INTRODUCTION
Trees at Thirty-Five

I. THE ROOTS OF *TREES*

It has been over thirty-five years since I wrote *Should Trees Have Standing?—Towards Legal Rights for Natural Objects*. It has since assumed a modest but apparently enduring place in contemporary environmental law and ethics, quite out of proportion to its actual impact on the courts. People have asked where I got the idea. I am not sure in what sense anyone ever "gets" any idea; and, at any rate I was later to be assured by readers—one should always be prepared to discover one's unoriginality—that the central notion had been floated about as far away as India[1] and as close to home as California.[2] The odd thing is that in this case I can assign a time, not much more than a moment, when the idea and I met up.

My thoughts were not even on the environment. I was teaching an introductory class in property law, and simply observing that societies, like human beings, progress through different stages of growth and sensitivity. In our progress through these stages, the law, in its way, participates, like art and literature in theirs. Our subject matter, the evolution of property law, was an illustration. Throughout history, there have been shifts in a cluster of related property variables, such as: what things, at various times were recognized as ownable (land, movables, ideas, other persons [slaves]); who was deemed capable of ownership (individuals, married women); the powers and privileges ownership conveyed (the right to destroy, the immunity from a warrantless search); and so on.[3] It was easy to see how each change shifted the locus and quality of power. But there also had to be an internal dimension, each advance in the law-legitimated concept of "ownership" fueling a change in consciousness, in the range and depth of feelings. For example, how did the innovation of the will—of the power to control our property after death—affect our sense of mortality, and thus of ourselves? Engrossing stuff (I thought). But we were approaching the end of the hour. I sensed that the students had already started to pack away their enthusiasm for the next venue. (I like to believe that every lecturer knows this feeling.) They needed to be lassoed back.

"So," I wondered aloud, reading their glazing skepticisms, "what would a radically different law-driven consciousness look like? . . . One in which Nature had rights," I supplied my own answer. "Yes, rivers, lakes, . . ." (warming to the idea) "trees . . . animals . . ." (I may have ventured "rocks"; I am not certain.) "How would such a posture *in law* affect a community's view *of itself*?"

This little thought experiment was greeted, quite sincerely, with uproar. At the end of the hour, none too soon, I stepped out into the hall and asked myself, "What did you just say in there? How could a tree have '*rights*'?" I had no idea.

The wish to answer my question was the starting point of *Should Trees Have Standing?* It launched as a vague, if heartfelt, conclusion tossed off in the heat of lecture. My initial motive was to restore my credibility. I set out to demonstrate that, whatever other criticisms might be leveled at the idea of Nature having legal rights, it was not incoherent.

But this was the hurdle: what were the criteria of an entity "having its own legal rights"? The question is complicated, because the law lends its mantle to protect all sorts of things, but not in a manner that would lead us to say that these things have rights. Under conventional law, if Jones lives next to a river, he has a property right to the flowing water in a condition suited for his domestic, or at least agricultural, use. If an upstream factory is polluting, Jones may well be able to sue the factory. Such a suit would protect the river indirectly. But no one would say the law was vindicating the river's rights. The rights would be Jones's. The suit would occur under conditions that Jones's interests in the river—its law-assured usefulness to him—were violated. Damages, if any, would go to Jones. If he were to win an injunction, he would have the liberty to negotiate it away—to release his claim against the factory for a price that was satisfactory to him (whatever the effect on the river's ecology).

So, then, what would be the criteria of a river having "its own" rights? One would have to imagine a legal system in which the rules (1) empower a suit to be brought against the factory owner in the name of the river (through a guardian or trustee); (2) hold the factory liable on the guardian's showing that, without justification, the factory changed the river from one state S to another state S* (for example, from oxygenated and teeming with fish to lifeless), irrespective of the economic consequences of the change on any human; and (3) the judgment would be for the benefit of the river (for example, if repairing the pollution—making the river "whole"—called for reoxygenating the river and restocking it with fish, the costs would be paid by the polluter into a fund for the river that its guardian would draw from).

I jotted down these three criteria on a yellow legal pad: (1) a suit in the object's own name (not some human's); (2) damages calculated by loss to a nonhuman entity (not limited to economic loss to humans); and (3) judgment applied for the benefit of the nonhuman entity. If the notion was ever to be more than a vague sentiment, I had to find some pending case in which this Nature-centered conception of rights might make a difference in the outcome. Could there be such?

I phoned my library reference desk, transmitted the criteria, and asked if they could come up with any litigation that fit this description. I did not expect a quick response. But within a half hour I got a call back: there was a case involving Mineral King in the California Sierra Nevada . . . Perhaps it might fit my needs?

II. SIERRA CLUB V. MORTON

The case the library had found, at the time entitled *Sierra Club v. Hickel*, had been recently decided by the Ninth Circuit Court of Appeals.[4] The U.S. Forest Service had granted a permit to Walt Disney Enterprises, Inc. to "develop" Mineral King Valley, a wilderness area in California's Sierra Nevada Mountains, by the construction of a $35 million complex of motels, restaurants, and recreational facilities. The Sierra Club, maintaining that the project would adversely affect the area's aesthetic and ecological balance, brought suit for an injunction. But the Ninth Circuit reversed. The key to the Ninth Circuit's opinion was this: not that the Forest Service had been right in granting the permit, but that the Sierra Club Legal Defense Fund had no "standing" to bring the question to the courts. After all, the Ninth Circuit reasoned, the Sierra Club itself

> does not allege that it is 'aggrieved' or that it is 'adversely affected' within the meaning of the rules of standing. Nor does the fact that no one else appears on the scene who is in fact aggrieved and is willing or desirous of taking up the cudgels create a right in appellee. The right to sue does not inure to one who does not possess it, simply because there is no one else willing and able to assert it.[5]

This, it was apparent at once, was the ready-made vehicle to bring to the Court's attention the theory that was taking shape in my mind. Perhaps the injury to the Sierra Club was tenuous, but the injury to Mineral King—the park itself—wasn't. If the courts could be persuaded to think about the park itself as a jural person—the way corporations are "persons"—the notion of Nature having rights would here make a significant operational difference—the difference between the case being heard and (the way things were then heading) being thrown out of court. In other words, if standing were the barrier, why not designate Mineral King, the wilderness area, as the plaintiff "adversely affected," let the Sierra Club be characterized as the attorney or guardian for the area, and get on with the merits? Indeed, that seemed a more straightforward way to get at the real issue, which was not what all that gouging of roadbeds would do to the club or its members, but what it would do to the valley. Why not come right out and say—and try to deal with—that?

It was October 1971. The Sierra Club's appeal had already been docketed for review by the U.S. Supreme Court under the name *Sierra Club v. Morton* (Morton being the name of the new Secretary of the Interior.). The case would be up for argument in November or December at the latest. I sat down with the editor-in-chief of the *Southern California Law Review*, and we made some quick estimates. The next issue of the *Review* to go to press would be a special symposium on law and technology, which was scheduled for publication in late March or early April. There was no hope, then, of getting an article out in time for the lawyers to work the idea into their briefs or oral arguments. Could something be

published in time for the Justices to see it before they had finished deliberating and writing their opinions? The chances that the case would still be undecided in April were only slim. But there was one hope. By coincidence, Justice William O. Douglas (who, if anyone on the Court, might be receptive to the notion of legal rights for natural objects) was scheduled to write the preface to the symposium issue. For this reason he would be supplied with a draft of all the manuscripts in December. Thus he would at least have this idea in his hands. If the case were long enough in the deciding, and if he found the theory convincing, he might even have the article available as a source of support.

We decided to try it. I pulled the thoughts together at a pace that, as such academic writings go, was almost breakneck, and the law review wedged it into a symposium in which it did not belong. The manuscripts for the symposium issue went to the printer in late December. Then began a long wait, all of us hoping that—at least in this case—the wheels of justice would turn slowly enough that the article could catch up with the briefs. It did.

The Supreme Court upheld the Ninth Circuit, a four Justice plurality affirming that "the 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured."[6] But Justice Douglas opened his dissent with warm endorsement for the theory that had just then made its way into print:

> The critical question of 'standing' would be simplified and also put neatly in focus if we . . . allowed environmental issues to be litigated . . . in the name of the inanimate object about to be despoiled, defaced, or invaded . . . Contemporary public concern for protecting nature's ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation. See *Should Trees Have Standing*? . . . This suit would therefore be more properly labeled as Mineral King v. Morton.[7]

Justices Harold Blackmun and William J. Brennan favored a liberal construction of available precedent to uphold the Sierra Club on the pleadings it submitted; but in the alternative, they would have permitted the "imaginative expansion" of standing for which Douglas was willing to speak.[8]

III. EARLY REACTIONS

Boosted by Douglas's endorsement, the media got onto *Trees* overnight. It is not unusual for Justices to cite law review articles. But there was something, if not prophetic, at least amiably zany about a law professor who "speaks for the trees"—and gets a few Justices to listen. Writing in the *Journal of the American Bar Association*, one practicing lawyer took to verse for rejoinder:

> If Justice Douglas has his way—
> O come not that dreadful day—

We'll be sued by lakes and hills
Seeking a redress of ills.
Great mountain peaks of name prestigious
Will suddenly become litigious.
Our brooks will babble in the courts,
Seeking damages for torts.
How can I rest beneath a tree
If it may soon be suing me?
Or enjoy the playful porpoise
While it's seeking habeas corpus?
Every beast within his paws
Will clutch an order to show cause.
The courts, besieged on every hand,
Will crowd with suits by chunks of land.
Ah! But vengeance will be sweet
Since this must be a two-way street.
I'll promptly sue my neighbor's tree
for shedding all its leaves on me.[9]

The style—a reluctance to confront us natural object advocates head-on, prose to prose—spread. In disposing of a 1983 suit by a tree owner to recover from a negligent driver for injuries to the tree, the Oakland County Michigan Appeals Court affirmed dismissal with the following opinion in its entirety:

We thought that we would never see
A suit to compensate a tree.
A suit whose claim in tort is prest
Upon a mangled tree's behest;
A tree whose battered trunk was prest
Against a Chevy's crumpled chest;
A tree that may forever bear
A lasting need for tender care.
Flora lovers though we three
We must uphold the court's decree.[10]

On the tide of such interest, the *Trees* article was brought out in book form utterly without reedit[11]—essentially photocopied, in fact—and sold briskly.[12] Most reactions were favorable. The *Berkeley Monthly*, for one, took *Trees* as a sign of better times to come. Others were critical, either of my ideas, or of nearly unrecognizable mutations which the writers proceeded to connect, at their convenience, I thought, with my name. I might have expected to be considered a born again pantheist, but not, as one reviewer initiated, that my agenda was transparently communistic. (The gist, as I recall, was that if we could not own *things*—and, after all, what else was there?—the whole institution of ownership was done for.) My name and little chatty, uncritical versions of the idea began to

embellish the sort of journals that carry pictures. A revised mass-market paperback edition of the essay was issued by Avon Books, unsentineled by scholarly footnotes.[13]

I had not been an environmental lawyer, and the focus of my attentions soon settled back to other things. But the Nature-rights movement was rolling along and lawyers began to file suits in the name of nonhumans. Early named plaintiffs included a river (the Byram),[14] a marsh (No Bottom),[15] a brook (Brown),[16] a beach (Makena),[17] a national monument (Death Valley),[18] a town commons (Billerica),[19] a tree,[20] and an endangered Hawaiian bird (the Palila).[21]

But I am getting ahead of the story. I will return to the post-*Trees* developments in the epilogue.

1. SHOULD TREES HAVE STANDING? Toward Legal Rights for Natural Objects

I. INTRODUCTION: THE UNTHINKABLE

In *The Descent of Man*, Charles Darwin observes that the history of moral development has been a continual extension in the objects of his "social instincts and sympathies." Originally, each man had regard only for himself and those of a very narrow circle about him; later, he came to regard more and more "not only the welfare, but the happiness of all his fellow-men"; then "his sympathies became more tender and widely diffused, extending to men of all races, to the imbecile, maimed, and other useless members of society, and finally to the lower animals. . . ."[1]

The history of the law suggests a parallel development. Perhaps there never was a pure Hobbesian state of nature, in which no "rights" existed except in the vacant sense of each man's "right to self-defense." But it is not unlikely that so far as the earliest "families" (including extended kinship groups and clans) were concerned, everyone outside the family was suspect, alien, rightless.[2] And even within the family, persons we presently regard as the natural holders of at least some rights had none. Take, for example, children. We know something of the early right-status of children from the widespread practice of infanticide—especially of the deformed and female.[3] (Senicide,[4] as among the North American Indians, was the corresponding rightlessness of the aged.[5]) Maine tells us that as late as the *patria potestas* of the Romans, the father had *jus vitae necisque*—the power of life and death—over his children. *A fortiori*, Maine writes, he had the power of "uncontrolled corporal chastisement; he can modify their personal condition at pleasure; he can give a wife to his son; he can give his daughter in marriage; he can divorce his children of either sex; he can transfer them to another family by adoption; and he can sell them." The child was less than a person: an object, a thing.[6]

The legal rights of children have long since been recognized in principle, and are still expanding in practice. Witness, *In re Gault*,[7] which guaranteed basic constitutional protections to juvenile defendants. We have been making persons of children although they were not, in law, always so. And we have done the same, albeit imperfectly some would say, with prisoners,[8] aliens, women (especially of the married variety), the insane,[9] African Americans, fetuses,[10] and Native Americans.

Nor is it only matter in human form that has come to be recognized as the possessor of rights. The world of the lawyer is peopled with inanimate right-holders: trusts, corporations, joint ventures, municipalities, Subchapter R

partnerships,[11] and nation-states, to mention just a few. Ships, still referred to by courts in the feminine gender, have long had an independent jural life, often with striking consequences.[12] We have become so accustomed to the idea of a corporation having "its" own rights, and being a "person" and "citizen" for so many statutory and constitutional purposes, that we forget how jarring the notion was to early jurists. "That invisible, intangible and artificial being, that mere legal entity" Chief Justice Marshall wrote of the corporation in *Bank of the United States v. Deveaux*[13]—could a suit be brought in its name? Ten years later, in the *Dartmouth College* case,[14] he was still refusing to let pass unnoticed the wonder of an entity "existing only in contemplation of law."[15] Yet, long before Marshall worried over the personifying of the modern corporation, the best medieval legal scholars had spent hundreds of years struggling with the notion of the legal nature of those great public "corporate bodies," the Church and the State. How could they exist in law, as entities transcending the living pope and king? It was clear how a king could bind himself—on his honor—by a treaty. But when the king died, what was it that was burdened with the obligations of, and claimed the rights under, the treaty his tangible hand had signed? The medieval mind saw (what we have lost our capacity to see)[16] how unthinkable it was, and worked out the most elaborate conceits and fallacies to serve as anthropomorphic flesh for the Universal Church and the Universal Empire.[17]

It is this note of the unthinkable that I want to dwell upon for a moment. Throughout legal history, each successive extension of rights to some new entity has been, theretofore, a bit unthinkable. We are inclined to suppose the rightlessness of rightless "things" to be a decree of Nature, not a legal convention acting in support of sonic status quo. It is thus that we defer considering the choices involved in all their moral, social, and economic dimensions. And so the U.S. Supreme Court could straight-facedly tell us in *Dred Scott* that African Americans had been denied the rights of citizenship "as a subordinate and inferior class of beings, who had been subjugated by the dominant race. . . ."[18]

In the nineteenth century, the highest court in California explained that the Chinese had not the right to testify against White men in criminal matters because they were a "race of people whom nature has marked as inferior, and who are incapable of progress or intellectual development beyond a certain point . . . between whom and ourselves nature has placed an impassable difference."[19] The popular conception of the Jew in the thirteenth century contributed to a law which treated them as "men *ferae naturae*, protected by a quasi forest law. Like the roe and the deer, they form an order apart."[20] Recall, too, that it was not so long ago that the fetus was "like the roe and the deer." In an early suit attempting to establish a wrongful death action on behalf of a negligently killed fetus (now widely accepted practice), Holmes, then on the Massachusetts Supreme Court, seems to have thought it simply inconceivable "that a man might owe a civil duty and incur a conditional prospective liability in tort to one

not yet in being."[21] The first woman in Wisconsin who thought she might have a right to practice law was told that she did not, in the following terms:

> The law of nature destines and qualifies the female sex for the bearing and nurture of the children of our race and for the custody of the homes of the world . . . [A]ll life-long callings of women, inconsistent with these radical and sacred duties of their sex, as is the profession of the law, are departures from the order of nature; and when voluntary, treason against it . . . The peculiar qualities of womanhood, its gentle graces, its quick sensibility, its tender susceptibility, its purity, its delicacy, its emotional impulses, its subordination of hard reason to sympathetic feeling, are surely not qualifications for forensic strife. Nature has tempered woman as little for the juridical conflicts of the court room, as for the physical conflicts of the battlefield. . . . [22]

The fact is, that each time there is a movement to confer rights onto some new "entity," the proposal is bound to sound odd or frightening or laughable.[23] This is partly because until the rightless thing receives its rights, we cannot see it as anything but a *thing* for the use of "us"—those who are holding rights at the time.[24] In this vein, what is striking about the Wisconsin case discussed earlier is that the court, for all its talk about women, so clearly was never able to see women as they are (and might become). All it could see was the popular "idealized" version of *an object it needed*. Such is the way the slave-holding South looked upon African Americans.[25] There is something of a seamless web involved: there will be resistance to giving the thing "rights" until it can be seen and valued for itself; yet, it is hard to see it and value it for itself until we can bring ourselves to give it "rights"—which is almost inevitably going to sound inconceivable to a large group of people.

The reason for this little discourse on the unthinkable, the reader must know by now, if only from the title of the paper. I am quite seriously proposing that we give legal rights to forests, oceans, rivers, and other so-called "natural objects" in the environment—indeed, to the natural environment as a whole.[26]

As strange as such a notion may sound, it is neither fanciful nor devoid of operational content. In fact, I do not think it would be a misdescription of certain developments in the law to say that we are already on the verge of assigning some such rights, although we have not faced up to what we are doing in those particular terms.[27] I argue here that we should do so now, and explore the implications such a notion would hold.

II. TOWARD RIGHTS FOR THE ENVIRONMENT

Now, to say that the natural environment should have rights is not to say anything as silly as that no one should be allowed to cut down a tree. We say

human beings have rights, but—at least as of the time of this writing—they can be executed.[28] Corporations have rights, but they cannot plead the Fifth Amendment.[29] *In re Gault* gave 15-year-olds certain rights in juvenile proceedings, but it did not give them the right to vote. Thus, to say that the environment should have rights is not to say that it should have every right we can imagine, or even the same body of rights as human beings have. Nor is it to say that everything in the environment should have the same rights as every other thing in the environment.

What the granting of rights does involve has two sides to it. The first involves what might be called the legal-operational aspects; the second, the psychic and socio-psychic aspects. I shall deal with these aspects in turn.

III. THE LEGAL-OPERATIONAL ASPECTS

(1) What It Means to Be a Holder of Legal Rights

There is, so far as I know, no generally accepted standard for how one ought to use the term "legal rights." Let me indicate how I shall be using it in this piece.

First and most obviously, if the term is to have any content at all, an entity cannot be said to hold a legal right unless and until *some public authoritative body* is prepared to give *some amount of review* to actions that are colorably inconsistent with that "right." For example, if a student can be expelled from a university and cannot get any public official, even a judge or administrative agent at the lowest level, either (1) to require the university to justify its actions (if only to the extent of filling out an affidavit alleging that the expulsion "was not wholly arbitrary and capricious"), or (2) to compel the university to accord the student some procedural safeguards (a hearing, right to counsel, right to have notice of charges), then the minimum requirements for saying that the student has a legal right to his education do not exist.[30]

But for a thing to be a *holder of legal rights*, something more is needed than that some authoritative body will review the actions and processes of those who threaten it. As I shall use the term, "holder of legal rights," each of three additional criteria must be satisfied. All three, one will observe, go toward making, a thing count judicially—to have a legally recognized worth and dignity in its own right, and not merely to serve as a means to benefit "us" (whoever the contemporary group of rights-holders may be). They are, first, that the thing can institute legal actions *at its behest*, second, that in determining the granting of legal relief, the court must take *injury to it* into account; and, third, that relief must run to the *benefit of it*.

To illustrate, even as between two societies that condone slavery there is a fundamental difference between S1, in which a master can (if he chooses), go to court and collect reduced chattel value damages from someone who has beaten his slave, and S2, in which the slave can institute the proceedings himself, for his

own recovery, damages being measured by, say, his pain and suffering. Notice that neither society is so structured as to leave wholly unprotected the slave's interests in not being beaten. But in S2 as opposed to S1 there are three operationally significant advantages that the slave has, and these make the slave in S2, albeit a slave, a holder of rights. Or, again, compare two societies, S1, in which prenatal injury to a live-born child gives a right of action against the tortfeasor at the mother's instance, for the mother's benefit, on the basis of the mother's mental anguish, and S2, which gives the child a suit in its own name (through a guardian ad litem) for its own recovery, for damages to it.

When I say, then, that at common law "natural objects" are not holders of legal rights, I am not simply remarking what we would all accept as obvious. I mean to emphasize three specific legal-operational advantages that the environment lacks, leaving it in the position of the slave and the fetus in S1, rather than the slave and fetus of S2.

(2) The Rightlessness of Natural Objects at Common Law

Consider, for example, the common law's posture toward the pollution of a stream. True, courts have always been able, in some circumstances, to issue orders that will stop the pollution—just as the legal system in S1 is so structured as incidentally to discourage beating slaves and being reckless around pregnant women. But the stream itself is fundamentally rightless, with implications that deserve careful reconsideration.

The first sense in which the stream is not a rights-holder has to do with standing. The stream itself has none. So 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. This conception of the riparian as the holder of the right to bring suit has more than theoretical interest. The lower riparians may simply not care about the pollution. They themselves may be polluting, and not wish to stir up legal waters. They may be economically dependent on their polluting neighbor.[31] And, of course, when they discount the value of winning by the costs of bringing suit and the chances of success, the action may not seem worth undertaking. Consider, for example, that while the polluter might be injuring one hundred downstream riparians of $100,000 a year *in the aggregate*, each riparian separately might be suffering injury only to the extent of $1000—possibly not enough for any one of them to want to press suit by himself, or even go to the trouble and cost of securing co-plaintiffs to make it worth everyone's while. This hesitance will be especially likely when the potential plaintiffs consider the burdens the law puts in their way:[32] proving, e.g., specific damages, the "unreasonableness" of defendant's use of the water, the fact that practicable means of abatement exist, and overcoming difficulties raised by issues such as joint causality, right to pollute by prescription, and so forth. Even in states which, like California, sought to overcome these difficulties by empowering the attorney general to sue for abatement

of pollution in limited instances, the power has been sparingly invoked and, when invoked, narrowly construed by the courts.[33]

The second sense in which the common law denies "rights" to natural objects has to do with the way in which the merits are decided in those cases in which someone is competent and willing to establish standing. At its more primitive levels, the system protected the "rights" of the property-owning human with minimal weighing of any values: "*Cujus est solum, ejus est usque ad coelum et ad infernos.*"[34] Today we have come more and more to make balances—but only such as will adjust the economic best interests of identifiable humans. For example, continuing with the case of streams, there are commentators who speak of a "general rule" that "a riparian owner is legally entitled to have the stream flow by his land with its quality unimpaired" and observe that "an upper owner has, prima facie, no right to pollute the water."[35] Such a doctrine, if strictly invoked, would protect the stream absolutely whenever a suit was brought; but obviously, to look around us, the law does not work that way. Almost everywhere there are doctrinal qualifications on riparian "rights" to an unpolluted stream.[36] Although these rules vary from jurisdiction to jurisdiction, and upon whether one is suing for an equitable injunction or for damages, what they all have in common is some sort of balancing. Whether under language of "reasonable use," "reasonable methods of use," "balance of convenience," or "the public interest doctrine,"[37] what the courts are balancing, with varying degrees of directness, are the economic hardships on the upper riparian (or dependent community) of abating the pollution vis-à-vis the economic hardships of continued pollution on the lower riparians. What does not weigh in the balance is the damage to the stream, its fish and turtles and lower life. So long as the natural environment itself is rightless, these are not matters for judicial cognizance. Thus, we find the highest court of Pennsylvania refusing to stop a coal company from discharging polluted mine water into a tributary of the Lackawanna River because a plaintiff's "grievance is for a mere personal inconvenience; and mere private personal inconveniences . . . must yield to the necessities of a great public industry, which although in the hands of a private corporation, subserves a great public interest."[38] The stream itself is lost sight of in "a quantitative compromise between two conflicting interests."[39]

The third way in which the common law makes natural objects rightless has to do with who is regarded as the beneficiary of a favorable judgment. Here, too, it makes a considerable difference that it is not the natural object that counts in its own right. To illustrate this point, let me begin by observing that it makes perfectly good sense to speak of, and ascertain, the legal damage to a natural object, if only in the sense of "making it whole" with respect to the most obvious factors.[40] The costs of making a forest whole, for example, would include the costs of reseeding, repairing watersheds, restocking wildlife—the sorts of costs the U.S. Forest Service undergoes after a fire. Making a polluted stream whole would include the costs of restocking with fish, waterfowl, and other animal and

vegetable life, dredging, washing out impurities, establishing natural and/or artificial aerating agents, and so forth. Now, what is important to note is that, under our present system, even if a plaintiff riparian wins a water pollution suit for damages, no money goes to the benefit of the stream itself to repair its damages.[41] This omission has the further effect that, at most, the law confronts a polluter with what it takes to make the plaintiff riparians whole; this may be far less than the damages to the stream,[42] but not so much as to force the polluter to desist. For example, it is easy to imagine a polluter whose activities damage a stream to the extent of $100,000 annually, although the aggregate damage to all the riparian plaintiffs who come into the suit is only $30,000. If $30,000 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. Similarly, even if the jurisdiction issues an injunction at the plaintiffs' behest (rather than to order payment of damages), there is nothing to stop the plaintiffs from "selling out" the stream, i.e., agreeing to dissolve or not enforce the injunction at some price (in the example described earlier, somewhere between plaintiffs' damages—$30,000—and defendant's next best economic alternative). Indeed, I take it this is exactly what Learned Hand had in mind in an opinion in which, after issuing an antipollution injunction, he suggests that the defendant "make its peace with the plaintiff as best it can."[43] What is meant is a peace between them, and not amongst them and the river.

I ought to make it clear at this point that the common law as it affects streams and rivers, which I have been using as an example so far, is not exactly the same as the law affecting other environmental objects. Indeed, one would be hard pressed to say that there was a "typical" environmental object, so far as its treatment at the hands of the law is concerned. There are some differences in the law applicable to all the various resources that are held in common: rivers, lakes, oceans, dunes, air, streams (surface and subterranean), beaches, and so forth.[44] And there is an even greater difference as between these traditional communal resources on one hand, and natural objects on traditionally private land, e.g., the pond on the farmer's field, or the stand of trees on the suburbanite's lawn.

On the other hand, although there be these differences which would make it fatuous to generalize about a law of the natural environment, most of these differences simply underscore the points made in the instance of rivers and streams. None of the natural objects, whether held in common or situated on private land, has any of the three criteria of a rights-holder. They have no standing in their own right; their unique damages do not count in determining outcome; and they are not the beneficiaries of awards. In such fashion, these objects have traditionally been regarded by the common law, and even by all but the most recent legislation, as objects for man to conquer and master and use—in such a way as the law once looked upon "man's" relationship to African Blacks. Even where special measures have been taken to conserve them, as by seasons on

game and limits on timber cutting, the dominant motive has been to conserve them for us—for the greatest good of the greatest number of human beings. Conservationists, so far as I am aware, are generally reluctant to maintain otherwise.[45] As the name implies, they want to conserve and guarantee our consumption and our enjoyment of these other living things. In their own right, natural objects have counted for little, in law as in popular movements.

As I mentioned at the outset, however, the rightlessness of the natural environment can and should change; it already shows signs of doing so.

(3) Toward Having Standing in Its Own Right

It is not inevitable, nor is it wise, that natural objects should have no rights to seek redress in their own behalf. It is no answer to say that streams and forests cannot have standing because streams and forests cannot speak. Corporations cannot speak, either; nor can states, estates, infants, incompetents, municipalities, or universities. Lawyers speak for them, as they customarily do for the ordinary citizen with legal problems. One ought, I think, to handle the legal problems of natural objects as one does the problems of legal incompetents—human beings who have become vegetative. If a human being shows signs of becoming senile and has affairs that he is de jure incompetent to manage, those concerned with his well being make such a showing to the court, and someone is designated by the court with the authority to manage the incompetent's affairs. The guardian[46] (or "conservator"[47] or "committee"[48]—the terminology varies) then represents the incompetent in his legal affairs. Courts make similar appointments when a corporation has become "incompetent": they appoint a trustee in bankruptcy or reorganization to oversee its affairs and speak for it in court when that becomes necessary.

On a parity of reasoning, we should have a system in which, when a friend of a natural object perceives it to be endangered, he can apply to a court for the creation of a guardianship.[49] Perhaps we already have the machinery to do so. California law, for example, defines an incompetent as "any person, whether insane or not, who by reason of old age, disease, weakness of mind, or other cause, is unable, unassisted, properly to manage and take care of himself or his property, and by reason thereof is likely to be deceived or imposed upon by artful or designing persons."[50] Of course, to urge a court that an endangered river is "a person" under this provision will call for lawyers as bold and imaginative as those who convinced the Supreme Court that a railroad corporation was a "person" under the Fourteenth Amendment, a constitutional provision theretofore generally thought of as designed to secure the rights of freed-men.[51] (When this article was first going to press, Professor John Byrn of Fordham petitioned the New York State Supreme Court to appoint him legal guardian for an unrelated fetus scheduled for abortion so as to enable him to bring a class action on behalf of all fetuses similarly situated in New York City's 18 municipal hospitals. Judge Holtzman granted the petition of guardianship.)[52] If such an argument

based on present statutes should fail, special environmental legislation could be enacted along traditional guardianship lines. Such provisions could provide for guardianship both in the instance of public natural objects and also, perhaps with slightly different standards, in the instance of natural objects on "private" land.[53]

The potential "friends" that such a statutory scheme requires are hardly lacking. The Sierra Club, the Environmental Defense Fund, Friends of the Earth, the Natural Resources Defense Counsel, and the Izaak Walton League are just some of the many groups which have manifested unflagging dedication to the environment and which are becoming increasingly capable of marshalling the requisite technical experts and lawyers. If, for example, the Environmental Defense Fund should have reason to believe that some company's strip mining operation might be irreparably destroying the ecological balance of large tracts of land, it could, under this procedure, apply to the court in which the lands were situated to be appointed guardian.[54] As guardian, it might be given rights of inspection (or visitation) to determine and bring to the court's attention a fuller finding on the land's condition. If there were indications that under the substantive law some redress might be available on the land's behalf, then the guardian would be entitled to raise the land's right in the land's name, i.e., without having to make the roundabout and often unavailing demonstration, discussed later, that the "rights" of the club's members were being invaded. Guardians would also be looked to for a host of other protective tasks, e.g., monitoring effluents (and/or monitoring the monitors), and representing their "wards" at legislative and administrative hearings on such matters as the setting of state water quality standards. Procedures exist, and can be strengthened, to move a court for the removal and substitution of guardians, for conflicts of interest or for other reasons,[55] as well as for the termination of the guardianship.[56]

In point of fact, there is a movement in the law toward giving the environment the benefits of standing, although not in a manner as satisfactory as the guardianship approach. What I am referring to is the marked liberalization of traditional standing requirements. As early as the 1960s, environmental action groups began to challenge federal government action. *Scenic Hudson Preservation Conference v. FPC*[57] is a good example. There, the Federal Power Commission had granted New York's Consolidated Edison a license to construct a hydroelectric project on the Hudson River at Storm King Mountain. The grant of license had been opposed by conservation interests on the grounds that the transmission lines would be unsightly, fish would be destroyed, and nature trails would be inundated. Two of these conservation groups, united under the name Scenic Hudson Preservation Conference, petitioned the Second Circuit to set aside the grant. Despite the claim that Scenic Hudson had no standing because it had not made the traditional claim "of any personal economic injury resulting from the Commission's actions,"[58] the petitions were heard, and the case sent back to the Commission. On the standing point, the court noted that Section 313(b)

of the Federal Power Act gave a right of instituting review to any party "aggrieved by an order issued by the Commission;"[59] it thereupon read "aggrieved by" as not limited to those alleging the traditional personal economic injury, but as broad enough to include "those who by their activities and conduct have exhibited a special interest in the aesthetic, conservational, and recreational aspects of power development."[60] A similar reasoning has swayed other circuits to allow proposed actions by the Federal Power Commission, the U.S. Department of Interior, and the U.S. Department of Health and Human Services to be challenged by environmental action groups on the basis of, e.g., recreational and esthetic interests of members, in lieu of direct economic injury.[61] Only the Ninth Circuit has balked, and one of these cases, involving the Sierra Club's attempt to challenge a Walt Disney development in the Sequoia National Forest, was at the original time of this writing awaiting decision by the U.S. Supreme Court.[62]

Even if the Supreme Court should reverse the Ninth Circuit in the Walt Disney–Sequoia National Forest matter, thereby encouraging the circuits to continue their trend toward liberalized standing in this area, there are significant reasons to press for the guardianship approach notwithstanding. For one thing, the cases of this sort have extended standing on the basis of interpretations of specific federal statutes—the Federal Power Commission Act,[63] the Administrative Procedure Act,[64] the Federal Insecticide, Fungicide and Rodenticide Act, and others. Such a basis supports environmental suits only where acts of federal agencies are involved; and even there, perhaps, only when there is some special statutory language, such as "aggrieved by" in the Federal Power Act, on which the action groups can rely.[65] Witness for example, *Bass Angler Sportsman Society v. United States Steel Corp.*[66] There, plaintiffs sued 175 corporate defendants located throughout Alabama, relying on 33 U.S.C. § 407 (1970), which provides:

> It shall not be lawful to throw, discharge, or deposit . . . any refuse matter . . . into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water . . . [67]

Another section of the Act provides that one-half the fines shall be paid to the person or persons giving information which shall lead to a conviction.[68] Relying on this latter provision, the plaintiff designated his action a *qui tam* action[69] and sought to enforce the Act by injunction and fine. The District Court ruled that, in the absence of express language to the contrary, no one outside the U.S. Department of Justice had standing to sue under a criminal act and refused to reach the question of whether violations were occurring.[70]

Unlike the liberalized standing approach, the guardianship approach would secure an effective voice for the environment even where federal administrative action and public lands and waters were not involved. It would also allay one of the fears courts—such as the Ninth Circuit—have about the extended standing concept: if any ad hoc group can spring up overnight, invoke some "right" as

universally claimable as the esthetic and recreational interests of its members and thereby get into court, how can a flood of litigation be prevented?[71] If an ad hoc committee loses a suit brought *sub nom.* the Committee to Preserve our Trees, what happens when its very same members reorganize two years later and sue *sub nom.* the Massapequa Sylvan Protection League? Is the new group bound by res judicata? Class action law may be capable of ameliorating some of the more obvious problems. But even so, court economy might be better served designating the guardian de jure representative of the natural object, with rights of discretionary intervention by others, but with the understanding that the natural object is "bound" by an adverse judgment. The guardian concept, too, would provide the endangered natural object with what the trustee in bankruptcy provides the endangered corporation: a continuous supervision over a period of time, with a consequent deeper understanding of a broad range of the ward's problems, not just the problems present in one particular piece of litigation. It would thus assure the courts that the plaintiff has the expertise and genuine adversity in pressing a claim which are the prerequisites of a true "case or controversy."

The guardianship approach, however, is apt to raise two objections, neither of which seems to me to have much force. The first is that a committee or guardian could not judge the needs of the river or forest in its charge; indeed, the very concept of "needs," it might be said, could be used here only in the most metaphorical way. The second objection is that such a system would not be much different from what we now have: is not the Department of Interior already such a guardian for public lands, and do not most states have legislation empowering their attorneys general to seek relief—in a sort of *parens patriae* way—for such injuries as a guardian might concern himself with?

As for the first objection, natural objects can communicate their wants (needs) to us, and in ways that are not terribly ambiguous. I am sure I can judge with more certainty and meaningfulness whether and when my lawn wants (needs) water, than the Attorney General can judge whether and when the United States wants (needs) to take an appeal from an adverse judgment by a lower court. The lawn tells me that it wants water by a certain dryness of the blades and soil—immediately obvious to the touch—the appearance of bald spots, yellowing, and a lack of springiness after being walked on; how does "the United States" communicate to the Attorney General? For similar reasons, the guardian-attorney for a smog-endangered stand of pines could venture with more confidence that his client wants the smog stopped, than the directors of a corporation can assert that "the corporation" wants dividends declared. We make decisions on behalf of, and in the purported interest of, others every day; these "others" are often creatures whose wants are far less verifiable, and even far more metaphysical in conception, than the wants of rivers, trees, and land.[72]

As for the second objection, one can indeed find evidence that the Department of Interior was conceived as a sort of guardian of the public lands.[73] But there are

two points to keep in mind. First, insofar as the department already is an adequate guardian it is only with respect to the federal public lands as per Article IV, section 3 of the Constitution.[74] Its guardianship includes neither local public lands nor private lands. Second, to judge from the environmentalist literature and from the cases environmental action groups have been bringing, the department is itself one of the bogeys of the environmental movement. (One thinks of the uneasy peace between Native Americans and the Bureau of Indian Affairs.) Whether the various charges be right or wrong, one cannot help but observe that the department has been charged with several institutional goals (never an easy burden), and has been looked to for action by quite a variety of interest groups, only one of which is the environmentalists. In this context, a guardian outside the institution becomes especially valuable. Besides, what a person wants, fully to secure his rights, is the ability to retain independent counsel even when, and perhaps especially when, the government is acting "for him" in a beneficent way. I have no reason to doubt, for example, that the social security system is being managed "for me"; but I would not want to abdicate my right to challenge its actions as they affect me, should the need arise.[75] I would not ask more trust of national forests, vis-à-vis the Department of Interior. The same considerations apply in the instance of local agencies, such as regional water pollution boards, whose members' expertise in pollution matters is often all too credible.[76]

The objection regarding the availability of attorneys general as protectors of the environment within the existing structure is somewhat the same. Their statutory powers are limited and sometimes unclear. As political creatures, they must exercise the discretion they have with an eye toward advancing and reconciling a broad variety of important social goals, from preserving morality to increasing their jurisdiction's tax base. The present state of our environment, and the history of cautious application and development of environmental protection laws long on the books,[77] testifies that the burdens of any attorney general's broad responsibility have apparently not left much manpower for the protection of nature. (Cf. *Bass Anglers*, earlier.) No doubt, strengthening interest in the environment will increase the zest of public attorneys even where, as will often be the case, well-represented corporate polluters are the quarry. Indeed, the U.S. Attorney General has stepped up antipollution activity, and ought to be further encouraged in this direction.[78] The statutory powers of the attorneys general should be enlarged, and they should be armed with criminal penalties made at least commensurate with the likely economic benefits of violating the law.[79] On the other hand, one cannot ignore the fact that there is increased pressure on public law-enforcement offices to give more attention to a host of other problems, from crime "on the streets" (why don't we say "in the rivers"?) to consumerism and school busing. If the environment is not to get lost in the shuffle, we would do well, I think, to adopt the guardianship approach as an additional safeguard, conceptualizing major natural objects as holders of their own rights, raisable by the court-appointed guardian.