AFTER LEBOR: CAN THE RIGHTS OF NATURE MOVEMENT STAND BACK UP?

Desmond Nichols[*]

Abstract

The Rights of Nature Movement, a global political movement that seeks to expand the legal rights traditionally granted to humans and corporations to natural entities like lakes, rivers, and ecosystems, is becoming more mainstream. In the United States, the movement has had successes in passing local ordinances that grant lakes and rivers the right to exist and flourish. The most high-profile of these victories for the movement was the Lake Erie Bill of Rights, an ordinance that passed in Toledo, Ohio, in February of 2019.

This Note explores the Rights of Nature Movement in the United States. The ordinances that have been enacted by various local governments generally establish the right of a river or lake to exist and flourish, and some ordinances strip corporations of their rights under state and federal law. While some saw the Lake Erie Bill of Rights ordinance as a big victory for the movement, a federal district court invalidated the ordinance in February of 2020. This Note analyzes that district court case and uses it as a foil to explore the weaknesses of the movement. This Note argues that the movement should stop focusing on local governments, and instead seek more nuanced policies at the state level, including a guardianship scheme for entities like lakes and rivers.

* J.D. Candidate, 2022, University of Florida Levin College of Law; M.S. 2019, Florida State University; B.A. 2016, University of Florida. First, I must thank my mother, Judith Nichols, for being an unwavering source of love and support and for always encouraging the leap of faith that is law school. I also want to express my gratitude to both Professor Michael Wolf and Kendall Bopp for their guidance during the research and writing process. I am grateful to Peter Chan, Jordan Grana and Evelyn White for not only being the most excellent of study buddies but also for their wonderful friendship. Finally, I want to thank the editors of the *Florida Law Review* for the hard work and dedication they put into improving and publishing this Note.

INTRODUCTION

In the United States, lawsuits are now being brought to recognize and enforce the rights of natural entities such as rivers and lakes.[1] This "Rights of Nature" movement seeks to continue to expand rights beyond those granted to humans and inanimate entities such as corporations, joint ventures, municipalities, partnerships, and ships.[2] The recognition of such rights would allow natural objects to seek redress in courts on their own behalf much in the same way as corporations, states, estates, infants, and incompetent persons.[3]

What was once seen as a fringe movement is now picking up mainstream political attention: the Democratic National Committee Council on Environment and Climate Crisis recommended establishing a commission similar to former President Barack Obama's Council on Sustainable Development "to explore incorporating Rights of Nature

1. For example, the "Colorado River Ecosystem" filed a lawsuit against the State of Colorado that sought a declaration from the district court that the "Colorado River is capable of possessing rights similar to a 'person'" and that the "Colorado River has certain rights to exist, flourish, regenerate, naturally evolve, and be restored." Amended Complaint for Declaratory & Injunctive Relief, at 3, Colorado River Ecosystem v. Colorado, No. 17-cv-oz316-NYW (D. Colo. Nov. 6, 2017), 2017 WL 9472427. However, under threat of Rule 11 sanctions from the senior assistant attorney general for Colorado, the attorney bringing the suit filed an "unopposed motion to dismiss amended complaint with prejudice," stating to Rights of Nature supporters that "what is best for the rights of nature movement is not to get involved in a lengthy sanctions battle, but to move forward with seeking environmental justice." Lindsay Fendt, *Colorado River 'Personhood' Case Pulled by Proponents*, ASPEN JOURNALISM (Dec. 5, 2017), https://www.aspenjournalism.org/colorado-river-personhood-case-pulled-by-proponents/ [https://perma.cc/S363-WAQF].

2. *See* Christopher D. Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450, 452 (1972). Professor Stone noted that each successive expansion of legal rights to some new "entity," whether it be an expansion to a corporate entity, women, or to Black or Chinese persons, has been at first unthinkable. *Id.* at 452–55. Professor Stone famously went on to "quite seriously propos[e] 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." *Id.* at 456. Professor Stone contrasted his proposal with the conservationist movement, which seeks "to conserve and guarantee *our* consumption and *our* enjoyment of these other living things." *Id.* at 463.

3. *Id.* at 464.

principles into U.S. law."[4] Further, the Florida Democratic Party adopted a provision in its party platform that reads, "We resolve to adequately protect our waters, support our communities' rights in reclaiming home rule authority and recognizing and protecting the inherent rights of nature."[5] The adoption of this provision has led to fears that the Democratic Party's pro-business element could co-opt the movement (which is currently being led by grassroots and indigenous organizers), or that such a provision in the platform would be disingenuous.[6]

The Rights of Nature movement is not just a phenomenon in the United States. The movement started in Ecuador when the country approved a constitution that granted inalienable rights to nature, stating that it "has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes."[7] The Ecuadorian Constitution also states that nature is "subject [to] those rights that the Constitution recognizes for it."[8] The world's first International Rights of Nature Tribunal was held in Ecuador in 2014.[9]

In 2010, Bolivia hosted the World People's Conference on Climate Change and the Rights of Mother Earth.[10] Bolivia then passed the Law of the Rights of Mother Earth, providing that Mother Earth has certain rights, including the right to life, to diversity of life, and to equilibrium.[11]

---

4. DNC COUNCIL ON THE ENVIRONMENT & CLIMATE CRISIS, ENVIRONMENTAL AND CLIMATE POLICY RECOMMENDATIONS FOR THE 2020 DEMOCRATIC PARTY PLATFORM 11 (2020).

5. *Media Statement: Florida Democrats Adopt Rights of Nature in Party Platform*, CELDF (Oct. 15, 2019), https://celdf.org/2019/10/media-statement-florida-democrats-adopt-rights-of-nature-in-party-platform/ [https://perma.cc/HY3G-PJ2U]. One Florida Democratic Party activist stated that: "In declaring the need for a paradigm shift, Florida Democrats demonstrated the bold initiative necessary to change the conversation from 'nature is property, to be used and abused for profit,' to 'nature is alive, and deserving of respect for its rights.'" *Id.*

6. *Democratic Party Must Not Water Down Rights of Nature*, CMTY. ENV'T LEGAL DEF. FUND (Sept. 4, 2020), https://celdf.org/2020/09/democratic-party-must-not-water-down-rights-of-nature/ [https://perma.cc/PV76-E8QH].

7. REPUBLICA DEL ECUADOR, CONSTITUCION DE 2008 [Republic of Ecuador, Constitution of 2008] Oct. 18, 2008, art. 71, https://pdba.georgetown.edu/Constitutions/Ecuador/english08.html [https://perma.cc/UQL3-EDCW].

8. *Id.* art. 10.

9. *1st International Rights of Nature Tribunal—Quito*, GLOB. ALL. FOR THE RTS. OF NATURE (Feb. 6, 2014), https://therightsofnature.org/rights-of-nature-tribunal-quito/ [https://perma.cc/KB9H-F2VZ].

10. *Universal Declaration of the Rights of Mother Earth*, GLOB. ALL. FOR THE RTS. OF NATURE (Apr. 22, 2010), https://therightsofnature.org/universal-declaration/ [https://perma.cc/9GUQ-8AYY].

11. *Law of the Rights of Mother Earth*, WORLD FUTURE FUND, http://www.worldfuturefund.org/Projects/Indicators/motherearthbolivia.html [https://perma.cc/7PLU-9T9S]. For a discussion on the law, see John Vidal, *Bolivia Enshrines Natural World's Rights with Equal Status*

In 2014, New Zealand granted the Whanganui River, the third longest river in New Zealand, recognition as a legal person in the Whanganui River Deed of Settlement.[12] This formalized the indigenous "Māori belief that the River is a person and empowers the local Iwi people to act collaboratively with the government as the River's guardians."[13] Like the Whanganui River Deed of Settlement, other Rights of Nature laws around the world tend to represent attempts of decolonization and restoration indigenous sovereignty.[14]

The Rights of Nature movement often has religious elements.[15] In his 2015 encyclical, Pope Francis argues that Christians who "ridicule expressions of concern for the environment" and those who are passive and "choose not to change their habits" are in need of an "ecological conversion."[16] Pope Francis noted that "self-improvement on the part of individuals will not by itself remedy the extremely complex situation facing our world today."[17] Rather, institutions should "promote best practice" and "stimulate creativity in seeking new solutions and to encourage individual or group initiatives."[18] The encyclical was lauded by Rights of Nature supporters as a "21st Century Manifesto for Earth Democracy."[19] Later, Pope Francis made an explicit call to respect the

for Mother Earth, GUARDIAN (Apr. 10, 2011, 1:17 PM), https://www.theguardian.com/environment/2011/apr/10/bolivia-enshrines-natural-worlds-rights [https://perma.cc/B8GW-T82E]. For a critique of how the Bolivian law has played out in practice, see Paola Villavicencio Calzadilla & Louis Kotzé, *Living in Harmony with Nature? A Critical Appraisal of the Rights of Mother Earth in Bolivia*, 7 TRANSNAT'L ENV'T L. 397, 397 (2018).

12. *New Zealand's Whanganui River Deed of Settlement*, FUTUREPOLICY.ORG, https://www.futurepolicy.org/biodiversity-and-soil/new-zealands-whanganui-river-deed-of-settlement/ [https://perma.cc/Q5SX-7HLP].

13. *Id.*

14. Elaine C. Hsiao, *Whanganui River Agreement: Indigenous Rights and Rights of Nature*, 42 ENV'T POL'Y & L. 371, 371 (2012).

15. Religions as diverse as Christianity, Confucianism, Hinduism, and Indigenous traditions are arguably compatible with a Rights of Nature framework. *See generally* JOHN GRIM & MARY EVELYN TUCKER, ECOLOGY AND RELIGION (2014) (discussing an interdisciplinary approach on how religion, science, and politics perceive ecological matters).

16. POPE FRANCIS, LAUDATO SI' 141 (2015).

17. *Id.* at 142. Pope Francis then went on to indicate that Christians have a religious responsibility to care for the planet: "We do not understand our superiority as a reason for personal glory or irresponsible dominion, but rather as a different capacity which, in its turn, entails a serious responsibility stemming from our faith." *Id.* at 143.

18. *Id.* at 117.

19. Vandana Shiva, *"Laudato Si"—A 21st Century Manifesto for Earth Democracy*, GLOB. ALL. FOR THE RTS. OF NATURE (July 1, 2015), https://www.therightsofnature.org/laudato-si-a-21st-century-manifesto-for-earth-democracy/ [https://perma.cc/A7EK-Y2TD].

"right of the environment" at a speech to the United Nations General Assembly.[20]

This Note focuses on the Rights of Nature movement in the United States, which is currently succeeding in passing ordinances at the local level in various parts of the country. Part I discusses the challenges of federal standing doctrine in the United States, which was a motivating factor for the movement. Part II discusses the various ordinances that have been passed in the United States to grant nature or some natural object rights.

Part III chronicles the events that led to the creation and passing of the Lake Erie Bill of Rights (LEBOR) in Toledo, Ohio. Part III discusses the federal lawsuit against the City of Toledo over LEBOR and analyzes the plaintiff's complaint and the defendant's arguments in response. This Part also discusses the constitutional arguments made in an amicus brief filed by the activist group Toledoans for Safe Water, which pushed for LEBOR to be on the local ballot. Part IV discusses the problems of the Rights of Nature's local-government approach, which often passes ordinances that seek to strip corporations of rights under state and federal law, and that assert authority to override state preemptions.

Part V argues that the Rights of Nature movement in the United States should reorient its strategy towards the passing of state statutes and state constitutional amendments and base these goals on the policy ideas expressed in the 1972 article, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*. These policy prescriptions include state constitutional amendments recognizing injuries to the natural objects themselves, a statutory scheme in which environmental organizations may be appointed as guardians to give legal representation to the natural objects, and state statutes requiring that polluting corporations create departments that devise alternative courses of action that would have less environmental impact, as well as requiring that these departments present their findings to the Board of Directors. Part V concludes with model statutory language that could serve as the basis of state statutes. Although defining the ontological boundaries of a natural object "will have a strong influence on the shape of the legal system," this Note avoids, when possible, these ontological issues.[21]

---

20. Suzanne Goldberg & Stephanie Kirchgaessner, *Pope Francis Demands UN Respect Rights of Environment Over 'Thirst for Power,'* GUARDIAN (Sept. 25, 2015, 2:30 PM), https://www.theguardian.com/world/2015/sep/25/pope-francis-asserts-right-environment-un [https://perma.cc/7SWE-3XCY].

21. *See* Stone, *supra* note 2, n.26. Professor Stone gave an example of a river: "from time to time one will wish to speak of that portion of a river that runs through a recognized jurisdiction; at other times, one may be concerned with the entire river, or the hydrologic cycle—or the whole of nature." *Id.* He concluded by noting that today, "we treat father and son as separate jural entities

I. THE PROBLEM OF STANDING

Much of the contemporary Rights of Nature movement in the United States is a reaction to the dismissal of suits filed on behalf of natural entities for a lack of standing. In *Sierra Club v. Morton*,[22] the Sierra Club sought an injunction to stop the development of a ski resort in the Mineral King Valley.[23] The Sierra Club sued as a membership corporation with "a special interest in the conservation and the sound maintenance of the national parks, game refuges and forests of the country."[24] The Court held that the Sierra Club lacked standing, as "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."[25] In other words, the Club was not a proper plaintiff because it had not been injured itself.[26]

In his famous dissent, Justice William O. Douglas argued that the Court should fashion a federal rule to allow environmental issues to be litigated before federal agencies or federal courts in the name of the ecological body that would be harmed.[27] Justice Douglas stated that, just as corporations are persons for purposes of the adjudicatory process, "so it should be as respects valleys, alpine meadows, rivers, lakes, estuaries, beaches, ridges, groves of trees, swampland, or even air that feels the destructive pressures of modern technology and modern life."[28]

The holding of *Sierra Club* was affirmed in *Lujan v. Defenders of Wildlife*.[29] The environmental organizations in that case challenged a rule promulgated by the Secretary of the Interior interpreting Section 7 of the Endangered Species Act (ESA) of 1973.[30] In 1986, a revised joint regulation was promulgated by the U.S. Fish and Wildlife Service and the National Marine Fisheries Service that reinterpreted Section 7(a)(2) to mean that the obligations to ensure that actions or funds by the agencies

---

for some purposes, but as a single jural entity for others. I do not see why, in principle, the task of working out a legal ontology of natural objects (and 'qualities,' *e.g.*, climatic warmth) should be any more unmanageable." *Id.* at 457 n.26.

22. 405 U.S. 727 (1972).

23. *Id.* at 728–30.

24. *Id.* at 730.

25. *Id.* at 734–35.

26. *Id.*

27. *Id.* at 741–42 (Douglas, J., dissenting). Interestingly, Professor Stone wrote *Should Trees Have Standing?* while *Sierra Club* was pending appeal to the United States Supreme Court. *See* Christopher D. Stone, *Should Trees Have Standing Revisited: How Far Will Law and Moral Reach? A Pluralist Perspective*, 59 S. CAL. L. REV. 1, 2 (1985). While he did not get the article to print in time for lawyers to incorporate its arguments in their briefs, Professor Stone was able to publish in a symposium while the Court still had the case under consideration, and Justice Douglas "opened his dissent with warm endorsement of the theory he had just then browsed in *Trees." Id.*

28. *Sierra Club*, 405 U.S. at 742–43 (Douglas, J., dissenting).

29. 504 U.S. 555, 578 (1992).

30. *Id.* at 557–58.

are not likely to jeopardize the existence of any endangered or threatened species only extend to actions in the United States and the high seas, not to actions in foreign nations.[31] Justice Antonin Scalia noted the difficulty for a third party to bring a successful suit challenging the regulation or lack of regulation of someone or something else: "[W]hen the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish."[32] The members of the Defenders of Wildlife lack a sufficient showing of an injury-in-fact.[33] Further, the requested injunction would not redress the Defenders' injury because the injury was being caused by the individual agencies, not the Secretary of the Interior, and because the agencies were only supplying a fraction of the funding for the foreign projects at issue.[34] Thus, suspension of the funding would not likely prevent the harm to the listed species.[35]

II. RIGHTS OF NATURE IN THE STATES AND LOCALITIES

Environmental organizations responded to this hostile standing jurisprudence of U.S. courts by seeking to enshrine natural entities with legal rights at the state and local level.[36] For example, the Community Environmental Legal Defense Fund (CELDF) works with communities in the United States and other countries, such as India, Nepal, Australia, and Colombia, to establish laws "protecting Nature."[37]

In 1971, Pennsylvania passed an "Environmental Rights Amendment" to the state constitution.[38] However, despite the fact that the Pennsylvania Supreme Court upheld a broad interpretation of the amendment, the environmental rights are granted to humans, not the environment itself.[39] The first local Rights of Nature ordinance was passed in 2006 in Tamaqua Borough, Pennsylvania.[40] Section 7.6 of the ordinance declared that "Borough residents, natural communities, and

31. *Id.* at 558–59.

32. *Id.* at 562 (citing Allen v. Wright, 468 U.S. 737, 758 (1984)).

33. *Id.* at 563–67.

34. *Id.* at 571.

35. *Id.*

36. *See Champion the Rights of Nature*, CELDF, https://celdf.org/advancing-community-rights/rights-of-nature/ [https://perma.cc/9K7V-PC84].

37. *Id.*

38. PA. CONST. art. I, § 27 (amended 1971).

39. Susan Philips, *Pa. Supreme Court Upholds Broad Interpretation of Environmental Rights Amendment*, STATE IMPACT PA. (June 20, 2017, 7:33 PM), https://stateimpact.npr.org/pennsylvania/2017/06/20/pa-supreme-court-upholds-broad-interpretation-of-environmental-rights-amendment/ [https://perma.cc/4GAX-Q6PM].

40. *In Wake of Toxic Dumping, Tamaqua Borough Passes Rights of Nature Ordinance, USA*, ENV'T JUST. ATLAS (Mar. 25, 2019), https://ejatlas.org/conflict/tamaqua-borough-passes-ordinance-on-rights-of-nature [https://perma.cc/R47F-F9HF].

ecosystems shall be considered to be 'persons' for purposes of the enforcement of the civil rights of those residents, natural communities, and ecosystems."[41] After this ordinance was passed in Tamaqua Borough, "[m]ore than 100 communities in the traditionally conservative region have followed suit."[42]

In 2014, Grant Township in the state of Pennsylvania enacted a CELDF-drafted Community Bill of Rights that included recognizing the Rights of Nature.[43] The ordinance enshrined rights of ecosystems within the town "to exist, flourish, and naturally evolve."[44] Further, the ordinance prohibited the disposal of waste from oil and gas extraction within the township, and stated that:

> Any action brought by either a resident of Grant Township or by the Township to enforce or defend the rights of ecosystems or natural communities secured by this Ordinance shall bring that action in the name of the ecosystem or natural community in a court possessing jurisdiction over activities occurring within the Township.[45]

Pennsylvania General Energy Company sued Grant Township over the Community Bill of Rights in federal court, and a judge enjoined the Township from enforcing several sections of the Community Bill of Rights on grounds that they exceeded the Township's legislative authority, and that the rights and prohibitions granted were preempted by the State of Pennsylvania.[46] Grant Township responded by adopting a Home Rule Charter that contained many of the provisions of the Community Bill of Rights, including the prohibition of oil and gas fluid injection wells and the Rights of Nature provision.[47] A lengthy legal battle between the Pennsylvania Department of Environmental Protection (DEP) and Grant Township over the prohibition of oil and gas fluid injection wells in the Home Rule Charter recently culminated in a court ruling that declined to review the constitutionality of the Home Rule

41. TAMAQUA BOROUGH, PA., CODE § 260-61(F) (2006).

42. Kate Beale, *Rights for Nature: In PA's Coal Region, a Radical Approach to Conservation Takes Root*, HUFFPOST (May 25, 2011), https://www.huffpost.com/entry/rights-for-nature-in-pas_b_154842 [https://perma.cc/AU73-FAG5].

43. Grant Township, Pa., Community Bill of Rights Ordinance § 2(d) (June 1, 2014); Melissa Troutman, *Rights of Nature Report: Pennsylvania Ecosystem Fights Corporation for Rights in Landmark Fracking Lawsuit*, PUBLIC HERALD, https://public herald.org/grant-township-speaks-for-the-trees-in-landmark-fracking-lawsuit/ [https://perma.cc/ KH5L-KSH6].

44. Grant Township, Pa., Community Bill of Rights Ordinance § 2(d).

45. *Id.* § 4(c).

46. Pennsylvania Gen. Energy Co. v. Grant Twp., 139 F. Supp. 3d 706, 710, 718–21 (W.D. Pa. 2015).

47. Home Rule Charter of the Township of Grant, Indiana County, Pennsylvania §§ 104, 106 [https://perma.cc/82SH-EY62].

Charter.[48] This led the DEP to revoke the permit that it previously issued for the rural injection well.[49]

Following its counterparts in conservative regions of the state, the city of Pittsburgh passed its own Rights of Nature ordinance.[50] The ordinance banning fracking and recognizing the Rights of Nature passed with a unanimous vote in 2010.[51] Other cities across the country have passed Rights of Nature ordinances, including Santa Monica, California;[52] Mountain Lake Park, Maryland;[53] Halifax, Virginia;[54] Barnstead, New Hampshire;[55] and Shapleigh, Maine.[56]

III. THE LAKE ERIE BILL OF RIGHTS

The Rights of Nature ordinance that garnered the most media attention was LEBOR, which passed in Toledo, Ohio, in 2019.[57] LEBOR declared that "Lake Erie, and the Lake Erie watershed, possess the right to exist, flourish, and naturally evolve."[58] The Lake Erie watershed was defined as "natural water features, communities of organisms," along with "soil as well as terrestrial and aquatic sub ecosystems."[59] The ordinance gave the City of Toledo, or any resident of the city, the ability to sue to enforce

48. Commonwealth v. Grant Twp. of Ind. Cnty., 2020 WL 1026215, at *3–4 (Pa. Commw. Ct., 2020).

49. Jon Hurdle, *DEP Revokes Permit for Rural Injection Well, Citing Local Home Rule Charter*, STATE IMPACT PA. (Mar. 27, 2020, 9:00 AM), https://stateimpact.npr.org/pennsylvania/2020/03/27/dep-revokes-permit-for-rural-injection-well-citing-local-home-rule-charter/ [https://perma.cc/WV9H-KVD8].

50. Madeleine Sheehan Perkins, *How Pittsburgh Embraced a Radical Environmental Movement Popping Up in Conservative Towns Across America*, BUS. INSIDER (July 9, 2017, 2:00 PM), https://www.businessinsider.com/rights-for-nature-preventing-fracking-pittsburgh-pennsylvania-2017-7 [https://perma.cc/AM79-A9WZ].

51. *Id.*

52. SANTA MONICA, CA., CODE § 12.02.030 (2013).

53. *Mountain Lake Park Passes Ordinance Banning Natural Gas Drilling in Town*, CUMBERLAND TIMES-NEWS (Mar. 5, 2011), https://www.times-news.com/news/local_news/mountain-lake-park-passes-ordinance-banning-natural-gas-drilling-in/article_73b99fc5-38a1-574d-b3e6-780275ab0960.html [https://perma.cc/5MKU-NCPM].

54. The Community Environmental Legal Defense Fund, *Virginia Town Bans Chemical and Radioactive Bodily Trespass*, PRECAUTION.ORG (Feb. 11, 2008), http://www.precaution.org/lib/08/prn_halifax_va_outlaws_chem_trespass.080211.htm [https://perma.cc/4LQX-BMJP].

55. *Barnstead Water Rights & Local Self-Government Ordinance as Amended October, 2008*, ALL. FOR DEMOCRACY https://afd-headlines.blogspot.com/2006/03/barnstead-water-rights-local-self.html [https://perma.cc/RQ6Q-TPLV].

56. SHAPLEIGH, ME., CODE § 99-12 (2009).

57. *See* Sigal Samuel, *Lake Erie Now Has Legal Rights, Just Like You*, VOX (Feb. 26, 2019, 11:00 PM), https://www.vox.com/future-perfect/2019/2/26/18241904/lake-erie-legal-rights-personhood-nature-environment-toledo-ohio [https://perma.cc/8C73-X4QB].

58. TOLEDO, OH., CODE § 254(a) (2019).

59. *Id.*

the rights under the ordinance.[60] LEBOR also declared that residents "possess both a collective and individual right to self-government in their local community, a right to a system of government that embodies that right, and the right to a system of government that protects and secures their human, civil, and collective rights."[61]

The ordinance also sought to modify rights of corporations and assert power over state and federal preemptive laws. Any corporations that violated the ordinance, or that

> [sought] to violate this law, shall not be deemed "persons" to the extent that such treatment would interfere with the rights or prohibitions enumerated by this law, nor shall they possess any other legal rights, powers, privileges, immunities, or duties that would interfere with the rights or prohibitions enumerated by this law, including the power to assert state or federal preemptive laws in an attempt to overturn this law, or the power to assert that the people of the City of Toledo lack the authority to adopt this law.[62]

Corporations under the ordinance were defined as "any business entity."[63] Further, state laws, regulations, permits, and licenses were declared invalid in Toledo to the extent that they conflict with the ordinance.[64]

A. *Movement Towards LEBOR*

The LEBOR movement started when the health of the eleventh largest lake in the world was failing, with "poisonous algal blooms in summer, runoff containing fertilizer and animal manure, and a constant threat from invasive fish."[65] In 2014, microcystin contamination from an enormous toxic algal bloom in Lake Erie caused the city's tap water to be deemed unusable.[66]

---

60. "The City of Toledo, or any resident of the City, may enforce the rights and prohibitions of this law through an action brought in the Lucas County Court of Common Pleas, General Division." TOLEDO, OH., CODE § 256(b) (2019).

61. *Id.* § 254(c).

62. *Id.* § 257(a).

63. *Id.* § 255(a).

64. "No permit, license, privilege, charter, or other authorization issued to a corporation, by any state or federal entity, that would violate the prohibitions of this law or any rights secured by this law, shall be deemed valid within the City of Toledo." *Id.* § 255(b).

65. Timothy Williams, *Legal Rights for Lake Erie? Voters in Ohio City Will Decide*, N.Y. TIMES (Feb. 17, 2019), https://www.nytimes.com/2019/02/17/us/lake-erie-legal-rights.html [https://perma.cc/PCQ2-BXCIK].

66. Nicole Rasul, *The Lake Erie Bill of Rights is Dead. A Voluntary Effort Will Pay Farmers to Reduce Runoff Instead*, CIVIL EATS (June 22, 2020), https://civileats.com/2020/06/22/the-lake-erie-bill-of-rights-is-dead-a-voluntary-effort-will-pay-farmers-to-reduce-runoff-instead/ [https://

There is minimal regulation of the farm runoff in Ohio that is largely responsible for polluting Lake Erie,[67] and farmers benefit from legal protections that limit their legal vulnerability for the pollution they cause.[68] Ohio has a "right-to-farm" law,[69] which "dramatically limits neighbors' ability to win lawsuits alleging that farm pollution unfairly impacts their quality of life."[70] A further problem is that the 1972 Clean Water Act "has always exempted most agricultural pollutants from regulation."[71] Voters in the City of Toledo overwhelmingly approved LEBOR in an election where its opponents dramatically outspent its supporters.[72]

After LEBOR passed in Toledo, investigative reporting revealed that the Ohio Chamber of Commerce secured the cooperation of a key lawmaker to slip an amendment in the Ohio budget to nullify the ordinance.[73] An investigative journalist obtained the email between the

---

perma.cc/2W7F-LWRQ]. Environmental scientists point to the lack of tilling of soil on the farms, which allows rainwater to wash phosphorus-rich runoff into the lake, as partly causing the algal blooms. *See, e.g.*, Jim Malewitz, *Lake Erie's Algae Bloom is Growing Again After Paralyzing Toledo Water System*, BRIDGE MICHIGAN (Aug. 22, 2018), https://www.bridgemi.com/michigan-environment-watch/lake-eries-algae-bloom-growing-again-after-paralyzing-toledo-water-system [https://perma.cc/N27P-2SFW] (explaining that less tilling of farmlands is one of three primary contributors to more dissolved phosphorus entering Lake Erie).

67. For reporting on the troubles of regulating farm runoff into Lake Erie, see Andy Chow, *Ohio Farmers Say They're Working to Reduce Runoff, Despite Rule Delays*, WOSU PUBLIC MEDIA (Nov. 5, 2018, 9:24 AM), https://radio.wosu.org/post/ohio-farmers-say-theyre-working-reduce-runoff-despite-rule-delays#stream/0 [https://perma.cc/6WXM-CK9F].

68. H. Claire Brown, *How Ohio's Chamber of Commerce Killed an Anti-Pollution Bill of Rights*, INTERCEPT (Aug. 29, 2019, 8:00 AM), https://theintercept.com/2019/08/29/lake-erie-bill-of-rights-ohio/ [https://perma.cc/LX8A-M5HU].

69. OHIO REV. CODE ANN. § 3767.13(D) (West) exempts "[p]ersons who are engaged in agriculture-related activities" from certain otherwise prohibited activities. For example, farmers are exempted from subsection (B) of the law, which states: "No person shall cause or allow offal, filth, or noisome substances to be collected or remain in any place to the damage or prejudice of others or of the public." *Id.* § 3767.13(B).

70. Brown, *supra* note 68.

71. Catherine Kling, *Polluting Farmers Should Pay*, N.Y. TIMES (Aug. 25, 2019), https://www.nytimes.com/2019/08/25/opinion/water-quality-agriculture.html [https://perma.cc/T7T2-7865].

72. Reporting shows that "Toledoans for Safe Water," the grassroots organization advocating for LEBOR, spent $7,762, while the "Toledo Coalition for Jobs and Growth," the group opposing the ordinance, dramatically outspent the advocates with $313,205. James Proffitt, *Finding the Funds: How the Lake Erie Bill of Rights Campaigns Were Financed*, GREAT LAKES NOW (May 2, 2019), https://www.greatlakesnow.org/2019/05/finding-the-funds-how-the-lake-erie-bill-of-rights-campaigns-were-financed/ [https://perma.cc/549K-QPZL]. Records show that $302,000 of the funding for the "Toledo Coalition for Jobs and Growth" came from just one source: BP North America. *Id.*

73. Brown, *supra* note 68. The budget bill also significantly expanded the geographic scope of the Right to Farm law, allowing virtually any land in Ohio that is actively being used for

Ohio Chamber of Commerce and an Ohio State Representative, which showed the Chamber of Commerce asserting that "[l]anguage in this amendment stating that [nature and ecosystems] do not have standing is essential to what we're trying to accomplish."[74] This amendment to the budget bill was reported by local media the next day as seeking to "nullify Toledo's Lake Erie Bill of Rights, which allows city residents to sue on behalf of the lake to, among other things, curb farmers' agricultural runoff that helps promote toxic algal blooms."[75] The budget passed with the text of the amendment stating in most pertinent part: "Nature or any ecosystem does not have standing to participate in or bring an action in any court of common pleas."[76]

B. *LEBOR in Federal Court*

In February of 2019, Drewes Farms Partnership filed a complaint in the Northern District of Ohio arguing that "LEBOR is unconstitutional and unlawful."[77] First, the complaint specifically alleged that LEBOR violated the First and Fourteenth Amendments because LEBOR "purports to divest corporations of their constitutional right to petition the government for redress of grievances in that it strips corporations of their status as 'persons' under the law."[78]

The complaint also alleged that the ordinance violated the Fourteenth Amendment's Equal Protection Clause because it "denies to Plaintiff equal protection because it arbitrarily restricts the activities of corporate persons while imposing no similar restriction on similar activities undertaken by natural persons or unincorporated associations."[79] In its third count, the complaint alleged that the ordinance violates the Fifth and Fourteenth Amendments because it is "unconstitutionally vague in that it does not specify what conduct would interfere with the purported right of Lake Erie and the Lake Erie watershed to 'exist, flourish, and naturally evolve.'"[80] Further, it argued that LEBOR is unconstitutionally vague

---

commercial agricultural production to likely qualify for the law's nuisance protection. Peggy Kirk Hall, *Budget Bill Brings Changes to Ohio's Right to Farm Law*, OHIO AGRIC. L. BLOG (Dec. 30, 2021, 12:28 PM), https://ohioaglaw.wordpress.com/tag/right-to-farm-law/ [https://perma.cc/3DTL-E6A5].

74. Brown, *supra* note 68 (alterations in original).

75. Jeremy Pelzer, *Across-the-Board Income-Tax Cut Added to Ohio's State Budget Plan*, CLEVELAND.COM (May 8, 2019, 7:45 PM), https://www.cleveland.com/politics/2019/05/across-the-board-state-income-tax-cut-added-to-ohios-state-budget-plan.html [https://perma.cc/DF8T-M6PN].

76. OHIO REV. CODE ANN. § 2305.011(B) (West 2019); Brown, *supra* note 68.

77. Complaint at ¶ 2, Drewes Farms P'ship v. City of Toledo, 441 F. Supp. 3d 551 (N.D. Ohio 2020) (No. 3:19-cv-00434).

78. *Id.* ¶ 60.

79. *Id.* ¶ 64.

80. *Id.* ¶ 71.

because it "does not specify what conduct would interfere with the purported right of the people of the City of Toledo to a 'clean and healthy environment, which shall include the right to a clean and healthy . . . Lake Erie ecosystem.'"[81] The complaint further alleged that the ordinance is unconstitutionally vague because it "directs criminal sanction not only at corporations that violate the law, but also to those that 'seek to violate' LEBOR, but does not specify what conduct would constitute such an offense."[82]

The complaint then alleged that the ordinance violated Procedural Due Process and Substantive Due Process under the Fourteenth Amendment.[83] Specifically, it argued that LEBOR deprives Drewes Farms of its right to seek redress in court, and provides no procedure through which any plaintiff could challenge the provision,[84] and it "denies 'corporations,' such as Drewes Farms, their legal and long-standing Constitutional rights, including, but not limited to, their rights under the First, the Fifth, and the Fourteenth Amendments."[85]

Aside from constitutional violations, the Plaintiff alleged that LEBOR was preempted in multiple ways. First, LEBOR was preempted because municipalities cannot create new causes of action under Ohio law.[86] Second, the ordinance granted the Lake Erie ecosystem the power to enforce its rights through an action prosecuted either by the City of Toledo or a resident of the City in the Lucas County Court of Common Pleas, but the Courts of Common Pleas in Ohio "are creatures of state law and the power to confer statutory standing to parties in Ohio State Courts is reserved to the Ohio Legislature."[87] Third, LEBOR purports to diminish the rights of corporations, but the Ohio Constitution reserves exclusive power to the Ohio legislature to enact legislation governing the formation, structure, and organization of corporations.[88] Lastly, LEBOR affects the permits and licenses issued through administrative actions by Ohio and the federal government, but Ohio law prohibits administrative actions from being subject to initiative.[89]

While the defendant, City of Toledo, in opposing the plaintiff's motion for Judgment on the Pleadings, argued that the plaintiff lacked

81. *Id.* ¶ 72.
82. *Id.* ¶ 75.
83. *Id.* ¶¶ 79–87.
84. *Id.* ¶¶ 81–82.
85. *Id.* ¶ 85.
86. *Id.* ¶ 119.
87. *Id.* ¶¶ 122–24.
88. *Id.* ¶¶ 126–29.
89. *Id.* ¶¶ 130–32.

standing and failed to state proper claims,[90] the Toledoans for Safe Water filed an amicus brief that made an explicit case to recognize a fundamental right.[91] Rather than argue for a fundamental right to a clean environment or safe water, or some similar environmental right, the amicus brief filed by Toledoans for Safe Water urged the court to recognize the "right of local community self-government" as fundamental.[92]

The brief relied on landmark Fourteenth Amendment cases, such as *Griswold v. Connecticut*[93] and *Obergefell v. Hodges*,[94] to demonstrate the court's power to recognize such fundamental rights that are "deeply rooted in our history and fundamental to our scheme of ordered liberty."[95] The brief reached back into colonial history, when local governments were founded without express authority from any centralized power, to show that "the right of self-government was one of the basic, fundamental values upon which this country was founded."[96] Further support for recognition of this fundamental right was the fact that the people of every state have included the Declaration's principles of the right of local self-government in every state constitution.[97]

Toledoans for Safe Water argued that the jurisprudence recognizing that state constitutions may expand existing federally guaranteed constitutional rights at the state level—as articulated in *State v. Sieyes*[98]—should establish that "local laws that expand rights, health, and safety protections should be immune from state ceiling preemption, just as greater rights protections in the state constitution are not preempted by

90. *See* Defendant City of Toledo's Combined Opposition to Plaintiff's Motion for Judgement on the Pleadings, and Cross-Motion Under Fed. Civ. R. 12(c) For Judgment on the Pleadings, at 6, 12, 17–19, Drewes Farms P'ship v. City of Toledo, 441 F. Supp. 3d 551 (N.D. Ohio 2020) (No. 3:19-cv-00434-JZ).

91. *See* Brief for Toledoans for Safe Water as Amicus Curiae Supporting Defendants, at 9, Drewes Farms P'ship v. City of Toledo, 441 F. Supp. 3d 551 (N.D. Ohio 2020) (No. 3:19-cv-00434-JZ).

92. *Id.* at 9–10.

93. 381 U.S. 479 (1965).

94. 576 U.S. 644 (2015).

95. Brief for Toledoans for Safe Water as Amicus Curiae Supporting Defendants, *supra* note 91, at 12.

96. *Id.*

97. *Id.* at 15 (citing Thomas Linzey & Daniel E. Brannen Jr., *A Phoenix From the Ashes: Resurrecting a Constitutional Right of Local, Community Self-Government in the Name of Environmental Sustainability*, 8 ARIZ. J. ENV'T & POL'Y 1, 19–24 (2017)).

98. 225 P.3d 995, 1003 (Wash. 2010) (en banc) ("Supreme Court application of the United States Constitution establishes a floor below which state courts cannot go to protect individual rights. But states of course can raise the ceiling to afford greater protections under their own constitutions.").

the federal constitution."[99] The brief argued that "this body of law provides a framework for modeling a contemporary jurisprudence for the right of local community self-government."[100] Because they infringe upon the fundamental right of local community self-government, Toledoans for Safe Water argued, the court must review Drewes Farms' assertions of corporate constitutional rights and state preemption with strict scrutiny.[101]

The court held that LEBOR indeed violated the Due Process Clause of the Fourteenth Amendment on vagueness grounds.[102] The court noted several examples of municipal legislation that has been invalidated as unconstitutionally vague.[103] One example included an ordinance that criminalized gathering on sidewalks "in a manner annoying to persons passing by."[104] The Supreme Court invalidated it, reasoning that "[c]onduct that annoys some people does not annoy others."[105] A federal court struck down a Detroit-area township ordinance that regulated the use of machines that keep water near boats and docks free from ice, where the ice-free areas could not exceed a "reasonable radius," for vagueness because it "fail[ed] to include a definition of 'reasonable.'"[106] An Ohio gun ordinance that "banned forty-six specific guns, as well as 'other models by the same manufacturer . . . that have *slight* modifications or enhancements,'" was also struck down on vagueness grounds because there was no reasonable basis for determining what changes qualify as "slight."[107]

The court stated that "LEBOR's environmental rights are even less clear than the provisions struck down in those cases."[108] To underscore its point, the court asked: "What conduct infringes the right of Lake Erie and its watershed to 'exist, flourish, and naturally evolve'? How would a prosecutor, judge, or jury decide?" [109] The court noted that "[s]imilar uncertainty shrouds the right of Toledoans to a 'clean and healthy environment,'" since "[t]he line between clean and unclean, and between

99. Brief for Toledoans for Safe Water as Amicus Curiae Supporting Defendants, *supra* note 91, at 12.

100. *Id.*

101. *Id.* at 19.

102. Drewes Farms P'ship v. City of Toledo, 441 F. Supp. 3d 551, 555–56 (N.D. Ohio 2020).

103. *Id.* at 556.

104. *Id.* (quoting Coates v. City of Cincinnati, 402 U.S. 611, 611 (1971)).

105. *Id.* (alterations in original) (quoting Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971)).

106. *Id.* (quoting Belle Maer Harbor v. Charter Twp. of Harrison, 170 F.3d 553, 555, 558–59 (6th Cir. 1999)).

107. *Id.* (alterations in original) (quoting Springfield Armory, Inc. v. City of Columbus, 29 F.3d 250, 251, 253–54 (6th Cir. 1994)).

108. *Id.*

109. *Id.* (citation omitted).

healthy and unhealthy, depends on who you ask."[110] Because of the vagueness, Plaintiff Drewes Farms reasonably feared criminal sanction for spreading even small amounts of fertilizer.[111] The court speculated that "[c]ountless other activities might run afoul of LEBOR's amorphous environmental rights: catching fish, dredging a riverbed, removing invasive species, driving a gas-fueled vehicle, pulling up weeds, planting corn, irrigating a field—and the list goes on."[112] As the court saw it, the authors of the ordinance did not attempt to balance the interests of environmental protection and economic activity.[113]

The court also voided the ordinance's "right of Toledoans to 'self-government in their local community'" on the grounds of being unconstitutionally vague.[114] While it seems to be a reiteration of the Ohio Constitution, "LEBOR imposes a fine on any business or government that violates the right."[115] The court concluded this point by stating that, "[l]ike LEBOR's environmental rights, this self-government right is an aspirational statement, not a rule of law."[116]

The opinion also discussed how certain provisions of LEBOR failed on their own merits. The court stated that "LEBOR's attempt to invalidate Ohio law in the name of environmental protection is a textbook example of what municipal government cannot do."[117] The court pointed out the problem of a city government attempting to give rights to a natural body that exceeds the territory of that city: "Lake Erie is not a pond in Toledo. It is one of the five Great Lakes and one of the largest lakes on Earth, bordering dozens of cities, four states, and two countries."[118] These facts mean that "the Lake's health falls well outside of the City's constitutional right to local self-government, which encompasses only 'the government and administration of the internal affairs of the municipality.'"[119]

In its conclusion, the court lauded the activists who campaigned for LEBOR's passage.[120] The court was blunt in granting the Plaintiff's Motion for Judgment on the Pleadings: "This is not a close call. LEBOR is unconstitutionally vague and exceeds the power of municipal

110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.* at 557.
117. *Id.*
118. *Id.*
119. *Id.* (quoting *In re* Complaint of Reynoldsburg, 134 Ohio St. 3d 29, ¶ 25 (2012)).
120. "Frustrated by the status quo, LEBOR supporters knocked on doors, engaged their fellow citizens, and used the democratic process to pursue a well-intentioned goal: the protection of Lake Erie." *Id.*

government in Ohio. It is therefore void in its entirety."[121] LEBOR failed to achieve the goal of protecting Lake Erie.[122] The City of Toledo has decided not to appeal the decision.[123]

IV. THE RADICAL LOCAL-COMMUNITY APPROACH TO RIGHTS OF NATURE

The CELDF, which has helped draft a number of the ordinances chronicled in this Note, conceives of itself not only as an organization pushing for the Rights of Nature, but as an explicitly anti-colonial movement that sees the root of our current ecological problems in Western conceptions of nature as property.[124] Bemoaning the lack of power that local governments have, CELDF stated that communities have been "transformed into mere resource colonies, with the people within them converted into squatters on their own land, relegated to enduring whatever the corporation chooses to give them."[125]

CELDF-associated ordinances quite often feature provisions that strip corporations of their rights under state or federal law. For example, the town of Shapleigh, Maine, passed a Rights of Nature ordinance that states:

> No corporation doing business within the town of Shapleigh shall be recognized as a "person" under the United States or Maine Constitutions, or laws of the United States or Maine, nor shall the corporation be afforded the protections of the Contracts Clause or Commerce Clause of the United States Constitution, or similar provision found within the Maine Constitution, within the town of Shapleigh.[126]

The problems with these ordinances are readily apparent. First, any local ordinance that strips corporations of their legal rights will almost certainly be invalidated as a violation of the prevailing (and longstanding)

---

121. *Id.* at 558.

122. *Id.* at 557–58.

123. *See* Larry Limpf, *Decision to Not Appeal LEBOR Ruling Frustrates Backers*, PRESS (May 15, 2020, 4:00 PM), https://presspublications.com/content/decision-not-appeal-lebor-ruling-frustrates-backers [https://perma.cc/Y32M-J3XF].

124. *See* CELDF, *Introducing CELDF 2021: a New Year, a New Structure*, CELDF (Feb. 28, 2021), https://celdf.org/2021/02/introducing-celdf-2021-a-new-year-a-new-structure/ [https://perma.cc/B5PP-PNZE]; *see also* CELDF, *Community Rights Paper #11: Slaves In All But Name*, CELDF (Jan. 13, 2016), https://celdf.org/2016/01/community-rights-paper-11-slaves-in-all-but-name/ [https://perma.cc/KC36-TF3T] [hereinafter *Rights Paper*] ("The community rights movement is . . . one which can be used to advance indigenous rights, expand workplace rights, impose police accountability, challenge bank foreclosures, and establish rights to housing and healthcare.").

125. *Rights Paper*, *supra* note 124.

126. SHAPLEIGH, ME., CODE § 99-11 (2009).

interpretation of the Fourteenth Amendment.[127] Indeed, corporations were viewed as artificial persons dating back to at least the mid-eighteenth century.[128] Corporations eventually "secured nearly all the same rights as individuals through a two-centuries-long effort concentrated on the Supreme Court."[129] The Supreme Court's 2014 decision in *Burwell v. Hobby Lobby Stores, Inc.*[130] was what one legal scholar described as "a near perfect embodiment of the more than two-hundred-year history of corporate rights jurisprudence."[131] Thus, there is little to no hope for a personhood-stripping ordinance, such as LEBOR,[132] to survive judicial review.

The other obvious problem with these local ordinances is the possibility (and likelihood) of state preemption. In the case of LEBOR, the ordinance sought to assert local authority over state and federal preemption,[133] yet the Ohio Constitution only grants municipalities the power to adopt laws that do not conflict with general laws.[134] While LEBOR attempted to regulate the "Lake Erie Ecosystem," including "all natural water features, communities of organisms, soil as well as terrestrial and aquatic sub ecosystems that are part of Lake Erie and its watershed,"[135] Ohio state law provided that Lake Erie and its protection

127. While the jurisprudence of corporate personhood is complicated, an ordinance that strips corporations of all rights under state or federal law could not possibly succeed. *See* Pembina Silver Mining Co. v. Pennsylvania, 125 U.S. 181, 189 (1888) ("Under the designation of person there is no doubt that a private corporation is included [in the Fourteenth Amendment]."); *see also* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 347 (2010) (holding that the First Amendment does not allow political speech restrictions based on a speaker's corporate identity). *Compare* FCC v. AT&T Inc., 562 U.S. 397, 409–10 (2011) (holding that the protection in the Freedom of Information Act "against disclosure of law enforcement information on the ground that it would constitute an unwarranted invasion of personal privacy does not extend to corporations"), *with* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 719 (2014) (holding that for-profit closely held corporations are persons under the Religious Freedom and Restoration Act).

128. Sir William Blackstone in 1758 described the corporation as an "artificial person," meaning the "corporation was an independent legal entity in the eyes of the law . . . [and] as an independent legal entity, it had certain legally enforceable rights similar to those of a natural person." ADAM WINKLER, WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS 47 (2018).

129. *Id.* at 376.

130. 573 U.S. 682 (2014).

131. WINKLER, *supra* note 128, at 380.

132. *See* TOLEDO, OH., CODE § 257(a) (2019).

133. *Id.*

134. "Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws." OH. CONST. art. XVIII, § 3.

135. TOLEDO, OH., CODE § 254(a) (2019).

belonged to the state.[136] While this was not mentioned in the opinion, nor was it argued in the plaintiff's complaint, the 2019 amendment to the Ohio budget included a provision that bars persons from bringing claims on behalf of nature or an ecosystem.[137]

The problem of preemption vis-à-vis local Rights of Nature ordinances also impacted a recent Florida ordinance. With the Rights of Nature movement growing in Florida,[138] the Florida Legislature amended the Environmental Protection Act[139] in its most recent environmental legislation, titled the Clean Waterways Act.[140] While the Clean Waterways Act intended to "aid in water conservation and protect water quality in Florida,"[141] the amendment preempted local governments in the state from recognizing rights of natural objects.[142] This amendment was a reaction to an Orange County charter amendment that was on the

---

136. The Ohio Revised Code states as follows:

> The waters of Lake Erie consisting of the territory within the boundaries of the state . . . together with the soil beneath and their contents, do now belong and have always, since the organization of the state of Ohio, belonged to the state as proprietor in trust for the people of the state . . . The department of natural resources is hereby designated as the state agency in all matters pertaining to the care, protection, and enforcement of the state's rights designated in this section.

OHIO REV. CODE ANN. § 1506.10 (West 2019).

137. "No person, on behalf of or representing nature or an ecosystem, shall bring an action in any court of common pleas." *Id.* § 2305.011(C)(1).

138. *The Rights of Nature Movement Has Arrived to Florida!*, GLOB. ALL. FOR THE RTS. OF NATURE (Sept. 26, 2019), https://therightsofnature.org/the-rights-of-nature-movement-has-arrived-to-florida/ [https://perma.cc/J5RN-95GT]. There is an excellent Florida-specific comparison of the public trust doctrine and the Rights of Nature initiatives which asks whether the two frameworks can mutually support one another or whether they are in conflict. *See generally* Erin Ryan et al., *Environmental Rights for the 21st Century: A Comprehensive Analysis of the Public Trust Doctrine and Rights of Nature Movement*, 42 CARDOZO L. REV. 2447 (2021) (contrasting the public trust doctrine and Rights of Nature movement).

139. FLA. STAT. § 403.412 (2020).

140. S. 150-712, 1st Sess., at 82 (Fla. 2020).

141. Morgan Pinkerton, *What Does the Clean Waterways Act Mean For Florida's Agricultural Producers?*, UF IFAS BLOG (Aug. 6, 2020), http://blogs.ifas.ufl.edu/seminoleco/2020/08/06/the-clean-waterways-act-floridas-agricultural-producers/ [https://perma.cc/5HRW-SWUD].

142. The Florida Statute states as follows:

> A local government regulation, ordinance, code, rule, comprehensive plan, charter, or any other provision of law may not recognize or grant any legal rights to a plant, an animal, a body of water, or any other part of the natural environment that is not a person or a political subdivision . . . or grant such person or political subdivision any specific rights relating to the natural environment not otherwise authorized in general law or specifically granted in the State Constitution.

FLA. STAT. § 403.412(9)(a) (2020).

2020 ballot, known as the Right to Clean Water Charter Amendment, which Orange County voters approved with 89% of the vote.[143] The Clean Water Charter Amendment has very similar language to the Lake Erie Bill of Rights,[144] granting the Wekiva River and Econlockhatchee River and all other waters within the boundaries of Orange County rights to "exist, Flow, to be protected against Pollution and to maintain a healthy ecosystem."[145] Because of the preemption—and potentially unconstitutional vagueness—the ordinance likely will not survive if and when it is challenged.

Speak Up Wekiva,[146] the group that pushed the amendment, sued Governor Ron DeSantis in federal court, alleging that the state preemption infringes "upon plaintiff members' and Florida citizens' constitutional right to local, self-government, and is thus devoid of any legal force or effect."[147] However, Speak Up Wekiva voluntarily dismissed the case late July of 2020.[148] The argument that there is a constitutional right of self-government that voids state preemptions would not pass muster in federal court, just as the same argument failed in the Lake Erie Bill of Rights case.[149] Speak Up Wekiva, using the same arguments as in their federal court suit, then filed in state court, but the case was dismissed without prejudice shortly after filing.[150]

The radical approach of CELDF and other organizations—seeking to strip corporations of rights granted under state and federal law and invalidate state preemptions rather than more moderate strategies to grant "rights" to natural bodies—will likely lead to more invalidated

143. *See* Joseph Bonasia, *Voters Approve Charter Amendment and Make Florida the Epicenter of Rights of Nature in the U.S.*, INVADING SEA (Nov. 6, 2020), https://www.theinvadingsea.com/2020/11/06/voters-approve-charter-amendment-and-make-florida-the-epicenter-of-rights-of-nature-in-the-u-s/ [https://perma.cc/2RUC-Z54J].

144. For the text of the amendment, see *Text of Charter Amendment*, THE RIGHT TO CLEAN WATER, righttocleanwater2020.com/textofcharteramendment [https://perma.cc/MX35-HA2A].

145. *Id.*; *see* Rebecca Renner, *In Florida, a River Gets Rights*, SIERRA (Feb. 9, 2021), https://www.sierraclub.org/sierra/2021-2-march-april/protect/florida-river-gets-rights [https://perma.cc/7ZLY-VRN6].

146. SPEAK UP WEKIVA, http://speakupwekiva.com/Home_Page.html [https://perma.cc/YJ7S-Y7VE].

147. Scott Powers, *Environmentalists Challenge 'Rights of Nature' Preemption in SB 712*, FLA. POL. (July 2, 2020), https://floridapolitics.com/archives/345753-environmentalists-challenge-rights-of-nature-preemption-in-sb-712 [https://perma.cc/Q9Q9-SPME].

148. Speak Up Wekiva, Inc., v. DeSantis, No. 6:20CV01173 (M.D. Fla. filed July 1, 2020).

149. *See Drewes Farms P'ship*, 441 F. Supp. 3d at 557.

150. Speak Up Wekiva, Inc. v. DeSantis, No. 372020CA001479 (Fla. 2d Cir. Ct. 2020); *see* Michael Carroll, *Florida 'Rights of Nature' Debate Moves to State Court*, FLORIDA RECORD (Aug. 28, 2020), https://flarecord.com/stories/549296396-florida-rights-of-nature-debate-moves-to-state-court [https://perma.cc/4VLR-BA8W].

ordinances and wasted resources by local governments.[151] The Rights of Nature concept was not originally intended to allow local governments to deprive corporations of their rights within a jurisdiction or invalidate otherwise valid state statutes.[152] Instead, it was conceived with much broader ideas that balanced the interests of natural entities with human economic interests.[153] In many ways, the Rights of Nature movement is sacrificing actual protections of natural bodies for ineffective ideological politics.

V. (RE)TURNING TO STONE

The current Rights of Nature movement, and those seeking to reverse trends in biodiversity loss and climate change more broadly by protecting natural entities from excessive pollution and depletion, should consider reevaluating their tactics and the laws they are pushing for. More specifically, there should be a return to Professor Christopher D. Stone's conception of nature's "rights" and his broad policy prescriptions to ensure them.

Professor Stone first proposed recognizing the legal rights of nature in his landmark 1972 article, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*.[154] Professor Stone laid out three conditions for nature to have qualified "rights": natural objects must have standing in their own right;[155] their unique damages must count in determining the outcome of a case;[156] and they must be the beneficiaries of awards.[157] Professor Stone distinguishes this proposed legal regime vis-à-vis natural objects from the current conservationist regime, where "special measures have been taken to conserve [natural objects], as by seasons on game and limits on timber cutting," noting that the "dominant motive has been to conserve them *for us*—for the greatest good of the greatest number of human beings."[158] The current legal regime denies

151. Other organizations that take radical approaches to the Rights of Nature and work with local governments to pass such ordinances include the Florida Rights of Nature Network, FLORIDA RIGHTS OF NATURE NETWORK, https://fronn.org/ [https://perma.cc/2AHM-CN2C], and the Center for Democratic and Environmental Rights, CENTER FOR DEMOCRATIC AND ENVIRONMENTAL RIGHTS, https://www.centerforenvironmentalrights.org/ [https://perma.cc/Y2HB-Z63L], among others.

152. *See* Stone, *supra* note 2, at 480.

153. *Id.* at 481.

154. *Id.* at 456.

155. *See id.* at 463–64.

156. *Id.* at 473.

157. *Id.* at 480.

158. *Id.* at 463.

standing for natural objects;[159] the merits of cases at common law involving natural objects are not influenced by the damages suffered by natural objects;[160] and natural objects are not the beneficiaries of favorable judgments.[161]

Professor Stone suggests that one ought to "handle the legal problems of natural objects as one does the problems of legal incompetents," or those who cannot address their own legal problems.[162] Thus we should create a system in which natural objects could have standing in their own right, so "when a friend of a natural object perceives it to be endangered, he can apply to a court for the creation of a guardianship."[163] Professor Stone speculated that California law at the time, which defined incompetence 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,[164]

provided the adequate legal machinery to create guardianships for natural objects.[165] He concluded that this was highly unlikely, given that convincing

> 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 freedmen.[166]

---

159. *See id.* at 459 ("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.").

160. *See id.* at 461 ("Whether under language of 'reasonable use,' 'reasonable methods of use,' 'balance of convenience,' or 'the public interest doctrine,' what the courts are balancing, with varying degrees of directness, are the economic hardships 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." (footnotes omitted)).

161. *See id.* at 462 ("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.").

162. *Id.* at 464.

163. *Id.*

164. *Id.* at 465.

165. *Id.* at 464–65.

166. *Id.* at 465 (citing Santa Clara Cnty. v. S. Pac. R.R., 118 U.S. 394 (1886)).

Thus, Professor Stone called for "special environmental legislation [that] could be enacted along traditional guardianship lines."[167]

Professor Stone's vision of guardianship was a statutory scheme that allowed organizations with unwavering dedication to the environment and the ability to marshal technical expertise and legal counsel (such as the Sierra Club or the Natural Resources Defense Council) to be appointed as guardians.[168] Guardians would have various capabilities, such as rights of inspection (or visitation),[169] monitoring effluents and "representing their 'wards' at legislative and administrative hearings on such matters as the setting of state water quality standards."[170] Further, "[p]rocedures exist, and can be strengthened, to move a court for the removal and substitution of guardians, for conflicts of interest or for other reasons, as well as for the termination of the guardianship."[171]

Professor Stone remarked that the constitutional standing requirement was liberalizing at the time his article was being written in 1972, and the standing requirement has indeed liberalized.[172] However, he posited that there were "significant reasons to press for the guardianship approach notwithstanding."[173] Unlike environmental actions that rely on liberalized standing requirements, "the guardianship approach would secure an effective voice for the environment even where federal administrative action and public-lands and waters were not involved."[174] Indeed, this approach would

> also allay one of the fears courts . . . 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?[175]

---

167. *Id.*

168. *Id.* at 466.

169. The right of inspection would be to "determine and bring to the court's attention a fuller finding on the land's condition." *Id.*

170. *Id.*

171. *Id.* at 466–67 (footnote omitted).

172. Sierra Club v. Morton, 405 U.S. 727, 738 (1972) ("The trend of cases arising under the APA and other statutes authorizing judicial review of federal agency action has been toward recognizing that injuries other than economic harm are sufficient to bring a person within the meaning of the statutory language . . . . We noted this development with approval . . . in saying that the interest alleged to have been injured 'may reflect "aesthetic, conservational, and recreational" as well as economic values.'" (citing Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150 (1970))).

173. Stone, *supra* note 2, at 469.

174. *Id.* at 470.

175. *Id.*

Guardians would be superior to state or federal agencies, such as the federal Department of Interior, because government agencies are tasked with several institutional goals and are pressured by a variety of interest groups.[176]

Rather than stripping corporations of their state and federal rights, Professor Stone argued that corporations whose actions have significant adverse effects on the environment should be legally required to make the sort of findings that are required of federal agencies under the National Environmental Policy Act (NEPA).[177] Indeed, NEPA requires federal agencies to

> include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on . . . the environmental impact of the proposed action, any adverse environmental effects which cannot be avoided should the proposal be implemented, [and] alternatives to the proposed action.[178]

Professor Stone argued that

> there should be requirements that these findings and reports be channeled to the Board of Directors; if the directors are not charged with the knowledge of what their corporation is doing to the environment, it will be all too easy for lower level management to prevent such reports from getting to a policy-making level.[179]

Additionally, he argues that it should be "grounds for a guardian to enjoin a private corporation's actions if such procedures had not been carried out."[180]

Lastly, Professor Stone recommended requiring polluting corporations to internally reorganize and create a department along the lines of the Council on Environmental Quality within the Executive Office of the President.[181] The Council on Environmental Quality is

---

176. Professor Stone gives an example:

> I have no reason to doubt . . . 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. I would not ask more trust of national forests, vis-à-vis the Department of Interior.

Id. at 472 (footnote omitted).

177. *See id.* at 483–84.

178. 42 U.S.C. § 4332(C)(i)–(iii).

179. Stone, *supra* note 2, at 484.

180. *Id.*

181. *Id.* at 484–85.

"conscious of and responsive to the scientific, economic, social, esthetic, and cultural needs and interests of the Nation" and formulates and recommends "national policies to promote the improvement of the quality of the environment."[182] Professor Stone argued that this newly required department for polluting corporations should be headed by a "Vice-President for Ecological Affairs."[183]

The Rights of Nature movement should look to these creative, subtle ways of granting rights and procedural protections to natural objects. Due to problems such as preemption, the movement's successes in passing local ordinances may turn out to simply be a waste of local government time and resources.

A. *What Is To Be Done?*

First, the Rights of Nature movement must move away from a strategy of pursuing local ordinances and instead lobby for state statutes or state constitutional amendments. Local governments are not capable of successfully granting "rights" to natural objects. This is because local governments are creatures of the state,[184] and the state has the power of preemption.[185] Further, there are problems when the natural objects are larger than the jurisdiction of the local government. As Judge Jack Zouhary stated in the LEBOR case, "Lake Erie is not a pond in Toledo. It is one of the five Great Lakes and one of the largest lakes on Earth, bordering dozens of cities, four states, and two countries."[186] The rivers intended to be protected in the Orange County, Florida, charter amendment—the Wekiva River and the Econlockhatchee River—also exceed the boundaries of the local jurisdiction. Thus, a judge would likely conclude that the health of these rivers falls outside of Orange County's constitutional right to self-government.[187]

Focusing on new legislation and constitutional amendments at the state level avoids the preemption and boundary issues.[188] Additionally, a focus on the state level will allow for the more robust vision that Professor Stone articulated in 1972. State constitutional amendments can

182. 42 U.S.C. § 4342.

183. Stone, *supra* note 2, at 485.

184. *See, e.g.*, OH. CONST. art. XVIII, § 3 ("Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.").

185. *See supra* Part IV.

186. Drewes Farms P'ship v. City of Toledo, 441 F. Supp. 3d 551, 557 (N.D. Ohio 2020).

187. *See id.*

188. For natural objects that cross state borders, interstate compacts could be considered. *See Understanding Interstate Compacts*, COUNCIL OF STATE GOV'TS—NAT'L CTR. FOR INTERSTATE COMPACTS, https://www.gsgp.org/media/1313/understanding_interstate_compacts-csgncic.pdf [https://perma.cc/7S8P-65UD].

give legal cognizance to natural objects, whether specific bodies like a river or natural objects in general, and the injuries they suffer.[189] State statutory schemes can create a guardianship system whereby environmental organizations—possibly even groups like Speak Up Wekiva[190] and Toledoans for Safe Water[191] that are currently pursuing these local ordinances—can obtain guardianship of the natural objects and better ensure they are not harmed. Guardianship can be broader than merely allowing the organizations to sue on behalf of injuries to the natural object; guardians could be granted rights of visitation or inspection, and be granted the ability to monitor the pollution. Whatever damages won by the guardians for injuries to natural objects could go to a fund to remediate the harm to the natural object rather than the human persons who may have been incidentally harmed.

Beyond statutory guardianship schemes, activists should consider building political support for state statutes that require reorganizations of the internal affairs of entities incorporated in the state. Requiring corporations to have a "Department of Ecological Affairs," with a person leading the department who informs the Board of Directors, may be an effective supplement to civil suits and damages in incentivizing corporate behavior in a way that avoids the constitutional issues of the current local-ordinance approach.

The downside to having state, rather than federal, laws providing for Rights of Nature is that suits alleging injures of the natural object can solely be brought in state court. Focusing on federal legislation would present problems of its own. Primarily, the "Cases and Controversies" requirement in Article III limits the types of statutory injuries Congress can create.[192] It is also unclear if a constitutional amendment or a reinterpretation of the Fourteenth Amendment is required for injuries to natural objects to be cognizable under federal law. For these reasons, and the difficulty of changing federal law, whether constitutional or statutory, this Note argues that the activists' focus should be at the state level.

B. *The Office of Environmental Guardians*

This Section proposes model statutory language for a state to create an "Office of Environmental Guardians." The model language deals with

189. A "Rights of Nature" constitutional amendment would be different than amendments like Pennsylvania's Environmental Rights Amendment. Whereas the Pennsylvania Supreme Court held that the environmental rights are granted to humans, not the environment itself, the "Rights of Nature" amendments would explicitly grant legal cognizance to the injuries natural objects face. *See* Philips, *supra* note 39.

190. SPEAK UP WEKIVA, *supra* note 146.

191. *The Lake Erie Bill of Rights Citizens Initiative*, TOLEDOANS FOR SAFE WATER, https://lakeerieaction.wixsite.com/safewatertoledo [https://perma.cc/M6J8-958Z].

192. Lujan v. Defenders of Wildlife, 504 U.S. 555, 577–78 (1992).

the creation of this office and the powers and duties of environmental guardians. An environmental guardian is, essentially, an environmental organization that can speak and act on behalf of the natural body it is appointed to serve. The model language here does not deal explicitly with the procedures by which an environmental guardian is appointed.

> Office of Environmental Guardians
>
> (1) There is created the Office of Environmental Guardians within the Department of Environmental Protection.
>
> (2) The Secretary of the Department of Environmental Protection shall appoint an executive director who shall head the Office of Environmental Guardians.
>
> (3) The executive director shall appoint a single environmental guardian to each of the natural bodies so designated by the Legislature in accordance with [substantive statute]. The guardian chosen for each natural body shall be an organization that meets the proper requirements for guardianship under [statute detailing requirements for guardianship].
>
> Powers and Duties of Environmental Guardians
>
> (1) The environmental guardian shall have the power to act in the name of the natural body it represents in all legal matters involving the natural body.
>
> (2) The environmental guardian may seek damages for any injuries the natural body may have suffered, and the environmental guardian may seek injunctive relief to prevent further injury.
>
> (3) The environmental guardian may speak on behalf of the natural body in all legislative and administrative hearings involving the natural body or its interests.
>
> (4) If the natural body the environmental guardian serves is a body of water, the environmental guardian shall monitor pollution levels in accordance with [state statute or agency rule]. If the environmental guardian finds pollution levels that surpass lawful limits under [state statute or agency rule], the environmental guardian may initiate proceedings under the appropriate state statute or agency rule.
>
> (5) The environmental guardian shall have rights of visitation and inspection on the first Monday of every month for any projects undertaken in accordance with [applicable statutes]. If the environmental guardian discovers unlawful

> activity, the environmental guardian may initiate proceedings under the appropriate state statute or agency rule.
>
> (6) Whenever the environmental guardian receives money resulting from a legal proceeding, including damages, funds received as a result of arbitration, and funds received as part of a settlement agreement, the monies shall be placed in a separate fund controlled by the environmental guardian. The environmental guardian shall use such monies solely for the remediation of the natural body from the harm involved in the underlying legal proceeding. The environmental guardian shall remediate the natural body in accordance with the applicable statute or agency rule.
>
> (7) If an organization is appointed as a successor environmental guardian, the organization immediately succeeds to all rights, duties, responsibilities, and powers of the preceding environmental guardian.

The Rights of Nature movement may have objections to the idea that the legislature be responsible for appointing environmental guardians and designating the natural bodies they protect. The movement seems to view state legislatures as impediments to their objectives. However, the financial capital and political energy spent to pass the local ordinances of the type discussed in this Note may prove to be spent in vain as states preempt local governments from recognizing injuries to natural bodies themselves. The rights of natural bodies will be much better secured by state legislation providing that injuries to certain designated bodies will be legally cognizable by courts and allowing legal proceedings to be initiated on their behalf. Rather than focusing on the local level, the movement should redirect its attention and funds to building statewide coalitions that can push for more permanent protections at the state level.

CONCLUSION

While it is raising awareness of the necessity of better legal protections for nature and natural objects, the current Rights of Nature movement is unlikely to achieve its goals of giving natural objects, and nature in general, rights to "exist, flourish and naturally evolve."[193] The movement's focus on local governments presents insurmountable obstacles, such as natural objects that exceed the jurisdiction of the local government and the preemption authority of state governments. Further, the movement's focus on stripping corporations of their rights under state or federal law when they injure the natural object will likely never survive

193. *See* TOLEDO, OH., CODE § 254(a) (2019).

Fourteenth Amendment challenges. Indeed, the very real threat of sanctions for making "unreasonable" legal arguments and taxing "limited judicial resources" should give pause to any law firm, nonprofit, or local government making the argument that local governments may preempt state law, or that they can strip corporations of their rights under federal and state law.[194]

Rather than focusing on local ordinances, the Rights of Nature movement should shift its focus to passing state statutes or state constitutional amendments. The movement should look to Professor Stone's landmark 1972 article for guidance, which provides for more robust legal protections of natural objects than mere aspirations that natural objects have rights to "exist, flourish and naturally evolve." The movement should seek to pass state constitutional amendments, where possible, that mandate legal cognizance of injuries to natural objects themselves rather than just economic, aesthetic, spiritual, or conservational injuries to the human persons associated with the natural objects. In addition, states can pass statutes that give protections to specific natural objects, such as lakes, rivers, or entire ecosystems, by allowing environmental organizations to become "guardians" of the natural objects. The statutes can provide that guardians not only have the ability to bring civil actions on behalf of the natural objects, but that they have other procedural rights, such as the right to inspection and visitation, monitor effluents, and speak on behalf of the natural object at legislative and administrative hearings.

These policy tools, first articulated by Professor Stone, are creative solutions to the various ecological problems of the twenty-first century, such as biodiversity loss, dwindling sources of drinking water, deforestation, and the various public health issues that result from a changing climate. They are the kinds of "best practices" and "new solutions" called for by Pope Francis in *Laudato Si'* that may promote the "ecological conversion" the world desperately needs.[195]

194. *See* Justin Nobel, *The Rights of Nature Movement Goes On Trial*, ROLLING STONE (Jan. 10, 2018, 7:13 PM), https://www.rollingstone.com/politics/politics-news/the-rights-of-nature-movement-goes-on-trial-125566/ [https://perma.cc/Q8ES-W37W].

195. *See* POPE FRANCIS, LAUDATO SI' 117, 141 (2015).