenced the early course of the doctrine of corporate personality.<sup>79</sup> In that case the state had attempted to transform the private Dartmouth College into a public institution. The Court, evincing a strongly concession-based theory of the corporation, held that the college, only existing as the creation of the state and only able to do what its charter allowed it to do, was a private institution—and “would be protected as a private contract” with the state.<sup>80</sup> Here, a concession-based theory that might have looked like a disavowal of the power of the corporation (as “mere creature of law”) was instead an assertion of its rights as against the state.<sup>81</sup> It has been argued that this development worked out practically to be something like real entity status.<sup>82</sup> As the nineteenth century began to come to a close, concession theory fell out of favor briefly, likely due to a rise in general incorporation statutes.<sup>83</sup>

Concession theory’s American successor, contract or aggregate theory, came about due to the gnarls of Federalism.<sup>84</sup> Issues regarding forum selection, diversity jurisdiction, state discrimination against foreign corporations, conflict of laws, and questions of corporate status raised with the ratification of the Fourteenth amendment spurred dissatisfaction with concession

form began soon after the revolution had ended. Avi-Yonah, *supra* note 57, at 784–85; Avi-Yonah, *supra* note 60, at 5–6.

76. Blair, *supra* note 70, at 426 (“By the 1820s, . . . the demand by business people for corporate charters was growing rapidly, and the states were responding by granting such charters ever more freely.”).

77. *Id.* at 439–40; Avi-Yonah, *supra* note 60, at 10 (noting that limited liability was adopted by most U.S. states in the 1830s, but did not exist for English corporations until 1855).

78. *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518 (1819).

79. See Horwitz, *supra* note 73, at 174; Pollman, *supra* note 3, at 1635 n.34 (“Dartmouth College did not involve a business corporation, but commentators have noted its primary significance is with regard to business corporations.”).

80. Pollman, *supra* note 3, at 1636.

81. *Woodward*, 17 U.S. at 636; ORTS, *supra* note 3, at 126.

82. Avi-Yonah, *supra* note 60, at 10.

83. *Id.*; Harris, *supra* note 61, at 1466; Horwitz, *supra* note 73, at 181. This is of course a broad sketch. Concession theory remains current, invoked where courts wish to rule in favor of the government. See generally Avi-Yonah, *supra* note 60.

84. See Harris, *supra* note 61, at 1466–68.

theory.<sup>85</sup> Contract theory—in which groups made themselves, becoming legal entities by means of the private contractual behavior of an aggregate of individuals—began to make sense in this context.<sup>86</sup> The legitimacy of this theory was linked to the rise of general incorporation statutes just as was the delegitimation of concession theory.<sup>87</sup>

Sometimes corporate interests have been best served by contract or aggregate theory's avoidance of the conceptualization of the corporation as its own entity. Although the words and reasoning of the opinion give no such grounds, *Santa Clara v. Southern Pacific R.R. Co.* has come to be seen as a central plank in the conception of corporations as “persons.”<sup>88</sup> Arguably, however, the case owes more to a conception of corporate personhood in the sense in which Mitt Romney appeared to mean it in the anecdote referenced at the start of this article: that the corporation ought to be seen as a “person” in order to protect the interests of the individual persons (conceptualized here, though not necessarily, as shareholders) comprising the corporation.<sup>89</sup>

Unfortunately, contract theory had problems of its own. For example, useful as it was in avoiding regulation,<sup>90</sup> it directly contradicted the limited liability that was so important for the rise of the corporate form.<sup>91</sup> Plus, contract theory-based arguments were so politically indeterminate that they could even be turned *against* the interests of big business.<sup>92</sup> Naturally, then, contract

85. *Id.* at 1467–68.

86. *Id.* at 1469. Pollman notes that this view of the corporation as a contract between its members gave rise to an aggregate theory more directly concerned with the nature of the corporation as collection of shareholders. Pollman, *supra* note 3, at 1641.

87. Harris, *supra* note 61, at 1468–69.

88. *City of Santa Clara v. S. Pac. R.R. Co.*, 118 U.S. 394 (1886); Pollman, *supra* note 3, at 1642–44.

89. See Horwitz, *supra* note 73; Pollman, *supra* note 3 at 1644–45; Ashley Parker, ‘Corporations are People,’ Romney Tells Iowa Hecklers Angry Over His Tax Policy, N.Y. TIMES (Aug. 12, 2011), <http://www.nytimes.com/2011/08/12/us/politics/12romney.html> [<https://perma.cc/ZW7A-EK8P>].

90. *E.g.*, *S. Pac. R.R. Co.*, 118 U.S. 394 (standing for the principle that railroad corporations are “persons” within the definition of the Fourteenth Amendment, stemming from whether the corporations could take certain deductions on their property); see also Pollman, *supra* note 3, at 1642.

91. Harris, *supra* note 61, at 1470.

92. *Id.* at 1470–71.

theory had to die. A briefly resurgent concession theory followed suit with the arrival of real entity theory.<sup>93</sup>

Real entity theory, wherein the corporation was, so to speak, its own person, ushered in the age of the extension of constitutional protections to the corporation. Real entity status, Harris notes, “justifies a wide set of constitutional protections, based in the Bill of Rights and the Fourteenth Amendment.”<sup>94</sup> This development thus provided protections previously unavailable to the corporation—simultaneously retaining both the limited liability of concession theory and the possibility of claiming rights reserved under the constitution for natural persons.<sup>95</sup>

Thus, throughout history, different conceptions of the corporation have served different ends at different times;<sup>96</sup> in the United States, the Court has swung between the three main conceptions outlined above, frustrating and complicating what might otherwise be imagined as a progression from one theory to the next.<sup>97</sup>

John Dewey once famously said that, so far as corporate personality went, “‘person’ might legally mean whatever the law makes it mean.”<sup>98</sup> Dewey’s classic pronouncement does not, of course, foreclose debate on what this signification might signify.<sup>99</sup> It is instead a call to analysis “based on the likely social consequences of recognizing one feature or another of an organization.”<sup>100</sup> While Dewey’s critique acted to free the theorization of the corporation from a tangle of endless debates that had long occupied it, it also in many ways impoverished it.<sup>101</sup>

This impoverishment has been felt in the wake of cases that have renewed interest in corporate theory.<sup>102</sup> *Citizens United* and *Hobby Lobby* may be considered notable for many reasons; chief among

93. *Id.* at 1470–72.

94. *Id.* at 1473.

95. *Id.* at 1474.

96. See Dewey, *supra* note 3; see also Avi-Yonah, *supra* note 57; Hager, *supra* note 67, at 637.

97. See, e.g., Avi-Yonah, *supra* note 57, at 795–97 (describing the self-contradictory usage of corporate theory in the case *Hale v. Henkel*, 201 U.S. 43 (1906)); Orts, *supra* note 59, at 561 (calling the Court’s corporate law jurisprudence “undertheorized”); Pollman, *supra* note 3, at 1645–59.

98. Dewey, *supra* note 3, at 656.

99. Orts, *supra* note 59, at 559–61.

100. *Id.* at 560.

101. *Id.* at 561.

102. *Id.*

these is their freewheeling—some would say undertheorized—take on the nature of the business corporation.<sup>103</sup>

While the swings outlined here appear to have borne out John Dewey's arguments that these arguments are manipulable to various (and sometimes even contradictory) ends, there are some caveats. The ends to which these theoretical stances on corporations may be put are not in fact infinitely pliable.<sup>104</sup> Newer scholarly approaches war between going almost directly back to Dewey's early legal realist approach<sup>105</sup> or splitting the difference—indeterminacy is there and the corporation is what the law says it is (it is made up), but also has real consequences so is also real.<sup>106</sup> In one view, an “iconic dimension”—overdetermining factors outside of the realm of logic, like ascendant metaphors or paradigms—limits the malleability of legal concepts.<sup>107</sup> This is so because “the ‘meaning’ of legal concepts does not lie primarily in their logical implications to begin with.”<sup>108</sup> History, in this view, is “highly relevant,” but most important is facility with metaphor and symbol.<sup>109</sup>

Throughout the course of the shifts in theoretical focus, it is clear that the important question is never merely whether or not the corporation is a person.<sup>110</sup> Compare Elizabeth Pollman's argument that corporate personhood “should be understood as merely recognizing the corporation's ability to hold rights in order to protect the people involved” and the similar, but much more flexible notion of the nature of rights in personhood articulated by Dewey and foundational in Pollman's understanding.<sup>111</sup> Eric Orts and Amy Sepinwall have challenged Pollman's arguments

103. *Id.*

104. Horwitz, *supra* note 73, at 224 (pushing back against Dewey's supposedly infinite indeterminacy by noting the relevance of historical conditions).

105. Pollman, *supra* note 3, at 1631; Walt & Schwartzman, *supra* note 3.

106. *See* ORTS, *supra* note 3, at 12.

107. Hager, *supra* note 67, at 576.

108. *Id.*

109. *Id.* at 577.

110. Pollman, *supra* note 3, at 1630–31 (The “concept [of corporate personhood] alone does not speak to whether corporations should have a particular right; it only provides a starting point of analysis . . .”).

111. *Id.*; Dewey, *supra* note 3, at 656 (“In saying that ‘person’ might legally mean whatever the law makes it mean, I am trying to say that ‘person’ might be used simply as a synonym for a right-and-duty-bearing unit. Any such unit would be a person; such a statement would be truistic, tautological. Hence it would convey no implications, except that the unit has those rights and duties which the courts find it to have.”).

regarding the nature of corporate personhood, arguing that corporations have rights that may be asserted independently of Pollman's "derivative rights" that must descend from the rights of human persons.<sup>112</sup>

It is important to keep in mind the caveat that Horwitz and Hager each centered in their work, and critiqued as under-recognized, or at least underemphasized, in Dewey's. While Dewey recognized that "we cannot say, without qualification in respecting time and conditions, that either theory [here fiction and real entity theory] works out in the direction of limitation of corporate power,"<sup>113</sup> it went underemphasized that "time and conditions" are not secondary but crucial to analysis. Historical and legal conditions do in fact limit the manipulation of theoretical stances—they are not endlessly manipulable.<sup>114</sup>

The same will be the case with the environment—how easily will we be able to imagine nature as a rights-holder, and how will that imaginatory space energize the will to protect nature by means of these varied rights arguments? Are we at a point where the "time and conditions" are finally such that we can use these ideas to protect nature with the zeal with which we have protected corporate power for the past century and a half?

#### IV. NATURE VERSUS PEOPLE VERSUS THINGS

As the previous Part should make clear, the legal fact of corporate personhood (as opposed to its parameters and content) is generally accepted. Socially, however, this is not the case: it makes little sense to most people strolling along a street to point out that person over there, Starbucks.<sup>115</sup> Even as the practical necessity of entity status for corporations goes mostly uncontested,

112. Eric W. Orts & Amy Sepinwall, *Privacy and Organizational Persons*, 99 MINN. L. REV. 2275, 2286–87 (2015).

113. Dewey, *supra* note 3, at 668.

114. Horwitz argued that "the most important controversial legal abstractions do have determinative legal or political significance." Horwitz, *supra* note 73, at 175–76. Horwitz might have believed too ferociously in the determinative significance of historical conditions. He does not mean to argue that things could only have happened the way that they did, but his assertion that "in particular contexts the choice of one theory over another is not random or accidental because history and usage have limited their deepest meanings and application" nonetheless obscures the contingency of these (real, actual) limits. *Id.* at 176.

115. Thanks to Vince Buccola for this articulation of this point.

the parameters of the corporation's personhood thus remain controversial.

In the case of the environment, the situation is reversed. While in most jurisdictions the environment is not a legal person, it arguably has a more compelling claim to personhood as it is socially understood. As outlined in the previous Part, changes in social understandings of the nature of the corporation underpinned and made more "right" particularly legal rights for the corporation. The environment's more convincing claim to personhood as it is socially understood makes it thus more legitimately the recipient of rights to personhood than the corporation.

To better understand this point, let us pause here to lay out just what it is we mean when we speak of giving "voice" or "rights" to something we call "nature." What's so great about personhood, anyway? Environmental ethicists have long wrangled with such questions.<sup>116</sup> Now the law must, too.<sup>117</sup>

#### A. Ontological Status and Political Context

Debates over the nature and limits of the ontological concerns that so animated the history of corporate theory take on new life in the environmental context, where ontological concerns will matter differently.

As described in Part III, the ontological status of the corporation matters less than its socio-political circumstances. This insight tracks the realist critique John Dewey made long ago as to the nature of the corporation: legal personhood "signifies what the law makes it signify."<sup>118</sup>

But what does this nature matter, for the business corporation? For Eric Orts, ontology matters as an unavoidable issue: "[t]o ignore organizational ontology," he argues, "is actually to adopt

116. See generally ALDO LEOPOLD, *A SAND COUNTY ALMANAC* (1949) (advocating for the idea of "land ethic," which is seen as an important moment in the conservation movement); DEREK PARFIT, *REASONS AND PERSONS* (1986) (postulating a reductive account and deflationary view of personal identity); see also RODERICK FRAZIER NASH, *THE RIGHTS OF NATURE: A HISTORY OF ENVIRONMENTAL ETHICS* (1989) (illustrating Americans' evolving relationship with nature and advocating for nature having rights).

117. See generally Jedediah Purdy, *Our Place in the World: A New Relationship for Environmental Ethics and Law*, 62 *DUKE L.J.* 857 (2013) (discussing recent changes in stakes and orientations regarding law and environmental ethics).

118. Dewey, *supra* note 3, at 655.

one or another ontological view unconsciously, ignorantly, or manipulatively.”<sup>119</sup>

Yet even in accepting this argument, we loop back to Dewey, and to a point made by Roberta Romano many years ago: our politics necessarily inform these adoptions.<sup>120</sup> Thus, the argument that corporate ontology does *not* matter has legs: we disagree not about whether corporations are entities, but how.<sup>121</sup> This is because, even as we argue over the effects of corporate status under the law, the possibility for corporate entity-hood is, at some basic level, uncontroversial. Reasonable people are not now wrestling over whether corporations ought, for instance, to have the legal status to sue and be sued.

Such is not the case for nature. Now, even many years after Christopher Stone’s seminal article,<sup>122</sup> the notion of rights for natural entities independent of human interests remains controversial and somewhat unusual.<sup>123</sup>

## B. From Anthropocentrism to Ecocentrism

What is outstanding about the legal regimes outlined in Part II is their decentering of human needs and interests. A homocentric view long tended to jam environmental protection arguments into particular shapes—an environmental measure might be justified based on, say, allowing more people to experience wilderness, or protecting the food chain for human consumption.<sup>124</sup>

119. Orts, *supra* note 59, at 562.

120. Roberta Romano, *Metapolitics and Corporate Law Reform*, 36 STANFORD L. REV. 923, 924 (1984). A fact too-seldom acknowledged in the corporate case. *Id.* As with corporations, however, the recognition of the capacity for rights is only the beginning: “To say that nature has its own rights does not give us a viable guideline in deciding when and to what extent nature’s rights should prevail over countervailing rights of individual humans.” Susan Emmenegger & Axel Tschentscher, *Taking Nature’s Rights Seriously: The Long Way to Biocentrism in Environmental Law*, 6 GEO. INT’L ENVTL. L. REV. 545, 581 (1994).

121. See generally Walt & Schwartzman, *supra* note 3.

122. See *supra* notes 30–31 and accompanying text.

123. See generally, e.g., PETER SINGER, *ANIMAL LIBERATION: A NEW ETHICS FOR OUR TREATMENT OF ANIMALS* (1975); Matt Ampleman & Douglas A. Kysar, *Living with Owning*, 92 IND. L. J. 327 (2016); Cass R. Sunstein, *Standing for Animals (with Notes on Animal Rights)*, 47 UCLA L. REV. 1333 (2000); Laura G. Kniaz, Comment, *Animal Liberation and the Law: Animals Board the Underground Railroad*, 43 BUFF. L. REV. 765 (1995).

124. Stone, *supra* note 5, at 490 (“One can say that we never know what is going to prove useful at some future time. In order to protect ourselves, therefore, we ought to be conservative now in our treatment of nature. I agree. But when conservationists argue this way to the exclusion of other arguments, or find themselves speaking in terms of



There have long been ethical arguments voiced for the protection of nature;<sup>125</sup> more recently, *legal* norms began in various ways to protect the environment too.<sup>126</sup> Throughout it all one thing that has stood out is the changing ways human beings relate to what we call nature. Perhaps we might view this set of changes as occurring in a way broadly analogous to the way that protections for the corporation co-evolved with shifting conceptions of individual personhood.<sup>127</sup>

In the United States, for instance, the end of the nineteenth century saw the legal establishment of national parks with the notion of protecting the environment *for* human use.<sup>128</sup> Over time, the focus of legal and scholarly attention to the protection of nature has moved from being entirely focused on human interests in exploiting nature, to protecting nature for future human generations, to conceptions that allow for nature to be protected as intrinsically valuable.<sup>129</sup> In contrast with previous “purely

‘recreational interests’ so continuously as to play up to, and reinforce, homocentrist perspectives, there is something sad about the spectacle. One feels that the arguments lack even their proponent’s convictions. I expect they want to say something less egotistic and more emphatic but the prevailing and sanctioned modes of explanation in our society are not quite ready for it.”)

125. See generally LEOPOLD, *supra* note 116 (discussing human action and the effects on nature); see also NASH, *supra* note 116 (describing changing attitudes to nature throughout history); PARFIT, *supra* note 116 (disintegrating personhood and identity).

126. See, e.g., Emmenegger & Tschentscher, *supra* note 120 (advocating that nature’s rights in a biocentric perspective can be shown through international environmental instruments); see also Purdy, *supra* note 117 (discussing the increasing legal protections of nature).

127. See Dewey, *supra* note 3, at 668 (comparing theories of corporate identity).

128. See Emmenegger & Tschentscher, *supra* note 120, at 553 (outlining the language used in instruments establishing national parks in America); see also JOSEPH L. SAX, MOUNTAINS WITHOUT HANDRAILS: REFLECTIONS ON THE NATIONAL PARKS (1980); Tribe, *supra* note 117, at 1326 (“By treating individual human need and desire as the ultimate frame of reference, and by assuming that human goals and ends must be taken as externally ‘given’ . . . rather than generated by reason, environmental policy makes a value judgment of enormous significance. And, once that judgment has been made, any claim for the continued existence of threatened wilderness areas or endangered species must rest on the identification of human wants and needs which would be jeopardized by a disputed development.”).

129. See Emmenegger & Tschentscher, *supra* note 120, at 547, 552–53, 564–65 n. 107, 571 (arguing that conceptions of the protection of nature began wholly anthropocentric, such as with the establishment of national parks for human use and enjoyment (as with the Convention Relative to the Preservation of Fauna and Flora in their Natural State); changed slowly to become still human-centered but at least taking into account the rights of future generations (as with sustainability discourse like the Rio Declaration on Environment and Development’s principle that “[t]he right to development must be fulfilled so as to equitably

anthropocentric” views,<sup>130</sup> often tied closely to utilitarian arguments,<sup>131</sup> environmental personhood has gained currency contemporaneously with scholarly reevaluation of the place of human interests in relation to nature—a reevaluation that gives new life to Christopher Stone’s 1972 argument that trees should have standing to litigate their own interests.

This early articulation of how a rights of nature regime might look spoke primarily to the concept of standing.<sup>132</sup> As Stone noted in an example concerning a stream, “[s]o far as the common law is concerned, there is in general no way to challenge the polluter’s actions save at the behest of a lower riparian—another human being—able to show an invasion of *his* rights.”<sup>133</sup> Even where some such riparian chooses to litigate harms to the stream, there are limits on how those harms are likely to be valued:

Whether under language of ‘reasonable use,’ ‘reasonable methods of use,’ ‘balance of convenience,’ or ‘the public interest doctrine,’ what the courts are balancing with varying degrees of directness, are the economic hardships the upper riparian (or dependent community) of abating the pollution vis-à-vis the economic hardships of continued pollution on the lower riparians.<sup>134</sup>

meet developmental and environmental needs of present and future generations”); and then, through this intermediate stage, became open to the value of nature in itself (as in the World Charter for Nature, which, the authors note, dramatically decenters the human by taking care to use language of “nature” rather than “the environment”). Although this neat teleology is a bit suspect, I take the authors’ general point. *See also* Purdy, *supra* note 117, at 889 (“[A]lthough many of the national parks were originally created on the non-Romantic theory that they would be good for public health and civic spirit, by the 1920s the standard account of their purpose was that they were secular temples that restored the spirit by enshrining nature’s finest aesthetic qualities.”).

130. *See generally* Emmenegger & Tschentscher, *supra* note 120 (describing the reasons for protecting nature throughout various time periods). Early treaty-based conservation efforts, for example, trucked extensively in human-centered rationales for conservation. *Id.* at 552–55.

131. *Id.* at 556–62 (discussing the utilitarian rational for natural resource protection). *But see* Stone, *supra* note 5, at 490 (arguing against a utilitarian analysis to rationalize an environmental protectionist’s position).

132. *See* Stone, *supra* note 5, at 475 (“[W]e in effect make the natural object, through its guardian, a jural entity competent to gather up these fragmented and otherwise unrepresented damage claims, and press them before the court even where, for legal or practical reasons, they are not going to be pressed by traditional class action plaintiffs.”) (emphasis omitted).

133. *Id.* at 459 (emphasis in original)

134. *Id.* at 461 (citations omitted). Stone later notes with approval a contemporaneous trend toward liberalization of standing requirements. *Id.* at 467 (“[T]here is a movement in the law toward giving the environment the benefits of standing, although not in a manner as

In the face of such anthropocentrism, noted Laurence Tribe, even a sense of duty toward the environment that gives rise to some effort to act on its behalf “will be translated into the terminology of human self-interest. . . . While the environmentalist may feel somewhat disingenuous in taking this approach, he is likely to regard it as justified by the demands of legal doctrine and the exigencies of political reality.”<sup>135</sup> A human-centered way of approaching environmental problems distorts even the best-intentioned environmentalism.

This means that a nature-focused “rights” approach to the protection of nature is preferable to a human-centered “duties” approach.<sup>136</sup> The point here is important, as arguments that the interests of human beings and those of nature are coterminous hold a certain intuitive force. Despite the fervor of ecologists for such arguments however, “the best interests of individual persons (and even of future human generations) are not demonstrably congruent with those of the natural order as a whole.”<sup>137</sup> Viewing

satisfactory as the guardianship approach.”). Despite the promise of these cases, however, Stone cautioned that the liberalized standing approach taken by the courts does not quite reproduce the putative benefits of the guardianship approach he suggests, which “would secure an effective voice for the environment even where federal administrative action and public-lands and waters were not involved” and would avoid floods of litigation from ill-defined and perhaps overlapping groups seeking to protect a natural feature. *Id.* at 470–72.

135. Laurence H. Tribe, *Ways Not to Think About Plastic Trees: New Foundations for Environmental Law*, 83 YALE L.J. 1315, 1330–31 (1974).

136. Objections as to the capacity of nature to be the subject of rights are easily defeated. See, e.g., Emmenegger & Tschentscher, *supra* note 120, at 574–75 (“Restricting rights to beings who are aware of their interests would make it conceptually impossible to accord them to fetuses or newborn infants . . . . [T]he concept of ‘rights’ is instrumental, i.e., it is merely a legal and moral instrument of protection. That is the reason why lifeless corporations can have rights.”); see also Walt & Schwartzman, *supra* note 3, at 15 (“We anticipate the objection that our argument in principle allows anything to count as a person. If the category of persons serves to promote the values prized by moral theory, then any entity that promotes them might be properly treated as a person. Rocks therefore could count as persons if they are serviceable in a suitable way. The charge accurately identifies an implication of the argument but does not undermine it. Because the category of persons is normative, the entities that count as persons is determined by moral theory, not fact. This is true in law, where statutes sometimes enumerate a nonexhaustive list of persons. It also is true in moral theory. The bare possibility that moral theory or statutes could oddly consider certain entities as persons does not impugn either. It likely turns out that a plausible moral theory does not recognize a value that is promoted by treating rocks as persons. Unorganized groups, such as ethnic minorities, present a closer question because they might have interests, or are instrumental in protecting interests, that the theory recognizes as worth protecting. Corporations present an even closer question.”).

137. Tribe, *supra* note 135, at 1331.

natural and human interests as equivalent in fact blinds us to the interests of nature that do not suit human interests. This is a “rightlessness” that goes right down to our ability to imagine who might be the beneficiary in Stone’s “stream” hypothetical:<sup>138</sup> any damages to the stream beyond those that might be claimed by human interests are rendered invisible to the law.<sup>139</sup>

Properly taking nature into account requires even more than the legal and institutional shifts necessary to be able to see such harms: “whether we will be able to bring about the requisite institutional and population growth changes [to stem the tide of human climate devastation] depends in part upon effecting a radical shift in our feelings about ‘our’ place in the rest of Nature.”<sup>140</sup> Stone gestures here toward the difficulty in recognizing subjects that may hold rights within the non-human natural world without changes in the way that humanness is imagined. Similarly, Laurence Tribe has argued that the choices society made regarding the environment would “significantly shape and . . . not merely implement” the ways in which society values nature.<sup>141</sup>

### C. Disintegrating the Individual in Culture and Law

And perhaps we are at a moment wherein our imagination finally becomes able to encompass the natural rights that failed to gain traction after the early seventies.<sup>142</sup> Legal and popular<sup>143</sup> shifts in

138. Stone, *supra* note 5, at 461; *see also* Emmenegger & Tschentscher, *supra* note 120, at 573 (arguing that the nature’s rights approach is a better rationale for the development of international environmental law).

139. *See, e.g.*, Stone, *supra* note 5, at 462 (“For example, it is easy to imagine a polluter whose activities damage a stream to the extent of \$10,000 annually, although the aggregate damage to all the riparian plaintiffs who come into the suit is only \$3000. If \$3000 is less than the cost to the polluter of shutting down, or making the requisite technological changes, he might prefer to pay off the damages (*i.e.*, the legally cognizable damages) and continue to pollute the stream.”).

140. *Id.* at 495. Stone quotes Hegel as an exemplar of the “stultifying” effect of classical attitudes of human beings toward “things”: “A person has as his substantive end the right of putting his will into any and every thing and thereby making it his, because it has no such end in itself and derives its destiny and soul from his will. This is the absolute right of appropriation which man has over all ‘things.’” *Id.* (quoting GEORGE HEGEL, *HEGEL’S PHILOSOPHY OF RIGHT* 41 (Thomas Malcom Knox trans., 1945)). How depressing!

141. Tribe, *supra* note 135, at 1324. And (as opposed to only) the other way around.

142. *Cf.* Purdy, *supra* note 117, at 883 (mentioning failed movements in environmental law).

143. *See id.* at 883–86 (“[C]hanges in experience and perception, and efforts to articulate these, have been central to the development of American environmental values, including the values that have motivated political and legal action . . . . [T]he most important role of

focus from absolute human centrality mirror the ontological turn in social science, which has recognized that our “selves” are as contingent<sup>144</sup> as “nature.”<sup>145</sup> Consider the evidence from

law in the development of environmental values may well be in shaping experience itself, which is a crucible of ethical change.”); *see, e.g.*, T.N. Godavarman Thirumulpad v. Union of India, AIR 2012 SC 1254, 1258 (India) (“Laws are man-made, hence there is likelihood of anthropocentric bias towards man, and rights of wild animals often tend to be of secondary importance but in the universe man and animal are equally placed . . . [but] environmental protection in case of conflict, is often based on anthropocentricity.”).

144. Schwartzman & Walt note:

There are conceptions of ontology that ask about the fundamental categories of things in the world or about what things are real. They ask a philosophical question, not a scientific one answerable by appeal to the explanatory role of entities in scientific explanations. On these conceptions, whether the corporation falls within which categories or measure of reality would be an ontological question. But this sense of ‘ontology,’ which is controversial, does not (nor could) deny that entities that figure in scientific explanations exist. It instead asks whether, in some well specified way, those entities are among the fundamental classes or are real. The same question could be asked about corporations as intentional agents. For that matter, ontologists who find these conceptions of ontology plausible need also to ask whether individuals are among the fundamental classes of things or are real in the requisite sense. The debate over corporate status and entitlements concerns the existence question, not the issue of fundamental categories or reality.

Schwartzman & Walt, *supra* note 3, at 18 (citations omitted). All fair questions, I think, when it comes to nature—especially when theorized as an Actor Network. *See infra* notes 155–158 and accompanying text. Philosophy, too, questions the unitary nature of human personhood. Take for example Derek Parfit’s argument in that human individuals do not stay ourselves our whole lives, replaced as we are by ourselves as the molecules and cells making us up change alongside shifting bits of memory and experience. PARFIT, *supra* note 116, 199–217.

145. Compare William Connelly & Jane Bennet, *The Crumpled Handkerchief*, in TIME AND HISTORY IN DELEUZE AND SERRES 153 (Bernd Herzogenrath ed., 2012) (disagreeing with Graham Harman’s concepts of lump ontology and relationism), with GRAHAM HARMAN, PRINCE OF NETWORKS: BRUNO LATOUR AND METAPHYSICS (2009) (discussing metaphysics extracted from works by Bruno Latour). *See generally* PHILLIPPE DESCOLA, THE ECOLOGY OF OTHERS (Geneviève Godbout & Benjamin P. Luley trans., 2012) (arguing against the traditional separation between nature and culture in Western anthropological thought); EDUARDO KOHN, HOW FORESTS THINK: TOWARD AN ANTHROPOLOGY BEYOND THE HUMAN (2013) (discussing anthropology based on studies of the Amazon and its inhabitants); Tim Ingold, *A Circumpolar Night’s Dream*, in FIGURED WORLDS: ONTOLOGICAL OBSTACLES IN INTERCULTURAL RELATIONS 25, 26 (John Clammer et al. eds., 2004) (“[I]t is one thing to ask what a human being is, as a particular kind of natural object; quite another to ask what it means to be human, to exist as a rational subject. The first question can be tackled empirically, but only when we already have an answer to the second, which is a question of ontology.”); Isabelle Stengers, *The Cosmopolitan Proposal*, in MAKING THINGS PUBLIC: ATMOSPHERES OF DEMOCRACY 994 (Bruno Latour & Peter Weibel eds., 2005); Ulrich Beck, *The Truth of Others: A Cosmopolitan Approach*, 10 COMMON KNOWLEDGE 430 (Patrick Camiller trans., 2004); Marisol de la Cadena, *Indigenous Cosmopolitics in the Andes: Conceptual Reflections Beyond “Politics,”* 25 CULTURAL ANTHROPOLOGY 334 (2010) (discussing indigenous politics in Latin America); Graham Harman, *Technology, Objects and Things in Heidegger*, 34 CAMBRIDGE J.

anthropology regarding the non-universality of familiar liberal conceptions of individuality. For example, anthropologist Marilyn Strathern, writing about collective personality, describes Melanesian persons who are individuals—“full persons”—only in action and who are otherwise bits of other persons. The conflicting bits only resolve themselves, and thus the person as a whole person only becomes visible, when these relationships come into question.<sup>146</sup>

A similar disintegration may be seen in the nature of the corporation. For example, our understandings of what corporations are—of why they exist, who they serve, what they consist in—matter for the way legal and ethical responsibilities become imputed to them. Social and ethical commitments become drawn and redrawn in the context of shareholder and other constituencies. There are two versions of the firm: one with very strict, sharp lines, the other with lines less sharp. When we ask questions about the firm as an economic institution, boundaries are sharp. When the firm is queried as a business organization, boundaries are shifting and complex.<sup>147</sup>

To an even greater extent than with the corporation, “there are large problems involved in defining the boundaries of the ‘natural object.’”<sup>148</sup> The bounds of the relevant natural entity may themselves be in dispute: if the Schuylkill river floods Center City Philadelphia, the object at issue may be that portion of the river, the entire river, the entire system of meltwater and tributaries giving life to the river, or wider systems. In any case, but especially in terms of the bounds of the natural object under law, “[o]ne’s ontological choices will have a strong influence on the shape of the

ECON. 17 (2010) (discussing the literary themes in Martin Heidegger’s works and their ontological background); Bruno Latour, *Whose Cosmos, Which Politics? Comments on the Peace Terms of Ulrich Beck*, 10 COMMON KNOWLEDGE 450 (2004); Bruno Latour, *Why Has Critique Run out of Steam? From Matters of Fact to Matters of Concern*, 225 CRITICAL INQUIRY 30 (2004); John Law & Marianne Elisabeth Lien, *Slippery: Field Notes in Empirical Ontology*, 43 SOC. STUD. SCI. 363 (2013) (exploring empirical ontology through a study of human dealings with salmon); Annemarie Mol, *Ontological Politics. A Word and Some Questions*, 47 SOC. REV. (SPECIAL ISSUE) 74 (1999).

146. Marilyn Strathern, *Losing (Out On) Intellectual Resources*, in LAW, ANTHROPOLOGY AND THE CONSTITUTION OF THE SOCIAL: MAKING PERSONS AND THINGS 201, 216 (Alain Pottage & Martha Mundy eds., 2004).

147. See generally, UNDERSTANDING THE FIRM: SPATIAL AND ORGANIZATIONAL DIMENSIONS (Michael Taylor & Paivi Oinas eds., 2006); cf. Luis Araujo et al., *The Multiple Boundaries of the Firm*, 40 J. MGMT. STUD. 1255 (2003).

148. Stone, *supra* note 5, at 456 n.26.

legal system.”<sup>149</sup> To this last point, Stone quotes Norman O. Brown’s comments to make the point that:

“Projection and introjection, the process whereby the self as distinct from the other is constituted, is not past history, an event in childhood, but a present process of continuous creation. The dualism of self and external world is built up by a constant process of reciprocal exchange between the two. . . . Every person, then, is many persons; a multitude made into one person; a corporate body; a corporation.”<sup>150</sup>

The unitary person is rendered strange.

Several strands of work in social science question commonsense divisions between nature, people and things;<sup>151</sup> some note the counter-intuitive generative power of these divisions, with supposedly-natural “nature” always pointing back to its human creators, and human society ever attached to its material foundations.<sup>152</sup> “Things are in fact a part of society,” Emile Durkheim said, “just as persons are, and play a specific part in it.”<sup>153</sup> For Durkheim, the idea of separation of the personal from the material, of alienation, is a non-starter: the division of communal property, and the division of labor which the alienation of property allows, is not—necessarily—our route to alienation and indifference. Another line of thought, one extending from the sociologist Marcel Mauss, theorizes the infusion of the material

149. *Id.*; cf. Hutchinson, *supra* note 27, at 180 (decision to grant legal personhood to natural objects indicates changing values).

150. Stone, *supra* note 5, at 456 n.26.

151. See EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 72–77 (W.D. Halls trans., 1984); see also Salmund, *supra* note 27, at 297 (“[T]he radical split between nature and culture is associated with a powerful and long-standing impetus to bring nature under human control.”).

152. See, e.g., GIORGIO AGAMBEN, *THE OPEN: MAN AND ANIMAL* (Kevin Attel trans., 2004); Michel Callon, *Some Elements of a Sociology of Translation: Domestication of the Scallops and the Fisherman of St Brieuc Bay*, in *POWER, ACTION AND BELIEF: A NEW SOCIOLOGY OF KNOWLEDGE?* 196 (John Law ed., 1986); 1 JEAN COMAROFF & JOHN L. COMAROFF, *OF REVELATION AND REVOLUTION: CHRISTIANITY, COLONIALISM, AND CONSCIOUSNESS IN SOUTH AFRICA* (1991); BRUNO LATOUR, *WE HAVE NEVER BEEN MODERN* (Catherine Porter trans., 1993); Arturo Escobar, *After Nature: Steps to an Antiessentialist Political Ecology*, 40 *CURRENT ANTHROPOLOGY* 1 (1999); Marilyn Strathern, *The Patent and the Malanggan*, *THEORY CULTURE & SOC’Y*, Aug. 2001, at 1.

153. DURKHEIM, *supra* note 151, at 72.

world with the spiritual.<sup>154</sup> Indeed, a focus upon the liveliness of things has been fruitful in discussing property, ownership, and responsibility.<sup>155</sup>

We have never been modern, Bruno Latour once wrote, because the ground upon which we have based our conception of ourselves as such—our difference from nature, from things, from animals—is an invented one.<sup>156</sup> We have imagined a sharp division between “nature” and “culture;” the failings in this manner of thinking about the world are exhibited in the proliferation of “hybrids”—we see an issue like global warming as a jumble of people, politics, and science because we have separated out into different fields the things that compose it. But there is no such boundary between nature and culture: things make up people and people make up things, and “society” is made up of both. People cannot have built the pyramids without the help of those very large blocks of stone.

For in Latour’s eyes, and in the eyes of other developers of so-called Actor-Network Theory (“ANT”), everything that has an effect has agency—which is to say, anything may have agency. Agency here is decoupled from the intentionality with which it is popularly linked. Anything—a corporate body, an individual, an aggregate, even a trait—may be an “actant” acting in society.<sup>157</sup> Thus Latour discards the divide that we draw between natural things “out there” and human society: both make up bits (quasi-subject, quasi-

154. See MARCEL MAUSS, *THE GIFT: THE FORM AND REASON FOR EXCHANGE IN ARCHAIC SOCIETIES* (1950); see also Daniel Miller, *Materiality: An Introduction*, in *MATERIALITY* (Daniel Miller ed., 2005); Hirokazu Miyazaki, *The Materiality of Finance Theory*, in *MATERIALITY* 165 (Daniel Miller ed., 2005); HIROKAZU MIYAZAKI, *THE METHOD OF HOPE: ANTHROPOLOGY, PHILOSOPHY, AND FIJIAN KNOWLEDGE* (2004); STANLEY JEYARAJA TAMBIAH, *THE BUDDHIST SAINTS OF THE FOREST AND THE CULT OF AMULETS: A STUDY IN CHARISMA, HAGIOGRAPHY, SECTARIANISM, AND MILLENIAL BUDDHISM* (1984).

155. See, e.g., ROSEMARY J. COOMBE, *THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION AND THE LAW* (1998); *MATERIAL CULTURES: WHY SOME THINGS MATTER* (Daniel Miller ed., 1998); Miller, *supra* note 154; MARILYN STRATHERN, *PROPERTY, SUBSTANCE, AND EFFECT: ANTHROPOLOGICAL ESSAYS ON PERSONS AND THINGS* (1999); Strathern, *supra* note 146; *THE SOCIAL LIFE OF THINGS: COMMODITIES IN CULTURAL PERSPECTIVE* (Arjun Appadurai ed., 1988); Elizabeth Povinelli, *Do Rocks Listen? The Cultural Politics of Apprehending Australian Aboriginal Labor*, 97 *AM. ANTHROPOLOGIST* 505 (1995); Marilyn Strathern, *Potential Property. Intellectual Rights and Property in Persons*, 4 *SOC. ANTHROPOLOGY* 17 (1996).

156. LATOUR, *supra* note 152, at 39–41.

157. BRUNO LATOUR, *REASSEMBLING THE SOCIAL: AN INTRODUCTION TO ACTOR-NETWORK THEORY* 54 (2005).



object)<sup>158</sup> of networks extending for however long we might allow them to do.

ANT versions of the relationship between humans and natural objects have come under intense critique. One concept of political ecology moves against some of the central pegs in Latour's ANT, envisioning an antiessentialist approach that puts together a constructivist view of the relationship between culture and biology that is not, as Latour's version has been called, indifferent to power relations.<sup>159</sup>

Latour's ANT leaves out the way that things that really matter matter really: some peoples are oppressed, and there really is difference in the world that matters.<sup>160</sup> It is not just that things are real, nor that they are merely constructed, nor just that things are discursive; things are, at once, really real, and really constructed, and they mean in certain ways.

Anna Tsing describes the question of "how nature becomes an actor in social history" as the new take on an old question common both to political ecological and science studies—informed views of nature.<sup>161</sup> In one work Tsing describes a process of mutual production that rejects an idea of a "natural" nature, of "resources" already extant and awaiting human hands.<sup>162</sup> She describes the way that people imagine forests—always already emptied of people, perhaps, or "naturally" full of "resources"; marked out with perfectly clear patchworks of ownership, or maybe marked out as state-backed private property—and the way that we transform the forest into each of these; into "nature," into "the environment," into "the frontier."<sup>163</sup>

Tsing sets against the notion of an indolent, waiting frontier one of the landscape as a "lively actor" both "natural and social."<sup>164</sup> There, she describes the various particulate pieces that came together in various, never-perfectly-aligned ways to form social movements. She speaks of friction, of scale-making and scale-hopping and disagreements and productive semi-agreements, of

158. LATOUR, *supra* note 152, at 50–51.

159. Escobar *supra* note 152, at 4–16.

160. *Id.* at 14.

161. Anna Lowenhaupt Tsing, *Nature in the Making*, in NEW DIRECTIONS IN ANTHROPOLOGY AND ENVIRONMENT: INTERSECTIONS 3, 4 (Carole Crumley ed., 2001).

162. *See generally* ANNA TSING, *FRICTION* (2005).

163. *Id.*

164. *Id.* at 29.

marginal and not-so-marginal places. The challenge lay in finding a way to see processes, people, and places from both ends: to see culture as “always *both* wide-ranging and situated, whether participants imagine them as global or local, modern or traditional, futuristic or backward looking.”<sup>165</sup> Thus, Tsing finds connections between nature and culture, between processes and people and place. Each feeds into the other; they stretch strands into each other until at once we see that each is both.

This debate over the nature of nature is not merely a spat between social scientists. Instead, just as is the case with the corporation, recognition of politics and context as inextricable from theoretical questions of ontology become clear here. The interplay of these power relations becomes the point—they become our way in to understanding nature as rights holder.

Human beings make nature and nature, both literally and by contrast, makes the human. Just as with the corporation, the real, the constructed, the narrated, and the existential may all be real at once, even in contradiction. The next Part outlines ways in which theories of environmental, corporate, and human persons intersect with specific examples from Ecuador, Bolivia, and New Zealand.

#### V. HOLISTIC PERSONHOOD AND SLIPPERY PERSONHOOD

The tensions articulated in popular and social scientific debates as to the nature of the relationship between human beings and nature are echoed in legal regimes recognizing the rights of nature. For example, the holistic theory of environmental ethics common to many rights of nature regimes “locates value in self-organizing systems such as ecosystems, species, or ‘nature’ itself.”<sup>166</sup> In considering environmental value, a too-pure commitment to principals of holism, on the one hand, or individualism, on the other, both lead to unsatisfactory outcomes.<sup>167</sup> Holism in particular renders difficult the very aim of environmental ethics, that of determining the proper way to evaluate human actions in relation to nature.<sup>168</sup>

165. *Id.* at 122 (emphasis in original).

166. Purdy, *supra* note 117, at 874.

167. *Id.* at 874–77.

168. *Id.* at 874–75.

Anthropocentrism in itself does not rob protections of non-human persons of all their power: corporate personhood itself is sometimes anthropocentric. Consider, in this vein, the aggregate approach and Pollman and Blair's derivative rights approach.<sup>169</sup> Thus, the protection of corporate interests does not necessarily depend upon decentering specific human interests. Importantly, however, corporate interests may, at varied junctures, be expressed as anthropocentric, corporate-entity-centric, or even both at the same time. As outlined in Part III, this flexibility gives corporate personhood some of its protective power.

Thus, one weakness in environmental personhood as it is currently articulated is what appears to be a widespread political commitment to a holistic ecocentrism functionally equivalent to real entity theories of the corporation. This Part outlines the parameters of this stance as it is expressed in the Bolivian and Ecuadorian context. It then examines an alternative that takes up corporate theory's "slipperiness"—its non-committal stance toward any one vision of the corporation—to protective effect.

Since the Ecuadorian and Bolivian regimes center holism so strongly, nature, even though metaphorically a person ("Mother Nature") and legally an entity, for practical purposes is not so bounded. If all of nature, including humankind, is the entity, it becomes difficult to partition out various, and perhaps conflicting, interests in a principled way. Both the constitution of Ecuador and the Bolivian Framework Law are hard to implement in ways that play out similarly to how one might have expected in looking at the development of holistic theories of environmental ethics.<sup>170</sup> A difficulty arises from this theoretical commitment: once we concede that humans are part of nature itself, what motivates human attention to what we would otherwise conceptualize as "our effect" on "nature"?<sup>171</sup>

From here it is likely very easy to slide, as political will for protecting the environment degrades, to a view that (perversely) privileges what once were imagined as human interests—especially

169. Margaret M. Blair and Elizabeth Pollman, *The Derivative Nature of Corporate Constitutional Rights*, 56 WM. & MARY L. REV. 1673 (2015).

170. Purdy, *supra* note 117, at 874–75 (citation omitted) ("By dissolving the human-nature contrast, holism denies environmental ethics the grounds on which to ask, 'What should we (humans) do with respect to nature (which is relevantly distinct from us)?'").

171. *Id.* at 875.

when powerful industries are doing the talking.<sup>172</sup> Just such industrial concerns dominate the economy of Bolivia.<sup>173</sup> The Bolivian laws for nature were imagined to be a strong response to climate change<sup>174</sup> and to environmental destruction wrought by the work of extractive industries.<sup>175</sup> Things have not, however, turned out quite so neatly.

While the Ecuadorian and Bolivian laws generated a great deal of hope and excitement,<sup>176</sup> and while in Bolivia the original law's

172. See Revkin, *supra* note 17 (discussing a constitutional amendment in Ecuador that granted rights to nature).

173. See, e.g., Nick Buxton, *The Law of Mother Earth: Behind Bolivia's Historic Bill*, YES! MAG. (Apr. 21, 2011), <http://www.yesmagazine.org/planet/the-law-of-mother-earth-behind-bolivia-historic-bill> [<http://perma.cc/RUY8-4NNQ>] (stating that difficulties in implementing a law granting rights to nature exist due to Bolivia's dependency on resistant industries); see also Vidal, *supra* note 17 (outlining environmental problems in Bolivia as a result of industries such as mining and the difficulties of implementing a law granting protective rights to nature).

174. Bolivia's water situation, now disastrous, has been acute for more than fifteen years. See William Finnegan, *Leasing the Rain*, NEW YORKER (Apr. 8, 2002), <http://www.newyorker.com/magazine/2002/04/08/leasing-the-rain> [<https://perma.cc/P4PN-6534>] (discussing the Bolivian water shortage); see also *Bolivia Declares State of Emergency Due to Drought, Water Shortage*, REUTERS (Nov. 21, 2016, 10:27 AM), <http://www.reuters.com/article/us-bolivia-drought-idUSKBN13G1P4> [<https://perma.cc/H8VJ-WB4R>]; Elisabeth Rosenthal, *In Bolivia, Water and Ice Tell of Climate Change*, N.Y. TIMES (Dec. 13, 2009), <http://www.nytimes.com/2009/12/14/science/earth/14bolivia.html> [<https://perma.cc/XGQ9-3EHZ>] (discussing disappearing glaciers in Bolivia and climate change).

175. See, e.g., Franz Chavez, *Bolivia's Mother Earth Law Hard to Implement*, INTER PRESS SERVICE (May 19, 2014), <http://www.ipsnews.net/2014/05/bolivas-mother-earth-law-hard-to-implement/> [<https://perma.cc/G46P-G527>] ("Application of the law is moving ahead slowly with great difficulty 'because the means of production, neoliberal policies' and business community are characterised by the careless exploitation of natural resources.") (spelling in original); see also Vidal, *supra* note 17.

176. See, e.g., Clare Kendall, *A New Law of Nature*, GUARDIAN (Sept. 23, 2008, 7:01 PM), <https://www.theguardian.com/environment/2008/sep/24/ecuador.conservacion> [<https://perma.cc/Y7JK-KAPF>] ("Is this the end of damaging development? The world is watching."); see also *Law of the Land: Bolivia Grants Nature Unprecedented Legal Rights*, SOLUTIONS J., July 2011, at 8–9 (reporting the "radical implications" of Bolivia's nature's rights law); Buxton, *supra* note 173; Brandon Keim, *Nature to Get Legal Rights in Bolivia*, WIRED (Apr. 18, 2011, 6:10 PM), <https://www.wired.com/2011/04/legal-rights-nature-bolivia/> [<https://perma.cc/3V-SZ-R7MJ>] (discussing the purpose and background for a Bolivian law meant to protect the environment); Mychalejko *supra* note 19 (describing cautiously the potential environmental benefits of an Ecuadorian law granting nature rights); Peter Neill, *Law of Mother Earth: A Vision from Bolivia*, HUFFPOST (Nov. 18, 2014, 3:32 PM), [http://www.huffingtonpost.com/peter-neill/law-of-mother-earth-a-vis\\_b\\_6180446.html](http://www.huffingtonpost.com/peter-neill/law-of-mother-earth-a-vis_b_6180446.html) [<https://perma.cc/R3Q4-E6US>] ("The Law of Mother Earth: not just an idea, more than a vision. Something new. Something real. Change must begin somewhere, sometime; perhaps Bolivia is inventing the social model and role of governance that will demonstrate how globally we can transcend the divisions and conflicts, beyond the destruction and despair that we feel, toward an harmonious, effective,

much more detailed successor was easily enacted in 2012,<sup>177</sup> their implementation has been plagued with issues.<sup>178</sup>

The first successful Ecuadorian rights of nature case did not occur until 2011.<sup>179</sup> Even now that there are several cases wherein rights of nature arguments were used successfully, it is notable that the losing cases tend to be ones versus large extractive interests.<sup>180</sup>

Perhaps, then, these revolutionary-sounding rights of nature regimes are just for show. Consider, for instance, New Zealand. Arguably, personhood for natural features in New Zealand was an easy change that changes little. New Zealand's environmental statute, the Resource Management Act ("RMA"), already functions in parts in a manner equivalent to a rights of nature stance.<sup>181</sup>

efficient, and equitable society connected by the true value of nature as sustainer?"); Vidal, *supra* note 17.

177. Ley Marco de la Madre Tierra y Desarrollo Integral para Vivir Bien, Law No. 300 (Oct. 15, 2012) (Bolivia).

178. See, e.g., Berros, *supra* note 19; Chavez, *supra* note 175; David Hill, *Is Bolivia Going to Frack 'Mother Earth'?*, GUARDIAN (Feb. 23, 2015, 7:39 PM), <https://www.theguardian.com/environment/andes-to-the-amazon/2015/feb/23/bolivia-frack-mother-earth> [<https://perma.cc/9SW7-MTQV>] ("[President] Evo [Morales] has adopted the Mother Earth discourse and goes all over the world and says these things and that's why people love him. . . . But if you look at what has actually been done since 2010 [sic] . . . . This is the industrial growth most of the rest of the world is saying no to. This is what a lot of people looking at Bolivia don't understand." (quoting Amos Batto, Reaccion Climatic Representative)); Karen Hoffmann, *Ecuador Condemned at the New Tribunal for the Rights of Nature in Paris*, MONGABAY (Dec. 10, 2015), <https://news.mongabay.com/2015/12/ecuador-condemned-at-the-new-tribunal-for-the-rights-of-nature-in-paris/> [<https://perma.cc/RF8F-Y89Y>] (discussing the Ecuadorian government's decision to mine a biodiverse national park despite the constitutional amendment granting nature protective rights).

179. Provincial Court of Justice of Loja, No. 11121-2011-0010, Mar. 30, 2011 (Ecuador). A road project was depositing large amounts of detritus in the river, narrowing it in a way that increased risks of floods and other disasters. A "Granted Constitutional Injunction 11121-2011-0010" stopped the project. See Natalia Greene, *The First Successful Case of the Rights of Nature Implementation in Ecuador*, GLOBAL ALLIANCE FOR RTS. NATURE, <http://therightsofnature.org/first-ron-case-ecuador/> [<https://perma.cc/DN9X-BZDF>] (last visited Feb. 6, 2017). The commentator on the case noted that the court's ruling established that "based on the precautionary principle . . . it is the responsibility of the constitutional judges to incline towards the immediate protection and the legal tutelage of the rights of nature, doing what is necessary to prevent contamination or call for remedy." *Id.*

180. See Craig M. Kauffman & Pamela L. Martin, *Can Rights of Nature Make Development More Sustainable? Why Some Ecuadorian Lawsuits Succeed and Others Fail*, 92 WORLD DEV. 130 (2016) (discussing Ecuadorian rights of nature cases). One case against an extractive concern was won by rights of nature arguments. *Id.* at 137. It was brought by the government against a small-scale ("artisanal") extractive company in order to protect the government's interest in controlling the extractive industries. *Id.*

181. For passages reading very much like the Bolivian and Ecuadorian grants of intrinsic value to nature, see, e.g., Resource Management Act 1991, pt 1, s 2(1) (N.Z.), (definitions of "environment" ("environment includes—(a) ecosystems and their constituent parts,

These protections are buttressed by protections of traditional Maori relationships to land attributable to the Treaty of Waitangi, widely seen as New Zealand's foundational document. This document ensures that Maori conceptions of land use matter; they affect how RMA protections of the environment play out. Thus, the RMA combined with the Treaty of Waitangi might be regarded as their own protector of the rights of nature, outside of entity status.

Further, New Zealand law has long taken the corporation to be a concession of the state.<sup>182</sup> Parliament may quite easily declare entities to be legal persons.<sup>183</sup>

But the legal personhood of natural objects is not quite so straightforward. The status of these persons is twinned: in the view of the government, concession theory rules, with Parliament able to name whatever it wishes as a person. In the view of Maori, these are real entities gaining their personhood not merely from government grant but also from the spiritual ties of *whakapapa*, genealogy.<sup>184</sup> Simultaneously for Maori, and not necessarily

including people and communities. . .”) and “intrinsic values” (“intrinsic values, in relation to ecosystems, means those aspects of ecosystems and their constituent parts which have value in their own right, including—(a) their biological and genetic diversity; and (b) the essential characteristics that determine an ecosystem’s integrity, form, functioning, and resilience”); *see also id.* pt. 2, ss 5(2)(b), 7(d) (outlining the intrinsic valuation of nature).

182. *See, e.g.*, JOHN H. FARRAR ET AL, *COMPANY AND SECURITIES LAW IN NEW ZEALAND* 69 (2008) (“Section 15 of the Companies Act 1993 provides that a company is a legal entity in its own right . . . [t]hus a company, once registered, is regarded as a legal person. This is an attribution by the law of fictitious personality to a group of persons providing a fund of capital.”); Hutchinson, *supra* note 27, at 179 (stating that as a “legal fiction,” personhood “can be applied to non-human beings also”).

183. *See* John Wilson, *New Zealand Sovereignty: 1857, 1907, 1947, OR 1987?* (Parliamentary Service, Parliamentary Research Paper, Aug. 2007) at 11 (“New Zealand, as of 1987, is a free-standing constitutional monarchy whose Parliament has unlimited sovereign power.”).

184. O’Neil, *supra* note 1 (“From our perspective as Maori, we believe that we come from the land and that the land has its own personality, its own heartbeat, its own health, its own soul. . . . The government was not willing to give ownership of that national park back to that tribe, so this legal personality concept resonated and is a term that both sides—the government and Maori tribes—can create a solution around: it’s an ancestor that owns itself.”); Kathleen Calderwood, *Why New Zealand is Granting a River the Same Rights as a Citizen*, AUST. BROADCASTING CORP. (Sept. 6, 2016, 2:53 PM), <http://www.abc.net.au/radionational/programs/sundayextra/new-zealand-granting-rivers-and-forests-same-rights-as-citizens/7816456> [<https://perma.cc/DFR7-9BR6>] (“This new act that moves that Te Urewera land from the national park regime puts it into its own place because it owns itself. Maori don’t own, the New Zealand government doesn’t own this land. It is its own person, it cannot be owned.”). In this conception, the river and the forest are actual ancestors; they would be with or without state grant. Gordon, *supra* note 28.

contradictorily, the legal structure of these persons aligns with the government's concession or artificial entity view. Parliamentary action was necessary to "personify" these natural objects; Parliamentary action could putatively take their legal personhood away.

The statuses of the Whanganui River and the Te Urewera forest are thus conceptualized in New Zealand as a new kind of personhood in addition to that of the natural person and the artificial person—the corporation.<sup>185</sup> This duality is useful in escaping political binds and encouraging compromise. It is also useful in normalizing environmental personhood, giving it simultaneous legal and cultural heft.

As it so happens, the interrelation of the RMA and the Treaty of Waitangi means that Parliament is unlikely to withdraw the personhood of the environmental entities it sees as having been created by New Zealand law. Thus, Maori cultural conceptions of environmental persons as real entities have effect in the law. The duality of the New Zealand conception of the nature of environmental personhood seems a good demonstration of the ANT idea that, as mentioned in the previous Part, *it is not just that things are real, nor that they are merely constructed, nor just that things are discursive; things are, at once, real, constructed, and lodged in discursive place.*

And perhaps that is just the point: the legal structure underlying the personhood changes give them actual heft, and can change the way people think about the rights of the environment in ways that really change the law in ways that affect the real world.

Contrast this legal heft with the status of the rights of nature in Ecuador. There, despite much sound and fury, the legal fabric underpinning nature's rights was far more fragile than in New Zealand. Just after the rights of nature were triumphantly enshrined in Ecuadorian law, the government asserted its intent to continue to further development in the nation by means of the already dominant extractive industries.<sup>186</sup> In the face of this pushback, proponents of the rights of nature feared bringing cases on the chance that these might set bad precedent.<sup>187</sup> Thus, the

185. Hutchinson, *supra* note 27, at 179.

186. Kauffman & Martin, *supra* note 180, at 130.

187. *Id.* at 133.

rights of nature have not developed with the robustness that might have been expected.

Despite these failings, in Ecuador the rights of nature do seem to be deepening and developing. While rights of nature arguments have won in only a few cases, and never against large extractive concerns, these few cases evince a growing normalcy in actual, practical care for the rights of nature.<sup>188</sup> These rights are weak currently but will likely become stronger, in a way that makes natural entities more legitimately person-like, as they become implicitly normed in law, moving the rights of nature from lip-service to something with heft.

What matters here is the tenor of the political will supporting legal protections of these entities. Consider: *Santa Clara's* usage of the term person in regard to corporations was, at the time it was made, meaningless in the sense the term now holds.<sup>189</sup> It was with changes to the ways people thought about corporate power and individual personhood that this glancing usage was transformed into what was imagined to be a foundational text for corporate personhood doctrine. What we are seeing now is what might be a similar turning in terms of environmental protection and acceptance of the destruction of the hegemony of the liberal understanding of individual personhood.

## VI. CONCLUSION

The genesis of environmental personhood may be seen partially as a response to—a protest of—corporate power. But those who would like to see the doctrine develop need not take corporate theory only as foil. We might also take the varied historical deployments of corporate personhood as a model.<sup>190</sup> This Article argues for just such a use and describes the ways it may be rendered generative and protective of environmental interests. In further developing legal doctrines like environmental personhood, we can make law an ally of the environment (and not just of human interests in the environment).

188. *Id.* at 134, 138.

189. Horwitz, *supra* note 73, at 173–74.

190. Classical commentators might be seen to agree. *See* Dewey, *supra* note 3, at 661; Horwitz, *supra* note 73, at 221.



A counterargument might be made that flexible theorization of environmental personhood may erode overarching respect for and commitment to the environment, either by enforcing in law what was once a naturally effusive love for the environment, or by regulating the issue to death instead of seeking to change cultural norms around environmental protection. This set of arguments might be discerned in comments made by John Dewey and by Laurence Tribe. Tribe argued (regarding nature) that legislating around natural rights might disintegrate the positive feeling toward nature that would motivate someone to act to care for nature in the first place.<sup>191</sup> Dewey argued (regarding corporations) that indirect efforts to render corporate personhood “progressive” would be less successful than directly working to dismantle corporate power through social mores. Since the personhood arguments are so malleable, and can be used in various ways based upon political will, perhaps the proper focus is not upon facility in argumentation but instead upon the development of the type of political will that will support environmental protection efforts.

But despite the many ways in which corporate personhood may be useful in theorizing environmental personhood, perhaps there is one very fundamental difference between the two: while corporate personhood might be imagined as merely legalistic,<sup>192</sup> the regimes outlined here each imagine something more.<sup>193</sup> For example, the notion of nature as living is not merely legalistic for any of the indigenous worldviews important to ushering in these regimes in Latin American and New Zealand.<sup>194</sup> The rights of

191. Tribe, *supra* note 135, at 1330–31 (arguing that externally imposed structure for the protection of nature is counterproductive); *id.* at 1338–39 (describing progress as dialectic).

192. However, I have argued that the legalistic developments have shaped popular views of the “human-like” nature of corporate rights. Gordon, *supra* note 48, at 369.

193. Laurence Tribe has argued that nature was something more. See Tribe, *supra* note 135, at 1343.

194. See discussion *supra* Part V. Cf. Purdy, *supra* note 117, at 899–901 (writing about the ethics and aesthetics of the uncanny in nature, with the uncanny defined as: “the bewildering experience of uncertainty about whether something is alive or conscious, another intelligence looking back at the watching person.”). For Purdy, the experience of the uncanny is “a pause in judgment that arises from a limit to perception and understanding: we know something is there, but we cannot say quite what it is. Our pause expresses the thought that we owe these other points of view some acknowledgement and consideration, even though we have no reliable way of calibrating that response.” *Id.* at 900. “Staying in the experience of uncanniness is a refusal to reduce this ambiguous experience to either side of the contrasts that form it, because the uncomfortable middle ground itself inspires a kind of respect.” *Id.* at 901.

nature regimes here described seem both to require and to generate new ways of looking at the relationship between human beings and the natural world.

Tribe has imagined as one such way of looking a mutually constitutive project, one not reachable by means of, say, Rawls' notions of justice and of humankind's relationship to nature. For Rawls, "ends are exogenous, and the exclusive office of thought in the world is to ensure their maximum realization, with nature as raw material to be shaped to individual human purposes."<sup>195</sup> This renders incoherent within his own paradigm Rawls' call for a correct accounting of humankind's relation to nature by means of "a theory of the natural order and our place in it."<sup>196</sup>

The new consciousness for which Tribe called had to be dialectical in other ways: it demanded an "evolving human consciousness and [sic] will" instead of either a romantic, animistic belief in the sacredness of all things or a structural notion that "modern science itself, and the unfolding structural truths it reveals about the natural order and the human condition, can somehow be the source of moral wisdom."<sup>197</sup> Instead, what was necessary was a synthesis of the two that would cut the boundaries between conceptions of nature and culture.<sup>198</sup> These were changes that, Tribe predicted, "might well make us different persons."<sup>199</sup> Perhaps we are becoming these persons.<sup>200</sup>

In the development of the doctrine of environmental personhood this article describes a dialectic akin to that for which Tribe hoped. Changing conceptions of the relationship between the natural and the human have opened up space for legal developments in the rights of nature. The development of these

195. Tribe, *supra* note 135, at 1335.

196. *Id.* (quoting JOHN RAWLS, A THEORY OF JUSTICE 512 (rev. ed. 1999)). *But see* Purdy, *supra* note 117, at 930-31 (arguing the coherence of a Rawlsian environmental ethics grounded in culture and politics).

197. Tribe, *supra* note 135, at 1337-38.

198. *Id.* at 1338-40.

199. *Id.* at 1346.

200. *Cf.* Purdy, *supra* note 117, at 883, 886 ("Today there is reason to think that the environmental ethics that Rawls imagined will become newly relevant as problems arise and attitudes emerge in political, cultural, and legal responses. . . . Environmental law can be generative for the development of environmental ethics, as many people briefly expected it to be in the early 1970s. Law can and should contribute to the development of environmental values.")

legal arguments can change culture, normalizing social imaginings of the rights of nature.

Just as in the corporate case, while theories of these rights of nature may be deployed in ways that shift with circumstances, social, political and material circumstances matter, as do ways of imagining. As such, a better question than the obvious ontological one—may nature properly be considered a person—is: how easily will we be able to imagine nature as rights holder in each regime, and how will that imaginatory space energize the will to protect nature by means of these varied rights arguments?

If we are committed to robust protection of the environment, we should look to, but improve upon, the development of the protean, politically fluid concept of corporate personhood as an exemplar of a dialectic of law and society.