IDENTIFYING CONTEMPORARY RIGHTS OF NATURE IN THE UNITED STATES

KAREN BRADSHAW*

ABSTRACT

The Rights of Nature movement is at the precipice of watershed social changes. Leaders of this international, Indigenous-led movement call upon the public to radically reimagine the human relationship with nature. This Article comes at a crucial moment when some leading environmental law scholars are questioning the potential Rights of Nature within the United States. This Article responds by building upon the ideas of Christopher Stone to chart the theoretical and doctrinal pathways that breathe life into the legal framework of Rights of Nature. It sketches the present status of Rights of Nature in the United States and links this overview to environmental, animal, and natural resources law literatures.

Most scholarly discourse about the Rights of Nature focuses on a few well-known examples outside of the United States, such as constitutional rights in Ecuador or New Zealand and Australia granting rights to wind and rivers. In fact, the United States has a growing body of diverse Rights of Nature that legal scholars have largely overlooked. For example, in six federal statutes, natural resource damages have resulted in over ten billion dollars of tort remedies that benefit nature. Indigenous governments located

* Professor of Law and Mary Sigler Research Fellow, Sandra Day O'Connor College of Law, Arizona State University. Senior Sustainability Scientist, Global Institute for Sustainability, Arizona State University. Faculty Affiliate, Classical Liberal Institute, New York University Law School. I am thankful for the comments provided by attendees at the University of Southern California Law Review Symposium, *Christopher Stone: Assessing the Influence of "Do Trees Have Standing"* (2022), the *Rights of Nature: Opening the Academic Debate in the European Legal Context*, University of Toulouse, IEJIJC, France, and Sustainability Conference of America Legal Educators, Arizona State University (2022). This Article benefitted greatly from comments by, and conversations with, Robin Kundis Craig, Michael Livermore, Delphine Misonne Julien Betaille, John Knox, Hendrik Schoukens, Guillaume Chapron, and Jan Darpo. I am thankful for the outstanding research assistance of Sarah Brunswick, Caitlin Doak, and Clayton Kinsey.

throughout the United States—including the Band of Ojibwe, Ho-Chunk Nation, Navajo Nation, and Ponca Nation—have created legal personhood, statutory personhood, and constitutional provisions in tribal government. Additionally, wildlife holds many rights hidden in federal statutes, as with bald eagles claiming property rights superior to those of humans in the Bald and Golden Eagle Protection Act. Collectively, this diffuse and innovative set of laws forms a body of existing Rights of Nature, showing that such rights exist in the United States today—examples that deserve discussion, consideration, and potential extension.

This Article seeks to uncover and elevate these rights, thus promoting, amplifying, and calling attention to many diffuse efforts to capitalize upon their collective potential to reshape the human relationship with nature and address the environmental problems of our time. It links popular discourse on the Rights of Nature with its theoretical foundations and well-established statutory systems of environmental law. It seeks to help and inspire legal thinkers in disparate fields to collectively co-create a more robust role for Rights of Nature—within the United States and beyond.

TABLE OF CONTENTS

INTRODUCTION

"Rights of Nature" recognize natural objects (such as trees, rivers, and wind) as having some legal rights, including them in our system of law and government. The Rights of Nature movement is international and Indigenous-led. It is part of a broader effort to displace anthropocentric conceptions of the human relationship with nature with an alternative worldview that prioritizes the needs of all parts of an ecosystem.

Famous international examples of governments recognizing natural objects as rightsholders have captivated public attention. Despite this public yearning to reimagine our relationship with nature, U.S. environmental law scholars were long slow to embrace the idea. Some have defined the idea narrowly, presupposing that Rights of Nature are narrowly confined to unenforceable constitutional provisions. Others have yet to engage the idea, thinking of it as orthogonal to environmental law, as it is conventionally understood as a set of statutes enacted in the 1970s (such as the Clean Air Act). This Article makes the novel claim that Rights of Nature not only exist but are actually widespread and can be found in many contemporary U.S. laws not conventionally understood as affording legal rights to natural objects. Further, it links conventional environmental law to the Rights of Nature movement, showing how merging these fields can revitalize environmental law to address pressing problems that presently narrow definitions of the field leave untouched. (This builds upon prior work in which I link Rights of Nature to animal law and animal rights literatures.[1]) This Article suggests that we, collectively as a community of scholars continuously co-creating the field of law governing the human relationship with the environment, should use our collective talent, time, and skills to identify, amplify, and extend Rights of Nature because they hold considerable potential to forward new legal pathways to much-needed ecological objectives.

After a slow start, the Rights of Nature movement is quickly gaining momentum. Christopher Stone was influential in the creation of the Rights of Nature.[2] Stone challenged conventional Western understandings of how law interacts with nature by considering affording standing to natural objects. Since then, Stone's thinking has influenced a large and growing international consortium of lawmakers, activists, and scholars in granting objects natural rights.

1. KAREN BRADSHAW, WILDLIFE AS PROPERTY OWNERS: A NEW CONCEPTION OF ANIMAL RIGHTS 150–56 (2020).

2. Delphine Misonne, Keynote Address at the University of Toulouse Rights of Nature Symposium: Christopher Stone's Influence on European Legal Scholars (Oct. 14, 2019).

Yet, scholars and commentators may not have yet developed a shared understanding of what "Rights of Nature" are.[3] Precision matters at this precarious moment, when an enthusiastic international group of legal scholars are beginning to seriously engage with the concept. There exists a danger that some scholars might ascribe the term a narrow definition—such as constitutional provisions—with understanding that they link to others—such as natural resource damages—which could lead commentators and courts to prematurely dismiss Rights of Nature. Thus, substantive outcomes result from the terminological definition—making proper understanding and definitions of critical importance.

Moreover, the early-stage practical challenges of forging new legal pathways give some leading environmental law scholars cold feet about the administrability of natural rights. For example, Mauricio Guim and Michael A. Livermore are self-described skeptics of the idea, noting "rights for nature are unlikely to provide the solution that frustrated environmentalists seek."[4] Although I have tremendous respect for these talented environmental thinkers, I think they dismiss the idea too quickly. Every legal movement is messy at first, needing many iterations to develop and mature into a well-functioning regime. Narrowly defining Rights of Nature and looking at early efforts to actualize it may produce too much skepticism for something that has the potential to provide a much-needed shakeup to the status quo. A broader definition of the Rights of Nature—the vision outlined in this Article—shows that, in fact, they already exist and are functioning quite well in natural resource damages statutes and Indigenous governments within the United States—two sources of Rights of Nature that Guim and Livermore do not contemplate in their valuable paper.

Despite the domestic origins of these ideas in contemporary legal structures, some U.S. scholars have dismissed the Rights of Nature as unworkable in our legal structure. That is beginning to change, with a wave of new scholarship on the Rights of Nature taking a more optimistic tone. Yet, even among this growing body of work, U.S. scholars have not created a typology of Rights of Nature or mined existing domestic law to uncover

3. Scholarly discourse surrounding "Rights of Nature" sometimes unwittingly assigns different definitions to the same term. This became clear across a series of outstanding presentations that scholars from around the world gave at the international conference Rights of Nature: Opening the Academic Debate in the European Legal Context at the University of Toulouse in Toulouse, France, on October 14, 2019. I am indebted to the conference organizer, Julien Bétaille, for expanding my interest in this topic by including me as one of two U.S. representatives at this event, which I believe was the first event of its kind for an international group of legal scholars. After attending the event, I noticed that different scholars writing on the Rights of Nature in the United States similarly assume different definitions of the term—a point that might not have been clear to me but for the excellent conference that Bétaille organized.

4. Mauricio Guim & Michael A. Livermore, *Where Nature's Rights Go Wrong*, 107 VA. L. REV. 1347, 1352 (2021).

examples of these rights with an eye towards reforming domestic environmental law.[5] As a result, some scholars are engaging with a superficial subpart of Rights of Nature as if it were the whole,[6] dismissing that subpart and with it the entire idea.[7] The problem is that the concept of Rights of Nature does not match the narrow definition that some scholars are ascribing to it. As a result, some are quickly dismissing the important movement as the latest iteration of the attractive-but-meaningless concept of "sustainability."[8]

I believe that definition matters a great deal here—that defining the Rights of Nature in a broad and multifaceted way for an audience of legal scholars can save this vital movement from being dismissed as unworkable before it really starts. This Article seeks to bridge the gap between the popular discourse on the Rights of Nature and law. It lays a very modest foundation for lawyers, commentators, and judges to situate the Rights of Nature within the legal context.

This Article begins to explore the idea that the Rights of Nature are not only viable within the U.S. legal structure but are, in fact, already in existence.[9] It begins by creating a novel typology of Rights of Nature, which is sometimes used in different ways in international discourse. Then, having briefly set forth types of rights, it maps this typology onto domestic laws to see whether—and where—there are Rights of Nature within our existing legal structure.

In doing so, this Article begins to reimagine how we define the field of

5. Kristen Stilt, *Rights of Nature, Rights of Animals*, 134 HARV. L. REV. F. 276, 278 (2021) (noting the nascent link between environmental law, animal law, and the Rights of Nature; stating an "intention to treat this topic more fully in a future work"). For a review of the Rights of Nature and existing literature on the topic, see *infra* Section I.B.

6. Julien Bétaille, *Rights of Nature: Why It Might Not Save the Entire World*, 16 J. FOR EUR. ENV'T & PLAN. L. 35, 36 (2019).

7. Scholars have sometimes seemingly operated from an assumption that the entire Rights of Nature movement is confined to constitutional provisions, an idea that this Article pushes against. *See* Laura Nieto Sanabria, *The Subalternization of a Progressive Legal Project: The Rights of Nature in Ecuador*, 10 MEX. L. REV. 117, 122 (2017); Joaquim Shiraishi Neto & Rosirene Martins Lima, *Rights of Nature: The "Biocentric Spin" in the 2008 Constitution of Ecuador*, 13 VEREDAS DO DIREITO 111 (2016).

8. Some environmental law scholars have expressed concern that the Rights of Nature movement is the social-media era answer to climate change—easy to "like" but impossible to implement. Julien Bétaille, Address at the University of Toulouse Rights of Nature Symposium: Christopher Stone's Influence on European Legal Scholars (Oct. 14, 2019). They point to the devolution of "sustainability," which began as an earth-changing idea but has shrunk into a term that is widely used but generally regarded as utterly devoid of meaning. Such vagueness amidst real consumer and public desire for environmental protections is a waste. The lesson to be taken from the sustainability movement is this: ideas and public will are not enough without an associated legal structure. If activists and scholars do not move—quickly and wisely—to capitalize on public sentiment, other interests will likely act to define the Rights of Nature movement in ways that benefit their interests without honoring the goals of the movement.

9. *See infra* Part III.

environmental law—a definition that erodes the existing boundaries of the field as a set of statutes from the 1970s and takes a broader, more expansive approach. Reframing environmental law as *laws that govern the human relationship with nature* represents a profound, much-needed shift in the field—one that may hold the potential to address the issues of inclusion and rapid geophysical change that we so sorely need at this moment.

Environmental law scholars may have underestimated the potential of existing laws by confining our understanding of the field to federal statutes. This underestimation has caused us to believe that our hands are tied to address environmental issues, that we must wait for Congress to enact new laws to address the many colliding crises of our time to save us as they once did in the 1970s. But this is not the case. Environmental law scholars can find threads running through black letter law that may create legal pathways for new ideas. Reframing environmental law through the Rights of Nature provides a new solution to pressing environmental problems. It also serves to fill a gap between how most people feel about nature and what law on the books states. A more expansive view of environmental law serves to integrate these values—and the long-marginalized populations who hold them—into the canon of environmental law.

This Article proceeds in three Parts.

Part I defines environmental law and the Rights of Nature. Until now, the field of environmental law has been largely understood as a subset of administrative law, focused on federal agency administration of statutes that Congress enacted in the 1970s with very little subsequent updating.[10] This disappointingly narrow conception of the field falls short of the legal tools society must wield to stem climate change and biodiversity loss.[11] Rights of Nature is an Indigenous-led effort to ascribe legal meaning to the rights of natural objects within government.[12] Some hope that Rights of Nature represents the most important shift in environmental law since the health-based statutes of the 1970s, which form the canonical version of environmental law. This analysis foreshadows not only the pluralistic descriptive analysis of the Rights of Nature in the United States but also foregrounds the need for new worldviews.

10. Todd S. Aagaard, *Environmental Law Outside the Canon*, 89 IND. L.J. 1239, 1240–41 (2014).

11. *Id.* at 1241–42.

12. Shannon Joyce Prince, *Green Is the New Black: African American Literature Informing Environmental Justice Law*, 32 J. ENV'T L. & LITIG. 33, 36 (2016) ("[N]ot all African Americans or indigenous individuals value nature, let alone see anyone other than humans as possessing personhood status or rights. Nor do all those who recognize nonhuman rights or personhood agree with how to classify or treat different members of the environmental community. Nor do all people of color have the same environmental goals.").

Part II explains that environmental crises highlight the need for alternative worldviews to inform the human relationship with nature. This begins by challenging the received wisdom of a legal and economic system that excludes natural interests—a human-created construct that erases the interests of nonhuman animals and plants. It advocates for readers to radically reimagine the human relationship with nature; it urges legal thinkers to forge creative pathways between the status quo and where we need to go.

Part III provides a typography of Rights of Nature, then compares this framework to existing laws within the United States today (inclusive of Indigenous governments). By mapping the origins of the term and its legal actualization in positive law in the United States today, I show that the concept is much broader than it is sometimes assumed to be. This analysis reveals that there are, in fact, widespread Rights of Nature for natural objects in the United States today. The conclusion considers the implications for Rights of Nature to revitalize environmental law. It briefly flags how some of the most pressing problems of our time—those that statutes alone are failing to address—can, and should, be addressed through innovative tools that integrate the interests of nonhuman rights-holders. This Article reveals that Rights of Nature extend beyond the narrow, commonly understood idea of affording legal personhood to nature in constitutions.

This Article concludes by calling for a change in what counts as environmental law. Students sign up for environmental law courses to learn how to protect pandas and save the world. They are so disappointed when they realize environmental law is mostly about pollution control. An unspoken secret about environmental law is that it is a tremendously narrow field. At the time the classic environmental law statutes (such as the Clean Air Act and Clean Water Act) were created, they were revolutionary. Today, they are clearly not enough to meet public demand. Why, then, do scholars and practitioners in the field accept the narrow constraints of current law? As a relatively new field, a living generation of environmental scholars and advocates built the field of environmental law from scratch.[13] Early actors fought for legitimacy. They worked hard and earned it. Now, it is time to think of new and bold ideas. Rights of Nature hold the potential to revitalize and reconceive environmental law. This Article suggests that following the path of Rights of Nature—the theories undergirding it and its statutory and doctrinal framework—provides a path to a new iteration of environmental law that is more inclusive, relevant, and expansive.

13. Todd S. Aagaard, *Environmental Law as a Legal Field: An Inquiry in Legal Taxonomy*, 95 CORNELL L. REV. 221, 251–79 (2010).

I. RIGHTS OF NATURE IN ENVIRONMENTAL LAW

In a recent TED talk, Kelsey Leonard introduced the Rights of Nature to an international audience, suggesting that we should treat "water [as] a living relation and grant[] it the legal personhood it deserves."[14] Over three million people watched Leonard's talk.[15] Rights of Nature enjoy widespread popularity—most people like the idea of treating rivers and animals well in the abstract. But how do Rights of Nature intersect with the legal system?

Understanding the nexus of current federal policy and the Rights of Nature begins with two interrelated questions: What is environmental law? And what is the Rights of Nature movement? The answer to both revolves around human relationships with nature. At present, the field of environmental law is largely anthropocentric—focusing on the needs of humans while largely ignoring those of other species.[16] Many (although not all) of our laws are focused on constraining human uses of natural objects (such as airscapes and rivers) so that they do not degrade to the point that they no longer satisfy human needs for clean air and drinking water. The premise of protecting the environment to satisfy ongoing human use of it is a centerpiece of much of the field.

In contrast, the fundamental premise of the Rights of Nature movement challenges this anthropocentric view. It suggests that other living things—rivers, wild rice, wind, animals—also have interests in the environment, which human uses should not fully degrade. Asserting rights on behalf of nature within contemporary human legal systems expands law beyond serving humans, creating a more expansive vision of our legal systems as navigating the human relationship with nature. Notably, this is not a new worldview. Many religions and cultures across time and history, including in much of the world today, reflect this ethos: the idea that the Earth and its resources are shared between its inhabitants, and humans ought not take more than our share from other creatures or destroy natural environments.[17] Through legal formalities and corporate structures, the legal functionaries

14. Kelsey Leonard, *Why Lakes and Rivers Should Have the Same Rights as Humans*, TED: TEDWOMEN 2019 (Dec. 2019), https://www.ted.com/talks/kelsey_leonard_why_lakes_and_rivers_should_have_the_same_rights_as_humans [https://perma.cc/M4NW-JN43].

15. *Id.*

16. For example, the Safe Drinking Water Act focuses on making water safe enough for human consumption. 42 U.S.C. §§ 300f–300j. The Clean Air Act focuses on limiting pollutants in the air for human health reasons. *Id.* §§ 7401–7671q. Clean air and water provide benefits to nonhuman animals, but the Acts are not framed in terms describing these benefits. The Endangered Species Act, with its focus on biodiversity, is an exception among the largely anthropocentric environmental laws. 16 U.S.C. §§ 1531–1544.

17. Karen Bradshaw, *Humans as Animals*, 2021 UTAH L. REV. 185, 196–200 (describing Jainism, Judaism, Muslim, and some Native American religious traditions and texts, and conceptualizing humans as co-equal with animals and other natural objects).

administering Western systems of law, government, and commerce have often pretended away the idea of nonhuman interests as worthy of equal consideration under the law—separating law from ecological morality.[18]

The remainder of this Part shows how Rights of Nature may resolve some of the shortcomings in current environmental law. Section A describes environmental law as a field of study and practice area. Section B shows that Rights of Nature provide an alternative worldview to existing environmental law, one in which nonhuman interests are formally recognized.

A. ENVIRONMENTAL LAW

Environmental law as a field is generally understood as a set of statutes enacted in the 1970s, such as the Clean Air Act, Clean Water Act, Endangered Species Act, and National Environmental Policy Act.[19] These laws have largely sat stagnant since then—rarely amended with very little new environmental legislation. As a result, existing environmental laws are not addressing ecological vicissitudes including climate change, wildfire policy, factory farming, and biodiversity loss. Environmental laws are sorely out of date.[20]

In the fifty years since the environmental laws were enacted, astonishing shifts have occurred in scientific understanding, showing many imbricated challenges that the statutory framework does not begin to address. Climate change, biodiversity loss, wildfire smoke emissions, and factory farming are modern environmental disasters. The worldview undergirding

18. Similarly, of course, majoritarian societal groups have also pretended away the interests of minoritarian humans, using law as a smokescreen for systemic injustice. Joyce Prince, *supra* note 12. The processes of excluding nature from systems of law and excluding female, Black, and Indigenous interests are intertwined, both in form (the procedures used) and substance (the linked genocide of animals and peoples, as with the intentional attempt to eradicate the buffalo as an indirect attempt to exterminate Indigenous groups that relied upon them). J. Weston Phippen, *'Kill Every Buffalo You Can! Every Buffalo Dead Is an Indian Gone*,*'* ATLANTIC (May 13, 2016), https://www.theatlantic.com/national/archive/2016/05/the-buffalo-killers/482349 [https://perma.cc/EEZ6-4NZG] ("Many things contributed to the buffalo's demise. One factor was that for a long time, the country's highest generals, politicians, and even then President Ulysses S. Grant saw the destruction of buffalo as a solution to the country's 'Indian Problem.' ").

19. Aagaard, *supra* note 10, at 1240 ("Environmental law has a clear canon of statutes that . . . . consists of four major anti-pollution statutes administered by the Environmental Protection Agency . . . along with two other statutes, the National Environmental Policy Act (NEPA) and Endangered Species Act (ESA).").

20. Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1, 7 (2014) (describing statutory obsolescence on the issues of climate change and modernizing electricity policy, stating "[i]n both policy domains, the responsible federal agencies have had to wrestle with the rise of important new problems requiring attention, but in neither domain has Congress spoken decisively and comprehensively about the central pressing issues"); Aagaard, *supra* note 10, at 1297 ("If it is to succeed in protecting human health and the environment, the environmental law of this new century may need to evolve into something that looks quite different from the extant environmental law canon.").

current laws are out-of-step with updated understandings of nature as part of an interconnected world.

While we have learned more about the natural world, so too has society shifted since the environmental laws were created.[21] First, an understanding of intergenerational, systemic racism has shown how racist institutions have created environmental justice problems that intersect with climate change, wildfire, and biodiversity in troubling ways. Second, Indigenous governments worldwide are innovating new laws that draw on traditional ecological knowledge to address environmental issues.[22] Third, Wicca and Paganism are quickly growing religions, emerging from the ashes of European and domestic genocide of people (generally identifying as women) who advocated on behalf of nature.[23] Fourth, animal law scholars have advanced a new agenda for radically reimagining a legal system focused on interspecies equity and expanding the law to make nonhumans co-participants in our systems of governance.[24]

Environmental law statutes have failed to keep pace with these social shifts. Laws that represented colonial perspectives and were largely developed by non-inclusive groups of lawmakers are still on the books. Scholars, lawyers, legislators, and judges should broaden environmental law to keep up with the times. New laws, tools, and approaches are desperately needed from more diverse voices. [25] The crucial question is how to update the field to incorporate new perspectives. Relying solely upon a narrow,

21. This paragraph summarizes arguments outlined in a forthcoming article, Karen Bradshaw, *Using Collaborative Governance to Create More Equitable and Inclusive Environmental Law* (unpublished manuscript) (on file with author).

22. Memorandum from Eric S. Lander, President Biden's Sci. Advisor, Dir. of Off. of Sci. & Tech. Pol'y, and Brenda Mallory, Chair of Council on Env't Quality, on Indigenous Traditional Ecological Knowledge and Federal Decision Making (Nov. 15, 2021), https://www.whitehouse.gov/wp-content/uploads/2021/11/111521-OSTP-CEQ-ITEK-Memo.pdf [https://perma.cc/Q2X3-XY3H]; Meredith N. Healy, *Fluid Standing: Incorporating the Indigenous Rights of Nature Concept into Collaborative Management of the Colorado River Ecosystem*, 30 COLO. NAT. RES. ENERGY & ENV'T L. REV. 327, 352 (2019).

23. Electa Draper, *Neopaganism Growing Quickly*, DENV. POST (May 7, 2016, 12:01 PM), https://www.denverpost.com/2008/06/25/neopaganism-growing-quickly [https://perma.cc/H5VR-ADQC] (noting that the number of modern pagans "roughly double about every 18 months in the United States, Canada, and Europe" with the largest group, Wiccans, growing "from 8,000 in 1990 to 134,000 in 2001").

24. BRADSHAW, *supra* note 1. *See generally* SUE DONALDSON & WILL KYMLICKA, ZOOPOLIS: A POLITICAL THEORY OF ANIMAL RIGHTS (2011).

25. For example, it appears that the top-ranked Yale Law Journal has published only four environmental law articles in the past twenty years, all of which were authored by men. *See Environmental Law*, YALE L.J., https://www.yalelawjournal.org/tag/environmental-law [https://perma.cc/4M47-NPNJ]. *See generally* Daniel C. Esty, *Good Governance at the Supranational Scale: Globalizing Administrative Law*, 115 YALE L.J. 1490 (2006); Jedediah Purdy, *The Politics of Nature: Climate Change, Environmental Law, and Democracy*, 119 YALE L.J. 1122 (2010); Benjamin Ewing & Douglas A. Kysar, *Prods and Pleas: Limited Government in an Era of Unlimited Harm*, 121 YALE L.J. 350 (2011); Michael A. Livermore, *The Perils of Experimentation*, 126 YALE L.J. 636 (2017).

statutory approach—by enacting more federal law—is insufficient to the intertwined challenges of natural and social concerns.

This is where the Rights of Nature come in—offering an opportunity to radically reimagine the human relationship with nature in ways that reflect both ancient worldviews and modern scientific understandings. The Rights of Nature is an international, Indigenous-led movement to update the law to recognize the legal rights of natural objects.

B. RIGHTS OF NATURE

The term "Rights of Nature" describes affording legal rights to nonhuman natural beings and objects.[26] Rights of Nature incorporate nonhumans into human legal systems. Affording rights to a river, for example, allows the river to independently assert its interests to legal institutions through human trustees. A constitutional provision may allow citizens to sue on behalf of natural objects. This removes the need for a human plaintiff to assert adequate standing—providing built-in access for natural entities to the judicial process.

The Rights of Nature is also a movement—an international effort for governments worldwide to fold nature into systems of law and government.[27] Rights of Nature seek to reinfuse pre-colonial values of human-nature relationships into legal and economic institutions in the United States and beyond. It is sometimes described as decolonization of property or the natural world.[28] The movement challenges anthropomorphic conceptions of the world by folding nature's interests into man-made institutions of law and markets.

26. Hope M. Babcock, *A Brook with Legal Rights: The Rights of Nature in Court*, 43 ECOLOGY L.Q. 1, 9 (2016).

27. *See generally* Laura S. Lynes, *The Rights of Nature and the Duty to Consult in Canada*, 37 J. ENERGY & NAT. RES. L. 353 (2019); Bétaille, *supra* note 6; Susana Borràs, *New Transitions from Human Rights to the Environment to the Rights of Nature*, 5 TRANSNAT'L ENV'T L. 113 (2016); Louis J. Kotzé & Paola Villavicencio Calzadilla, *Somewhere Between Rhetoric and Reality: Environmental Constitutionalism and the Rights of Nature in Ecuador*, 6 TRANSNAT'L ENV'T L. 401 (2017); Iván Dario Vargas Roncancio, *Plants and the Law: Vegetal Ontologies and the Rights of Nature. A Perspective from Latin America*, 43 AUSTL. FEMINIST L.J. 67 (2017); Nieto Sanabria, *supra* note 7; Mădălina Virginia Antonescu, *Rights of the Nature and Rights of Planet Earth—Towards a Consolidated Regime of Ius Cogens, in the 21st Century Transnational Law*, 5 LOGOS UNIVERSALITY MENTALITY EDUC. NOVELTY, SECTION: L. 5 (2017); Paola Villavicencio Calzadilla, *A Paradigm Shift in Courts' View on Nature: The Atrato River and Amazon Basin Cases in Colombia*, 15 LAW, ENV'T & DEV. J. 49 (2019).

28. Elaine C. Hsiao, *Whanganui River Agreement—Indigenous Rights and Rights of Nature*, 42 ENV'T POL'Y & L. 371, 371 (2012); DINA GILIO-WHITAKER, AS LONG AS GRASS GROWS: THE INDIGENOUS FIGHT FOR ENVIRONMENTAL JUSTICE, FROM COLONIZATION TO STANDING ROCK 157 (2019); Robert A. Williams, Jr., *Large Binocular Telescopes, Red Squirrel Piñatas, and Apache Sacred Mountains: Decolonizing Environmental Law in a Multicultural World*, 96 W. VA. L. REV. 1133, 1135 (1994).

The "Rights of Nature" are once new and ancient. Legal scholars often credit Christopher Stone's canonical article *Should Trees Have Standing?* with giving birth to each of these ideas.[29] Three central features define Stone's conception of affording legal rights to natural objects: (1) the standing to sue for a legal remedy in court; (2) the opportunity to obtain a legal remedy, such as money damages or an injunction; and (3) the opportunity to directly benefit from the legal remedy provided.[30] The effect of giving nature legal rights is to allow natural objects to collect damages, reallocating the cost of damaging nature as it presently is (costless, in economic terms) to having a value (the harm caused to nature through its damage). This essentially shifts an externality to the person creating it, a form of the "polluter pays" principle.[31] In his seminal article, Stone argued that conferring rights on nature would impose economic costs on the value of nature that people had harmed.[32] Granting legal rights to nature also reduces the damage to nature by encouraging precaution to protect against harm, the cost of which is not justified under a system in which the harm is not paid for.

Environmental law scholars tend to credit Stone's canonical article *Should Trees Have Standing?* with giving birth to the Rights of Nature.[33] Surely, Stone's work is of vital importance to the legal actualization of Rights of Nature, which is credited as an influence by European and South American scholars.[34] For example, influential scholar Delphine Misonne has meticulously traced the influence of Stone's writings on international legal developments, showing that his ideas were foundational to a number of international efforts to afford nature rights, which might otherwise appear scattered but—thanks to the work of Misonne—are instead rightfully linked to Stone's influence.[35]

Yet, world-changing ideas rarely come to one person at one time;

29. Misonne, *supra* note 2. *See generally* Christopher D. Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972).

30. *See generally* CHRISTOPHER D. STONE, SHOULD TREES HAVE STANDING?: LAW, MORALITY, AND THE ENVIRONMENT (Oxford University Press, 3rd ed. 2010) (1974).

31. ROBERT V. PERCIVAL, CHRISTOPHER H. SCHROEDER, ALAN S. MILLER & JAMES P. LEAPE, ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 30 (9th ed. 2022).

32. Stone, *supra* note 29, at 474. Many legal scholars credit Stone's work with giving birth to each of these ideas. Surely, Stone's decades of work are of vital importance to the concept and its relevance in modern legal discourse. Yet, as Stone himself acknowledges, the idea of nature having rights preexisted his work. *See id.* at 481. His ideas are a modern, legal interpretation of concepts found in hundreds of years of Indigenous, Black, and pre-colonial cultures.

33. *See, e.g.*, David R. Boyd, *Recognizing the Rights of Nature: Lofty Rhetoric or Legal Revolution?*, 32 NAT. RES. & ENV'T 13, 13 (2018) ("Almost 50 years later, the seed of an idea planted by Professor Stone and endorsed by Justice Douglas is blossoming all over the world.").

34. Misonne, *supra* note 2.

35. *Id.*

instead, they are things that people have always believed.[36] Stone's writing might be understood as an excellent modern legal interpretation of similar concepts found in other cultural traditions, past and present. The genesis for humans acknowledging the right of natural objects is present in cultural and religious ideas throughout time and history.[37] Indeed, Western culture might be unique for creating legal and economic constructs that erase nature. The Rights of Nature movement merely seeks to reincorporate natural interests in legal regimes that erased them. For these reasons, Rights of Nature can be understood as either a modern legal invention or a return to pre-colonial ideas of rules governing human interactions with nature, which some cultures have held uninterrupted since time immemorial.[38]

Today, Rights of Nature are a burgeoning area of environmental law scholarship.[39] Yet, existing scholarship overlooks the extent to which damages are already being collected for human harms to nature and the extent to which they have (or have not) deterred additional harm. Scholars tend to focus on the question of standing, debating the possibility (or impossibility) of natural objects seeking legal remedies in court.[40] This Article takes a different approach. It starts by looking at remedies obtained by natural objects in practice. In this way, this Article shows that the Rights of Nature are neither wholly theoretical nor confined to international examples; they are embedded in a variety of laws. But first, I briefly highlight the importance of searching for Rights of Nature in domestic law by outlining why they might serve to incorporate vitally needed diverse perspectives into our field and practice.

36. James H. Lubowitz, Jefferson C. Brand & Michael J. Rossi, Editorial, *Two of a Kind: Multiple Discovery AKA Simultaneous Invention Is the Rule*, 34 ARTHROSCOPY: J. ARTHROSCOPIC & RELATED SURGERY 2257, 2257 (2018) ("In contrast to the 'heroic theory' of invention and discovery, '(t)he concept of multiple discovery (also known as simultaneous invention) is the hypothesis that most scientific discoveries and inventions are made independently and more or less simultaneously by multiple scientists and inventors.[']" (citation omitted)).

37. Karen Bradshaw, Interspecies Equity 11, 18 (Jan. 9, 2023) (unpublished manuscript) (on file with author).

38. *Id.* at 18, 56.

39. *See generally* Patrick Parenteau, *Green Justice Revisited: Dick Brooks on the Laws of Nature and the Nature of Law*, 20 VT. J. ENV'T L. 183 (2019); Matthew Miller, *Environmental Personhood and Standing for Nature: Examining the* Colorado River *Case*, 17 U.N.H. L. REV. 355 (2019); Oliver A. Houck, *Noah's Second Voyage: The Rights of Nature as Law*, 31 TUL. ENV'T L.J. 1 (2017); Michelle Maloney, *Building an Alternative Jurisprudence for the Earth: The International Rights of Nature Tribunal*, 41 VT. L. REV. 129 (2016); Reed Loder, *Pursuing a Good Life in the Law: Professor Richard Brooks*, 18 VT. J. ENV'T L. 177 (2019); Stacy Jane Schaefer, *The Standing of Nature: The Delineated Natural Ecosystem Proxy*, 9 GEO. WASH. J. ENERGY & ENV'T. L. 70 (2018); L. Kinvin Wroth, *Introduction*, 43 VT. L. REV. 415 (2019); Joshua Ulan Galperin, *Value Hypocrisy and Policy Sincerity: A Food Law Case Study*, 42 VT. L. REV. 345 (2017).

40. *See* Babcock, *supra* note 26, at 11, 13–14 (discussing the Court's rejection of standing in cases concerning the Rights of Nature).

II. INFUSING DIVERSE WORLDVIEWS INTO ENVIRONMENTAL LAW AND POLICY

A radically different model of envisioning human relationships with nature requires finding alternatives to the dominant discourse that frames environmental law in scientific and economic terms.[41] This Part briefly overviews alternative inputs that could inform our field, drawing upon a body of my work that engages environmental values from diverse perspectives.[42] This opens the door to more pluralistic worldviews that—directly and indirectly—are informing the Rights of Nature movement and could be incorporated into environmental law.

Dramatically increasing the diversity of inputs into ecological policymaking is crucial to course-correcting our current, disastrous environmental trajectory. One way to understand the myriad overlapping environmental problems is through a relational perspective, understanding the human relationship with nature as frayed. Humans are acting badly in our relationship with Earth and the other living creatures on it. From this perspective, the key to solving problems like climate change or factory farming is not merely practical (reduce CO_2 emissions), but also philosophical (live sustainably). Sustainable living within the confines of a living world is not a value system embedded in dominant Western capitalist perspectives. Indeed, the values undergirding the dominant social views are what landed us in our current crisis. It follows, then, that backing away from the crisis cannot be achieved through the policies that landed us in this predicament, nor by the people whose decision-making is informed by worldviews that have landed us there. To do better and differently in our relationship with the natural world requires new understandings of our perspectives and obligations to it. For this, diversity is sorely needed—not

41. Karen Bradshaw, *Climate Change Lessons from a Disney Princess*, L. PROFESSOR BLOGS NETWORK: ENV'T L. PROF BLOG (Oct. 13, 2021), https://lawprofessors.typepad.com/environmental_law/2021/10/climate-change-lessons-from-a-disney-princess.html [https://perma.cc/6L69-XK3E] ("[W]e must be bold and welcoming of new and unconventional ideas, which means pursuing and valuing diverse ideas and perspectives. We need new approaches."); Nancy Perkins Spyke, *The Land Use-Environmental Law Distinction: A Geo-Feminist Critique*, 13 DUKE ENV'T L. & POL'Y F. 55, 77 (2002) ("Asking the woman question strives to uncover gender implications in apparently neutral laws, revealing how those laws ignore women's experiences.").

42. In other works, I consider the perspective of rural, socioeconomically-disadvantaged, Black, Indigenous, ecofeminist, and religious views on environmental law issues. Bradshaw, *supra* note 17 (surveying Christian, Hindu, and Buddhist religious text and leaders on the treatment of animals); Karen Bradshaw, *Stakeholder Dynamics in Land Development Projects*, 50 J. LEGAL STUD. S53 (2021) (considering a rural, impoverished community's reaction to housing a water bottling facility from Nestle, the largest food and beverage manufacturer in the world); Karen Bradshaw, *Stakeholder Collaboration as an Alternative to Cost-Benefit Analysis*, 2019 BYU L. REV. 655 (2019) (providing extended case studies of rural Alaskan Native communities' reliance on caribou for subsistence amidst food shortages); Bradshaw, *supra* note 21 (exploring the human relationship with nature found in Black, Indigenous, ecofeminist, and Pagan worldviews).

for the sake of diversity alone (which would be valid), but also because our current mindsets have proven limited and problematic.

In recent work, I note, "I believe that marginalized members of society—those most absent from academic discourse and positions of federal policymaking—hold the insights that are key to our collective survival."[43] Without adapting our existing property laws and environmental statutes to incorporate other perspectives, we are doomed to continue unknowingly replicating the flaws in the code of our laws. Only rethinking the underlying mindsets—which requires engaging with voices left out in prior iterations of federal statutory decision-making—will point out the problems in our perspective that led to too-narrow, ineffective, and dated laws.

Fortunately, legal scholars in related fields are shedding light on how to update common law and statutory fields to reflect more diverse perspectives. We can learn from the reckoning happening in administrative law and property law. Administrative law professor Bijal Shah suggests that "[t]he core models of analysis in administrative law are inflexible and entrenched, and the scope, quality, and materiality of administrative law scholarship has stagnated as a result."[44] Shah advocates for introducing critical legal study of administrative law in order to invigorate the field.[45] Relatedly, in property law, K-Sue Park notes that "[a] growing body of legal scholarship suggests that erasure of the histories of conquest, slavery, and race is widespread across doctrinal areas."[46] Park advocates for scholars to review the historical development of legal doctrines through a presumption of erasure and a close look at buried material.[47] Shah and Park both point to the work of scholars who have done important, critical work that speaks to administrative law, property law, and—by extension—environmental law.

Animal law scholars are calling for interspecies equity and shifts in the legal status of nonhuman animals. Maneesha Deckha is leading an international coalition of scholars in considering how Indigenous and eco-feminist perspectives might transform anthropocentric systems into more pluralistic spaces.[48] An Ecuadorian court recently found that the Rights of

43. Bradshaw, *supra* note 41.

44. Bijal Shah, *Towards a Critical Theory of Administrative Law*, YALE J. ON REGUL.: NOTICE & COMMENT (July 30, 2020), https://www.yalejreg.com/nc/toward-a-critical-theory-of-administrative-law-by-bijal-shah [https://perma.cc/WUG2-P8ZG].

45. *Id.*

46. K-Sue Park, *This Land Is Not Our Land*, 87 U. CHI. L. REV. 1977, 1992 (2020) (reviewing JEDIDIAH PURDY, THIS LAND IS OUR LAND: THE STRUGGLE FOR A NEW COMMONWEALTH (2019)).

47. *Id.* at 1985–89.

48. *See generally* Maneesha Deckha, *Animalizing Law, Humanizing Animals: The Diverse and Feminist-Informed Debates in Animal Law About How to Resist Legal Anthropocentrism*, 46 DALHOUSIE L.J. (forthcoming 2023); Maneesha Deckha, *Unsettling Anthropocentric Legal Systems: Reconciliation,*

Nature protects individual nonhuman animals.[49]

Environmental law scholars are considering perspectives outside of the mainstream environmental status quo, considering concepts like decolonization and unsettling. Rights of Nature provides one of many opportunities to engage these concepts within Western legal structures. Learning from pluralistic worldviews about the ways in which Rights of Nature provides insight into how environmental law scholars can and should engage our body of law amidst personal examination and institutional critiques about diversity, equity, and inclusion.

III. A TYPOLOGY OF RIGHTS OF NATURE APPLIED TO U.S. LAW

This Part provides an overview of Rights of Nature. Section A provides a typology of Rights of Nature, which applies to domestic and international law. Section B explores domestic law, comparing existing laws outside environmental law that nevertheless map on to Rights of Nature. Section C suggests that natural resource damages might constitute the best-developed Right of Nature in the United States, although it has not previously been considered as such. Section D outlines three crucial next steps to expanding existing legal instruments to more fully accommodate a Rights-of-Nature approach.

A. TYPOLOGY OF RIGHTS OF NATURE

This Section sketches a very rough typology of the legal instruments to actualize Rights of Nature. At present, various sources of positive law exist under this broad term, which lacks the requisite exactitude for legal purposes. Concretely identifying the legal meaning of Rights of Nature requires taking a broad view of possible sources of rights, sifting through potential applications, and delineating various sources of rights.

The inquiry in this Section proceeds in three steps. First, it draws upon actions by Indigenous communities worldwide, which have been forerunners in granting a variety of rights consistent with traditional ecological knowledge. Second, it draws upon emerging definitions that international law scholars are giving to Rights of Nature, such as constitutional provisions in some South American countries and tort remedies for repairing nature under French law. Third, it looks to law—treaties, constitutions, cases, statutes, regulations, and ordinances. From these diverse sources, I link the

Indigenous Laws, and Animal Personhood, 41 J. INTERCULTURAL STUD. 77 (2020); MANEESHA DECKHA, ANIMALS AS LEGAL BEINGS: CONTESTING ANTHROPOCENTRIC LEGAL ORDERS (2021).

49. Corte Constitucional del Ecuador [Constitutional Court of Ecuador], Jan. 27, 2022, Sentencia No. 253-20-JH/22.

ephemeral concept of right to concrete legal instruments.

Two brief disclaimers are necessary. First, mapping a quickly emerging area of law runs the risk of overlooking an important component. Therefore, I present this list tentatively as a modest first step, with the assumption that subsequent scholarly discussion will refine and better it. Second, it is necessary to note a technical point: rights can overlap. For example, a constitutional provision could also create legal personhood. Therefore, this is a rough typology and not a perfect mapping, which ideally will emerge collaboratively as the field matures.

This Article identifies various legal meanings of "the Rights of Nature," including constitutional provisions, standing, tort remedies, the right to own property, equitable consideration under the law, and rights-based personhood. This novel typology seeks to provide a legal framework for the many different meanings that scholars and commentators are assigning to the Rights of Nature.

Constitutional provisions provide perhaps the best-known Rights of Nature. International bodies, national governments, states, and Indigenous constitutions can (and do) create positive, written rights to nature in their constitutions. This can be anthropocentric—guaranteeing citizens a right to nature—or eco-centric—making an independent right of nature exist. Over one hundred governments provide some variation of a right to the environment.[50] Some well-known examples include the constitutional provisions in Ecuador and the Navajo Nation.

Legal personhood allows defined natural objects the opportunity to participate in the legal system by suing in court.[51] A crucial question embedded in this is standing, or whether—and by whom—legal remedies can be sought on behalf of nature.[52] Potential intermediaries include government entities, Indigenous communities, and nongovernmental organizations. Broader considerations of personhood include communities and governments granting natural features legal personhood, as with communities that have declared the Whanganui River or Klamath River legal persons.[53] Standing can be granted statutorily, with Congress explicitly allowing standing through statute. Courts can also grant legal personhood,

50. Borràs, *supra* note 27, at 124. ("In total, the constitutional right to a healthy environment is recognized in over 100 countries, either explicitly or through judicial interpretation of other provision.").

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

52. Misonne, *supra* note 2.

53. Nick Perry, *New Zealand River's Personhood Status Offers Hope to Māori*, AP NEWS (Aug. 14, 2022), https://apnews.com/article/religion-sacred-rivers-new-zealand-86d34a78f5fc662ccd554dd7f578d217 [https://perma.cc/N4KT-DYR8].

creating a "jurisprudential paradigm shift."[54] Tribal, state, and local laws are also being used.[55]

Equitable consideration means a court considering the fairness of a particular outcome on a nonhuman animal. This is most evident in the growing number of states in which judges engage in a "best interest of all involved" standard to determine the custodial interests of pets—a degree of judicial consideration previously confined to human children.[56]

Tort remedies provide a judicial remedy for a court to order that a person who harms nature pay money damages to compensate for that harm. French scholar Matthieu Poumarède asserts that making humans pay to fix nature when they hurt it is one form of a Right of Nature.[57] This is essentially saying that nature deserves to be free from harm—much as tort law suggests that people should not be harmed—and to receive damages when it is harmed.

Property rights describe nature, or natural elements such as trees, having the right to own property for its benefit. The federal natural resource damage fund is an example of this: hundreds of millions of dollars that can only be spent to restore nature. More recently, philosophers and legal scholars are considering extending the ability to own property to nature, including wildlife.[58]

Right to Exist confers rights on nature equivalent to those enjoyed not only by people but also by corporations. "[N]ature has certain rights as a legal subject and holder of rights[,] . . . such as the rights to exist, to survive, and to persist and regenerate vital cycles."[59] Philosophers urge the distinction between moral and legal rights.[60] For example, we may believe animals have a right to dignity, but that is not legally enforceable.

International agreements are also creating Rights of Nature. In 1982,

54. Villavicencio Calzadilla, *supra* note 27, at 51, 56–57 (describing the Columbian Constitutional Court judgment recognizing the Atrato River as jurisprudential paradigm shift, from a human-centric to a non-anthropocentric world view).

55. Guillaume Chapron, Yaffa Epstein & José Vincente López-Bao, *A Rights Revolution for Nature*, 363 SCIENCE 1392, 1392–93 (2019).

56. Brief for Amici Curiae Law Professors, Nonhumans Rts. Project, Inc. v. Breheny, 197 N.E.3d 921 (N.Y. 2022) (No. 52).

57. Matthieu Poumarède, Address at the University of Toulouse Rights of Nature Symposium: Does Environmental Liability Needs [sic] the Right of Nature? (Oct. 15, 2019) (suggesting that making humans pay to fix nature when they hurt it creates a right of nature).

58. Karen Bradshaw, *Animal Property Rights*, 89 U. COLO. L. REV. 809, 823 (2018).

59. Borràs, *supra* note 27, at 114.

60. Pierre Brunet, Address at the University of Toulouse Rights of Nature Symposium: Navigating the Rights of Nature Turn: Legal, Moral, and Political Issues (Oct. 14, 2019); Olivier Clerc, Address at the University of Toulouse Rights of Nature Symposium: The Environmental Law Critic Through Ecocentric Ethics (Oct. 14, 2019).

111 countries signed a United Nations ("U.N.") Charter for the Rights of Nature declaring rights for all living things.[61] Also, in September 2012, the fifth World Conservation Congress of the International Union for Conservation of Nature ("IUCN") passed a resolution on "[i]ncorporation of the Rights of Nature as the organizational focal point in IUCN's decision making."[62] Former U.N. Special Rapporteur to the Environment, John Knox, advocates for a U.N. provision recognizing a right to a clean environment.[63]

Having sketched out a very rough typography of Rights of Nature, the next Section considers whether such rights exist within the United States

B. MAPPING CURRENT RIGHTS OF NATURE IN THE UNITED STATES

This Article makes a surprising claim: the United States, in fact, already partially recognizes the Rights of Nature. This survey of U.S. law setting aside the legal elements of the Rights of Nature reveals a surprising overlap. Familiar examples include the Endangered Species Act providing a right-to-exist for plants and wildlife.[64] The National Environmental Policy Act affords procedural protections—and attendant dignity—to government actions on viewsheds.[65]

At its core, Rights of Nature allow human advocates to bring suit to collect damages for ecosystems or their component parts. Rights of Nature can be found in various sources of law, ranging from constitutional provisions to federal statutes, but they always involve a focus on natural objects or systems.

The Rights of Nature exist in many forms. For example, a nongovernmental organization may sue for a legal remedy on behalf of an animal.[66] A whale can sue the United States, asking the government to stop sonar testing that damages the whale's vital organs and interferes with important biological behaviors such as feeding and mating.[67] A monkey can sue a photographer, asserting that he owns a copyright for a picture that he

61. G.A. Res. 37/7, World Charter for Nature (Oct. 28, 1982); *see also* Harold W. Wood, Jr., *The United Nations World Charter for Nature: The Developing Nations' Initiative to Establish Protections for the Environment*, 12 ECOLOGY L.Q. 977, 979 (1985).

62. Int'l Union for Conservation of Nature [IUCN], *Incorporation of the Rights of Nature as the Organizational Focal Point in IUCN's Decision Making*, IUCN Doc. WCC-2012-Res-100-EN (Sept. 6–15, 2012).

63. John Knox, Address at the University of Toulouse Rights of Nature Symposium: Rights of Nature vs the Right to Environment Across the World (Oct. 15, 2019) (proposing a new U.N. provision).

64. 16 U.S.C. §§ 1531–1544.

65. 42 U.S.C. §§ 4321–4370m.

66. *See generally, e.g.*, Nonhuman Rts. Project, Inc. *ex rel.* Kiko v. Presti, 999 N.Y.S.2d 652 (App. Div. 2015); Nonhuman Rts. Project, Inc. *ex rel.* Tommy v. Lavery, 54 N.Y.S.3d 392 (App. Div. 2017).

67. Cetacean Cmty. v. Bush, 386 F.3d 1169, 1172 (9th Cir. 2004).

took using the photographer's camera.[68] A pet, represented by a trustee, can inherit millions of dollars from her owner.[69] Similarly, a government can sue as a trustee for damages that someone causes to public lands or resources. If an oil spill kills a bird, the government must sue the oil company for the cost of restoring the habitat so more of that species can live there.[70]

Unlike human litigants, natural objects do not sue on their own behalf. The monkey does not stand in the courtroom and seek to convince the judge that the picture is his. A human trustee must stand in for the natural object. Many legal thinkers get stuck on this point of standing—who may rightfully stand in for an animal, when, and how? As scholars debate these questions, nature continues to participate in the legal system—collecting billions of dollars in damages, amassing countless funds in inheritance, and benefiting through tort deterrence of natural action.[71]

Below, this Article begins to tentatively chart how legal advocacy for Rights of Nature occurs in practice, studying the activist lawyering that is expanding the margins of the legal Rights of Nature and the little-known federal statutes that form the basis for collecting damages on behalf of natural objects, as Stone imagined. It begins by setting aside the questions of standing and focuses instead on the remedies garnered. This reveals a large, previously unseen set of laws in place, from which one can trace back the questions of standing. This analysis provides insights that reframe our understanding of how, in practice, litigation for nature occurs.

68. Naruto v. Slater, 888 F.3d 418, 420 (9th Cir. 2018).

69. Cara Buckley, *Cosseted Life and Secret End of a Millionaire Maltese*, N.Y. TIMES (June 9, 2011), https://www.nytimes.com/2011/06/10/nyregion/leona-helmsleys-millionaire-dog-trouble-is-dead.html [https://perma.cc/PCY9-NQNE].

70. Third Amended Complaint for Natural Resource Damages, Response Costs and Declaratory Relief Under 42 U.S.C. § 9607(a), United States v. Montrose Chem., No. 2:90-CV-03122-R, 2019 U.S. Dist. LEXIS 241241 (C.D. Cal. Dec. 8, 1999); *About Us*, NAT'L OCEANIC & ATMOSPHERIC ADMIN.: MONTROSE SETTLEMENTS RESTORATION PROGRAM, https://www.montroserestoration.noaa.gov/about-us [https://perma.cc/4WJE-5RA8].

71. Karen Bradshaw, *Settling for Natural Resource Damages*, 40 HARV. ENV'T L. REV. 211, 232 (2016) (describing federal agencies collecting over ten billion dollars in natural resource damages); Bradshaw, *supra* note 58, at 828–29 (describing pets inheriting millions of dollars from human owners through animal trusts).

TABLE 1. Rights of Nature in U.S. Law

Legal Aspect	*Analogy in U.S. Law*
Constitutional Provision	• None; some argue it is embedded in the human "right to happiness" • Ecuadorian Constitution[a] • Indigenous constitutions within the United States (Navajo Nation)
Legal Personhood	• Pa. Gen. Energy Co., LLC v. Grant Twp., No. 14-209ERIE, 2018 U.S. Dist. LEXIS 2069 (W.D. Pa. Jan. 5, 2018). • Colo. River Ecosystem *ex rel.* Deep Green Resistance v. Colorado, No. 17-cv-02316-NYW (D. Colo. 2017). • Mute swan case: Fund for Animals v. Norton, 281 F. Supp. 2d 209 (D.D.C. 2003). • Legal Personhood of Klamath River
Standing	• Cetacean Cmty. v. Bush, 386 F.3d 1169 (9th Cir. 2004); Tilikum *ex rel.* People for the Ethical Treatment of Animals v. Sea World Parks & Ent. Inc., 842 F. Supp. 2d 1259 (S.D. Cal. 2012). *But see* Palila v. Haw. Dep't Land & Nat. Res., 852 F.2d 1106, 1107 (9th Cir. 1988). • Lujan v. Defs. of Wildlife, 504 U.S. 555 (1992).
Human Rights	• ESA = right to exist • Public trust doctrine • Steven Wise; Nonhuman Rights Project litigation[b]
Tort Remedy	• Natural resource damages
Dignity	• Cultural resource claims—Native American • Wild and Scenic River Act, 16 U.S.C. § 1271, stakeholder collectives

	• National Park Service and Related Programs Act, 54 U.S.C. § 100101(a), and the National Monument enabling statute, Antiquities Act of 1906, 54 U.S.C. §§ 320301–320303
Property Rights	• Animal property rights • Public lands management • National Wildlife Refuge System Administration Act of 1966, 16 U.S.C. § 668dd(a)(2) • National Park Service and Related Programs Act, 54 U.S.C. § 100101(a)[c]

Sources: [a] CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR, Oct. 20, 2008, art. 7. [b] STEVEN M. WISE, RATTLING THE CAGE: TOWARD LEGAL RIGHTS FOR ANIMALS (2000). For critiques of this approach, see Richard A. Posner, *Animal Rights*, 110 YALE L.J. 527, 539–40 (2000); Richard Epstein, *Animals as Objects, or Subjects, of Rights* (Univ. of Chi. John M. Olin Law & Econ., Working Paper No. 171, 2002). For a summary of efforts in court, see Bradshaw *supra* note 58, at 812, 812 n.10. [c] Bradshaw, *supra* note 58, at 823–30.

Of the potential Rights of Nature outlined above, perhaps the remedy most closely tracking Stone's conception are the natural resource damages statutes, which are discussed in greater detail below.

C. NATURAL RESOURCE DAMAGES AS RIGHTS OF NATURE

This Article links the existing environmental law tort remedy of natural resource damages to the Rights of Nature. This account radically reframes legal discussions of nature's rights, showing them to be far more tangible and well-developed than the nascent rights that scholars and commentators generally describe them as. This advances scholarly discourse about the Rights of Nature beyond whether they *should* exist to sophisticated discussions of how they have been *already operating* in practice for decades at the highest levels of federal and international law. Conceptualizing Rights of Nature as including natural resource damages has important implications for environmental law activists and scholars—it charts new pathways for pursuing Rights of Nature.

Natural resource damages are a tort remedy that require tortfeasers that harm public lands or natural resources to pay money damages to fix them.[72] Tort remedies provide a judicial remedy for a court to order that a company,

72. Bradshaw, *supra* note 71, at 213–14.

agency, or individual who harms nature must pay money damages to compensate for that harm.[73]

Six federal statutes provide nature with a natural resource damages remedy.[74] Natural resource damages are collected by the government under the public trust doctrine. Teams of environmental lawyers employed by the government seek natural resource damages on behalf of the federal trusts. The damages can only be used to restore nature to a pre-incident baseline condition; they are not a fine or penalty, nor are they used for clean-up. This remedy has produced over ten billion dollars in the past thirty years. It is best known as the vehicle through which British Petroleum ("B.P.") paid for the restoration of the gulf coast following the Deepwater Horizon oil spill.[75]

Although widespread in practice, natural resource damages are relatively rarely studied. Until recently, environmental law scholars largely overlooked natural resource damages.[76] In 2012, Sanne Knudsen provided an outstanding introduction to the remedy, describing it as protecting ecosystem health and serving as a limitation on environmentally detrimental uses of private property.[77] In 2016, I published a descriptive article that provided a longitudinal mapping of the various statutes in which the remedies arise and reported the collection activities by the thirteen federal and resource management agencies.[78]

Despite not yet being understood as conceptually linked, natural resource damages may be the best-developed actualization of Rights of Nature in the United States.[79] The United States has quietly and unwittingly charted a novel path for statutory Rights of Nature. This is a departure from the splashier continuation of all recognitions afforded Rights of Nature in other countries and tribal governments. Situating natural resource damages among other, international efforts to advance the Rights of Nature paves the

73. Sanne H. Knudsen, *Remedying the Misuse of Nature*, 2012 UTAH L. REV. 141, 183 (considering natural resource damages as a remedy for human misuses of nature).

74. 42 U.S.C. §§ 9601–9675; 33 U.S.C. §§ 2701–2706; 33 U.S.C. § 1321(f)(4)–(5); 54 U.S.C §§ 100721–100725; 16 U.S.C. §§ 1431–1444; 16 U.S.C. § 579c.

75. *In re* Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010, MDL No. 2179, 2016 U.S. Dist. LEXIS 50466, at *49 (E.D. La. Apr. 4, 2016) ("BPXP shall pay $7.1 billion, plus any of the $1 billion and accrued interest not yet paid by BPXP under the Framework Agreement, to the United States and the Gulf States for Natural Resource Damages resulting from the *Deepwater Horizon* Incident.").

76. Only a few casebooks and articles addressed a few of the six statutes. Some articles suggested that the remedy was seldom used. Bradshaw, *supra* note 71, at 220 ("Natural resource damages tend to be overlooked by those outside the narrow field. . . . Commentators, casebook authors, and government officials understate the frequency with which claims are pursued and the cumulative dollar value of claims.").

77. Knudsen, *supra* note 73.

78. Bradshaw, *supra* note 71.

79. STONE, *supra* note 30.

way to revitalizing environmental law.

Courts and commentators alike underestimate the importance of tort damages for nature. This leads courts to rubber stamp settlements, which in turn allows overstretched agencies to settle for cents on the dollar. Parties, in turn, rely upon agencies' inability to litigate cases to push hard for aggressive settlements that do not satisfy the *fix what you broke* nature of the statute. For example, the agencies in *Deepwater Horizon* were reliant on B.P. to provide early-stage funding to mitigate damage and assessment costs. This creates an inherent conflict for agencies, which must threaten to sue the party funding the science underlying the settlement. Understanding natural resource damages as Rights of Nature revitalizes the statutes and agencies, providing outside attention to offset the financial interests of responsible parties. Agencies should be increasingly comfortable taking more aggressive settlement and litigation positions if courts and outside commentators—such as environmental nongovernmental organizations—are playing an active role advocating for nature through these statutes. In other words, to realize the potential of natural resource damages, courts and commentators must realize its intellectual hook to Rights of Nature.

Advocating for legal acceptance of the Rights of Nature is at once prosaic and radical. Pragmatically, this Article proceeds in the established model of environmental law by pointing towards six federal natural resource damages statutes in the United States. In 2016, a longitudinal research project revealed that Congress has enacted six statutes that clearly give natural objects legal rights, under which federal agencies, tribes, and states have collected over ten billion dollars.[80] This Article links natural resource damages to the canonical legal thinking on affording nature rights, linking the law with the theory. This effectively ends the conversation about whether Rights of Nature could possibly exist in the United States. They can, and they do.

Rights of Nature—as they presently exist in federal law—elevate the legal status of nonhuman animals, plants, and natural objects on public lands as protected by law. If a party (person, company, or government entity) harms nature, they must pay tort damages.[81] Those damages can only be used to actively repair the harmed object.[82] If an oil spill kills songbirds, government agencies will sue the vessel that spilled the oil and use the money damages to restore songbirds. This might mean buying land in Costa Rica where the songbird nests, devoting that land to the songbirds, and

80. Bradshaw, *supra* note 71, at 215, 227–28.
81. *Id*. at 213–14.
82. *Id*.

rebuilding the population to the point that the songbirds return to the California coast.[83] This is one example of hundreds of well-documented cases in which federal agencies used statutes to collect money damages on behalf of nature, then used those funds to restore natural objects that humans had damaged. This is the actualization of Christopher Stone's idea in *Should Trees Have Standing?*—his vision has come to fruition.[84] If we believe that natural resource damages give nature legal rights, then one could argue that Rights of Nature have existed in the United States for at least forty years.

Theoretically, Rights of Nature shift environmental law from an anthropocentric to eco-centric perspective. Nature deserves to exist outside of its uses to humans. Courts might apply the Endangered Species Act to outline the economic purposes of the songbirds—for tourists to see, for hunters to shoot. The Rights of Nature take a dramatic step, suggesting that the public trust doctrine invests in public land and resources a shared, communal right to the continued existence of the resources. Songbirds should exist because they are part of nature, which is part of the American public. Tribal and international examples take a step further still, citing the independent right of natural objects to exist, showing how existing examples of Rights of Nature might evolve in U.S. law over time.

D. EXPANDING THE RIGHTS OF NATURE

Despite widespread public enthusiasm for reimagining the human relationship with nature, desire and discourse are insufficient to create lasting change. Legal and political institutions translate public will into law. Scholars, lawyers, and law students can act quickly to leverage public will for protecting nature into a powerful, enduring, and meaningful set of legal instruments. I identify three core steps for doing so as the Rights of Nature develop: establishing trusteeship; institutionalizing sound governance models; and innovating legal routes to institutionalize emerging, continually evolving notions of Rights of Nature.

1. Trustees

The first and most urgent step is to institutionalize the early gains of legal personhood by establishing appropriate trustees. Who can be a trustee for a river?[85] Federal, state, local, or tribal governments? What about trustee

83. Bradshaw, *supra* note 71, at 250.

84. Stone discusses natural resource damages as an actualization of his idea in the 2010 version of his book. STONE, *supra* note 30, at 76–77.

85. *See generally* Cristy Clark, Nia Emmanouil, John Page & Alessandro Pelizzon, *Can You Hear the Rivers Sing? Legal Personhood, Ontology, and the Nitty-Gritty of Governance*, 45 ECOLOGY L.Q. 787 (2018) (considering the international cases and implication of legal personhood for rivers); Miller, *supra* note 39; Healy, *supra* note 22.

claims by nongovernmental organizations, corporations, trusts, or individuals? Who is best situated to advocate for, establish, protect, and manage the Rights of Nature?

These are urgent questions. Public will has outpaced legal answers. There already exist rivers and lakes in the United States that are legal persons. Now, environmental law theorists owe it to the efforts of hard-working environmental advocates to take the baton of shepherding these rights through the legal system. This means providing solid legal analysis and advice for institutionalizing early gains. Nongovernmental organizations are surely working on them, but they should not work alone.

Lessons from the history of environmental law can shape the answers to these questions. For example, a body of extremely valuable recent work by Jessica Owley, tracing the development of conservation easements, can provide valuable lessons for this emerging tool.[86]

2. Institutionalizing Governance

The second task is to consider the institutional features of adjudicating trust responsibilities. Environmental law scholars can bring to bear the cumulative lessons of fifty years of environmental history to craft well-reasoned governance mechanisms. As a default, courts are responsible. Judges have deep expertise in the procedural questions of trusts. They are generally less expert, however, on scientific topics—a reason for the substantial deference generally afforded agencies. Perhaps a system of private governance should exist to answer the scientific management question of natural rights (an argument I make specifically with regard to wildlife property trusts elsewhere).[87]

Trustees, unlike agencies, are not responsive to public will and lack democratic legitimacy. As such, I argue, it is vital that a unified system of private governance emerges, composed of a certifying body representing diverse expertise including scientists, animal advocates, sociologists, and persons with traditional ecological knowledge. Here, too, we find an analogy in land trusts: the Land Alliance is a certifying body to which many reputable trusts remain. History from sustainability certifications, however, warn of the danger of look-alike certifications with less stringent objectives.[88] To

86. *See generally* Jessica Owley, *Conservation Easements at the Climate Change Crossroads*, 74 LAW & CONTEMP. PROBS. 199 (2011); Jessica Owley, *The Enforceability of Exacted Conservation Easements*, 36 VT. L. REV. 261 (2011); Jessica Owley, Federico Cheever, Adena R. Rissman, M. Rebecca Shaw, Barton H. Thompson, Jr. & William Weeks, *Climate Change Challenges for Land Conservation: Rethinking Conservation Easements, Strategies, and Tools*, 95 DENV. L. REV. 727 (2018).

87. BRADSHAW, *supra* note 1, at 89.

88. Karen Bradshaw Schulz, *New Governance and Industry Culture*, 88 NOTRE DAME L. REV.

avoid this, I argue, the certifying body should follow the model of Administrative Conference of the United States—a federal government agency that is composed of public and private members. The imprimatur of the federal government will add legitimacy to the proposal; the private element guards against capture.

3. Expanding the Rights of Nature

The broader task of environmental law is to integrate its current narrow framing with the Rights of Nature and environmental justice to create a meaningful, evolving, substantive area of law. This means looking beyond the statutory confines of environmental law. It means listening to what members of the public want for the environment and figuring out how to actualize it. It also means, as a field, engaging in robust debate.

Much as lawyers are called "deal killers" in corporate transactions because they spot the potential problems, so too must we bring skepticism to this project, however aligned we might be with its aims. Some ideas that sound good initially may prove ultimately detrimental. What is the worst that could happen? How could it be guarded against? Lessons learned from environmental law should also apply. If we impose on rural and landowner interests without consultation, they might derail even the clearest of laws. If elite legal architects discount the perspectives of underrepresented voices of women and people of color, our environmental law will not reflect our social values.

The difficult balance of brainstorming, experimentation, and debate may change the nature of the field. Environmental law scholars have long been aligned with one another, assessing the risk from the outside, and thus perhaps not pushing and challenging ideas far enough. But two crucial things have changed since the advent of environmental law. Public sentiment is increasing, and our field has matured. Unification in the fight for legitimacy is no longer necessary; in fact, it holds back the potential to create debate within the field that differentiates a field of scholarship from advocacy. We are ready for that leap; the world needs it. Boldly setting forth new ideas is essential. We can preserve the enviable norms of our field for supporting junior scholars, actively welcoming and encouraging women and people of color. But environmental law scholars must also look for vital and undeniable links between our fields and Indigenous law, animal law, health law, and corporate law.

2515, 2532 (2013).

CONCLUSION

Indigenous communities and nongovernmental organizations are investing heavily in creating Rights of Nature. Environmental law scholars might collectively choose to answer that call by taking the idea seriously and charting the theoretical and doctrinal pathways to breathe life into it. Although it is simpler to continue forward without critical examination of the past, our present environmental crises warn that is not enough. It is time for a radical reimagining of the human relationship with nature, a shift that must take place through law.

Environmental law scholars need not be the "deal killers" of bold, new ideas. Instead, it is our task to find throughlines in black letter law that create pathways to give legal life to social ideas. This Article strives to do just that—linking popular discourse on the Rights of Nature with its theoretical foundations and well-established statutory systems in the United States. It argues that Rights of Nature have become embedded in seldom-explored cracks and crevices of the law, waiting to be discovered and mined for ideas and new approaches.

This Article links the passion for Rights of Nature to the existing legal framework, providing a novel theoretical analysis and charting doctrinal pathways to institutionalize and actualize Rights of Nature in the United States. Desire and discourse are necessary but not enough. Legal and political institutions translate public will into law. Scholars, lawyers, and law students must act quickly to leverage public will for protecting nature into a powerful, enduring, and meaningful set of legal instruments. I identify three core steps for doing so: establishing trusteeship, institutionalizing sound governance models, and innovating legal routes to institutionalize emerging, continually evolving notions of Rights of Nature. Reframing environmental law like this expands the available remedies in a way that can respond to increased environmental challenges such as climate change, which existing statutes alone cannot address.

It could be the chosen task of a new generation of environmental law scholars to find the Rights of Nature, explore them, and expand them. The public enthusiasm behind Rights of Nature provides precisely such an opportunity. We are not confined to a dozen leading environmental law statutes or to history; our collective scholarly effort should not be limited to merely building upon what is, but also searching out what could be. The Rights of Nature are playing out across hundreds of seldom-explored sources of law in many courtrooms. Identifying them, creating typologies, and assessing outcomes—this is work worthy of the minds available to do it.

Environmental statutes, although vital, may have been a scaffold to

build toward a more sophisticated reconciliation of capitalist and environmental values. At this moment in history, we have the combination of the urgent need, public will, and legal pathways to actualize sweeping change. Both the will and tools exist. We have the matches and the kindling—environmental law scholars can collectively choose to build the fire. I hope we do.