

Wild Law 2007–8

## Halting the global meltdown: can environmental law play a role?

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### Introduction: the story of *Mass v. EPA*\*

On April 2, 2007 the United States Supreme Court handed down its decision in *Massachusetts v. Environmental Protection Agency*,<sup>1</sup> its first case dealing with the issue of global warming. The decision was a landmark victory for environmentalists: it legitimized the urgency of the global warming crisis and the claim that the Bush Administration was illegally withholding regulation that could help address this crisis. Whether this decision will actually spur significant action by the U.S. on climate change is yet to be seen. However, there is general agreement that when the Supreme Court gave its imprimatur to the legitimacy and unprecedented importance of global warming, the public policy debate in the U.S. was altered permanently.

I had a personal and professional stake in this legal battle over global warming. Twenty years before this decision I co-founded the Greenhouse Crisis Foundation and organized the first local summit on global warming, attended by more than 50 mayors from around the world. A few years later I initiated the filing of the first-ever lawsuits challenging U.S. federal agencies' failures to include global warming impacts in their environmental analyses. After some initial legal success, the courts ruled against these attempts on jurisdictional and procedural grounds, a problem I will address later in this article. Then, almost a decade ago, my legal partner Joseph Mendelson III and I conjured up this case's genesis: the idea of forcing the Environmental Protection Agency (EPA) to regulate carbon dioxide (CO<sub>2</sub>) and other greenhouse gases under the Clean Air Act (CAA).<sup>2</sup>

In 1999, our organization, the International Center for Technology Assessment (ICTA), filed a formal legal petition with the EPA demanding that it regulate greenhouse gas emissions from motor vehicles as required

by the CAA.<sup>3</sup> It was the start of an eight-year long struggle by our organization.<sup>4</sup> The Clinton Administration responded to the petition by holding several meetings with us to discuss initiating this historic regulation. A public notice and comment process was undertaken, with over 50,000 public comments received by the agency in a five-month period.<sup>5</sup> However, with the advent of the George W. Bush Administration in 2000, all communication ceased. In 2003, we were forced to sue the EPA for unreasonable delay in even responding to our petition. As a result of that lawsuit the Bush EPA finally did respond to the petition, denying our demands.<sup>6</sup> The Administration claimed that: 1) EPA lacked the necessary statutory authority to deal with global warming; and 2) even if it did have that authority, regulating global warming was not appropriate for a number of policy reasons including its view that the science was too uncertain to be a basis for regulation.<sup>7</sup>

Joined by a number of other environmental groups and several U.S. States, we appealed this denial by filing a petition for review in the U.S. Court of Appeals for the District of Columbia (D.C. Circuit). After briefing and oral argument, an ideologically divided three-judge panel of that appellate court upheld the EPA decision to deny our Greenhouse Gas petition by a 2–1 margin.<sup>8</sup> The full D.C. Circuit then declined to reconsider the panel decision *en banc* by an equally narrow margin of 4–3.<sup>9</sup> Ultimately, we and our environmental non-profit and State partners appealed to the U.S. Supreme Court. Surprisingly the High Court granted review.<sup>10</sup> Oral argument was held in December 2006, and after five months of deliberation

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A similar presentation was given at the United Kingdom Environmental Law Association (UKELA) Wild Law workshop 'Wild law: a response to climate change' 21–23 September 2007.

1 *Massachusetts et al. v. EPA et al.* – U.S.–, 127 S. Ct. 1438 (2007).

2 42 U.S.C. §§ 7401 *et seq.*

3 The original 1999 ICTA petition, formally entitled 'Petition for Rulemaking and Collateral Relief Seeking the Regulation of Greenhouse Gas Emissions from New Motor Vehicles Under § 202 of the Clean Air Act' (Greenhouse Gas Petition) is available at <http://www.icta.org/doc/ghgpet2.pdf>.

4 A chronology for the case is available at <http://www.icta.org/doc/Chronology%20Short%208-31-06.pdf>.

5 See 68 Fed. Reg. 52924 (2003).

6 See 68 Fed. Reg. 52922.

7 *ibid.*

8 *Mass v. EPA*, 415 F.3d 50 (D.C. Cir. 2005). The court voted along essentially party lines: the two republican-appointed judges (Randolph, Sentelle) ruled against us and the judge appointed by a democratic president (Tatel) voted in our favor. *ibid.* at 61–82 (Tatel, J., dissenting).

9 *Mass v. EPA*, 433 F.3d 66 (D.C. Cir. 2005).

10 *Mass v. EPA*, 126 S. Ct. 2960 (June 26, 2006).

and waiting, the Court announced its decision in April of this year: a stunning victory for us, reversing the agency and the lower court, by a narrow 5–4 margin.<sup>11</sup> Writing for the five-judge majority, Justice Stevens held that EPA did indeed have the authority to regulate greenhouse gases as air pollutants under the CAA and that EPA had illegally failed to meet its statutory obligations.<sup>12</sup> Stevens was joined by Justices Breyer, Souter, Ginsburg and Kennedy. The remaining four justices (Chief Justice Roberts, and Justices Scalia, Thomas and Alito) each joined two dissenting opinions: one, authored by Chief Justice Roberts arguing that the petitioners lacked standing to sue;<sup>13</sup> and a second dissent written by Justice Scalia reaching the merits and agreeing with EPA’s policy assertions (including scientific uncertainty) for not regulating global warming.<sup>14</sup>

Legally, the global warming case is hugely important, a momentous decision. While Justice Stevens’ majority is thin, there is nothing thin about the sweeping nature of the ruling: the Court ruled in our favor on all counts.<sup>15</sup> The historic case recognized the right to sue because of injuries caused by global warming.<sup>16</sup> Further, the Court held that the Bush Administration had illegally resisted efforts to regulate global warming pollution.<sup>17</sup> The case defines a major new arena for EPA regulations, namely addressing global warming. Subsequent demands to the agency by other groups and political entities will have to be respected by the agency and acted upon. Finally, with regard to the science of climate change, the decision fundamentally altered the nation’s discourse on climate change. The Court definitively declared: ‘The harms associated with climate change are serious and well recognized’, and quoted at length from studies cataloging present and future harms.<sup>18</sup> However, for me and some other observers, the most remarkable aspect of this case was what lurked behind the actual legal holdings: an implicit understanding of nature that comports with ecological reality and the relevance of this ecological world view vis-à-vis the rule of law.

The ‘ecological model’ views nature as a complex series of interdependent dialectical relationships. It sees industrial production as a profound disruption of those relationships and supports the view that these disruptions will cause significant harm even if such harm is not immediately apparent and may be distant in time or even location. Obviously this precautionary principle-based ecological approach has important implications for the law. For example, accepting such a premise leads one to a broad interpretation of access to courts for those who object to activities potentially harmful to the environment. Furthermore, such a view is far-sighted, seeing future

secondary and tertiary injuries as potentially sufficient bases for action – although these harms may be uncertain or difficult to measure in the present.

The Court’s majority opinion is unique among recent Supreme Court rulings for its internalization of this ecological point of view. The holding begins in striking fashion, repeating the petitioner’s view that global warming is ‘the most pressing environmental challenge of our time’ and emphasizing the ‘unusual importance of the underlying issue.’<sup>19</sup> The Court then proceeds to find standing for the State of Massachusetts (and thereby all petitioners) based on the Court’s ability to assume injury from the human disturbance of the earth’s climate system.<sup>20</sup> This included the acceptance of significant climate impacts that are not easily quantifiable or immediate. The Court recognized that the problem was ‘widely shared’, but held that the shared nature of the harm did not negate the petitioners’ specific injury and standing.<sup>21</sup> Finally, the Court properly recognized the global scope of the problem while still holding EPA could help remedy the problem: ‘A reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere.’<sup>22</sup> In sum, the Court’s grant of standing is based on an interpretation of the law (here the jurisdictional bar of standing) and of the facts that is relatively consistent with the aforementioned ecologically sound model.

We can see a similar ecological approach in the majority’s analysis of the merits of the case.<sup>23</sup> The Court did not allow EPA unfettered discretion in the decision on whether to regulate greenhouse gases under the CAA. EPA could not rely on a ‘laundry list’ of impermissible factors that ‘have nothing to do with whether greenhouse gas emissions contribute to climate change.’<sup>24</sup> As in the standing discussion, the Court’s analysis recognized the international, interconnected nature of the global warming problem, eviscerating arguments from the Bush Administration and industry that the worldwide nature of the problem negated any government duty to regulate. For example, the Court held that the president’s ‘broad authority in foreign affairs’ did not ‘extend to the refusal to execute domestic laws’ with regard to alleviating global climate change.<sup>25</sup> Moreover, the Court’s views are framed with the sense of urgency about global warming and the need to begin addressing the crisis quickly. The Court is clearly frustrated with the EPA’s refusals, as the nation’s leading environmental protection agency, to take adequate oversight steps.

Even as the Court’s adoption of this implicitly ecological approach is a welcome change, it is a fragile one. The decision was after all 5–4. Additionally, the four dissenters left little doubt that should there be a change

11 *Massachusetts et al. v. EPA et al.*, \_\_\_ U.S. \_\_\_, 127 S. Ct. 1438 (2007).

12 *ibid* at 1438–63.

13 *ibid* at 1463–71 (Roberts, C.J., dissenting).

14 *ibid* at 1471–78 (Scalia, J., dissenting).

15 *ibid* at 1438.

16 *ibid* at 1452–59 (the majority’s standing analysis).

17 *ibid* at 1459–63.

18 *ibid* at 1455.

19 *ibid* at 1446–47.

20 *ibid* at 1452–59.

21 *ibid* at 1456.

22 *ibid* at 1457–58.

23 *ibid* at 1459–63.

24 *ibid* at 1462–63.

25 *ibid* at 1463.

in the Court's personnel in their favor this precedent would soon be reversed or marginalized. Thus, ironically, as positive as the Court's ruling is for global warming and environmental law at large, it also clearly indicates how our legal framework does not adequately address the current decimation of the natural world caused by our industrial production system. Here we have the most unprecedented environmental threat yet experienced by human society, the biochemistry of the planet compromised, and the highest court in the U.S. only orders regulation by a single vote margin! We have the earth in peril and perhaps the future of the planet in the balance and lawyers are fighting for the high ground in the interstices of administrative law to try and find some remedy, some regulatory framework trigger or hook. How can western law begin to resolve its own crisis and make itself relevant to the most pressing environmental issues of our time? How can the 'ecological' approach implicit in *Mass v. EPA* be amplified to provide a contextual model for future environmental jurisprudence?

### The rediscovery of Natural Law

Fortunately, the history of western law provides us with such a potential context for the next stage of environmental law. A central concept in the development of law in ancient Greece was the idea of a 'Natural Law'. The Greeks were not satisfied with simple *ad hoc* legal systems but rather sought a basis for all law in the 'order' of nature. Following the Platonic lead they found such ordering in the 'telos' of nature – the belief that every element in nature has a meaning and is interconnected with the meaning of the whole. They saw an ultimate design and hierarchy in nature and sought to comport their laws with this design. In a number of different incarnations, natural law came to be viewed as a body of rules for the making, administration, and adjudication of positive laws. Natural law was not seen as a set of rules which precisely dictated positive law, but rather as a set of principles that put the processes of law in operation and directed their influence through dialectic, analogy, and example (the bases for the art of rhetoric). In the memorable phrase of philosopher Scott Buchanan, 'Natural law, as does reason, sits within the mind of the magistrate, lawyer, and citizen as the internal teacher'.

Throughout the subsequent history of western jurisprudence, when the governing law ceased to be relevant to the needs of a society, that society then re-examined Natural Law to rediscover the 'internal teacher' who would guide them. I think this is at least in part the road we must take again as we face the environmental crisis today and the inadequacy of our legal system to deal with that crisis. Here are a couple of common definitions of Natural Law.

'Natural Law' is defined by BLACK'S LAW DICTIONARY as:

1. a physical law of nature (Ex. gravity)
2. a philosophical system of legal and moral principles purportedly deriving from a universalized conception of human nature or

divine justice rather than from legislative or judicial action; moral law embodied in principles of right and wrong (cf positive law).<sup>26</sup>

More from A DICTIONARY OF MODERN LEGAL USAGE:

Historically a number of senses have been attributed to the term; today the prevailing sense especially in legal contexts is 'law that determines what is right and wrong and that has power or is valid by nature, inherently, hence everywhere and always' (L. Strauss, *Natural Law*, 11 *International Encyclopedia of the Social Sciences* 80, 80 (1968)). Because *natural law* and *positive law* are not mutually exclusive, a rule such as 'Thou shalt not kill' might be a rule equally in both systems.<sup>27</sup>

In these definitions of Natural Law we see the ecological approach amplified. Natural Law is understood to reflect or be validated by the laws of nature. The tenets of Natural Law at their core then give legal status to the 'telos' of every element in nature, which means that under the law no aspect of nature can be viewed merely as a 'means' (ie a resource for exploitation), but must also be legally understood as an end in itself. Moreover, we can now bolster the teleological tenets of Natural Law with the profound insights offered by modern ecology, effectively marrying Natural Law with the law of nature.

Here then are new versions of the three generally agreed basic formulations of Natural Law (with apologies to Immanuel Kant) which reflect how they could be used as the context for new and effective environmental laws.

#### First formulation

This is meant for legislators and judges.

'Choose the maxims of your acts as if they were to serve as universal laws of nature.'

(To be relevant this formulation must now be informed with the science of ecology and our deepening understanding of the 'laws of nature'.)

#### Second formulation

This is meant for legal philosophers.

'All maxims ought to by their own legislation harmonize with the understanding of life as a kingdom of ends.' (This again should be amplified by the 'surreptitious' teleology of ecology.)

#### Third formulation

This is meant for all citizens and all private and public entities.

<sup>26</sup> Bryan Garner (ed) BLACK'S LAW DICTIONARY (2nd edn West Group 2001) 467–68.

<sup>27</sup> Bryan Garner A DICTIONARY OF MODERN LEGAL USAGE (2nd edn OUP Inc USA 2001) 581–82.

'Each natural thing must be treated as an end in itself, not merely as a means.' (Actions violate this formation if any aspect of nature is treated merely as means. This does not mean that they can never be treated as means. Rather that subjects act reciprocally as a means and ends regarding one another, or as mutual means or a common end, as the organs in an organism, or as members of a free community. They may serve each other but the 'royalty' in each must be respected under the law.)

### Embodying the Natural Law approach

Current positive law is becoming more and more irrelevant in addressing the environmental crises engulfing us. Clearly we need new legal principles on which to base a new wave of environmental laws and regulations which are effective in halting the exploitation and devastation of the natural world endemic to our technological system, including of course the most profound threat – global warming. Rather than attempting to invent new legal principles 'from scratch', I believe that the long tradition of Natural Law which has been the basis for western law for millennia can now come to our aid, as it has during many other legal crises in the past (including being the legal basis for democracy and the U.S. Constitution).

To be effective, Natural Law must be rediscovered and re-envisioned. This recovery involves extending natural law's teleological vision to the entire community of nature (as the Greeks did), rather than just to human subjects as has been the habit since the Enlightenment (as codified by Kant). The re-envisioning involves amplifying the teleological bases of Natural Law with the modern understanding of ecology, thereby marrying Natural Law with the laws of nature.

Here is a sample of existing normative law concepts that can be used as manifestations of this new Natural Law approach.

### The public trust doctrine

The public trust doctrine is a common law property concept, with roots extending back to Roman law. It holds that mankind has a common right to the use of resources such as air, wildlife, running water, the oceans and their shores and also has a right not to have these destroyed through private ownership and exploitation.<sup>28</sup> Natural Law has often been associated with the public trust doctrine. Under this doctrine an aspect of nature cannot be used in such a way as to alter fundamentally its character and usefulness. The basic understanding is that the sovereign holds certain common properties in trust, barring

destructive exploitation, so that they can exist in their useful state in perpetuity. The doctrine protects public resources, preventing the government from adversely affecting those rights. As stated by the U.S. Supreme Court in 1892: 'absolute private dominion over property impressed with the public trust can never be granted unless it is in the public interest to do so.'<sup>29</sup>

The doctrine was rediscovered in the U.S. in a 1970 article by University of Michigan law professor and water law scholar Joseph Sax, who suggested it could be used to address a number of environmental problems.<sup>30</sup> It is fundamentally a judicial doctrine and courts have decided whether and to what extent it applies in a given state. Although originally water resources based (eg navigation, commerce and fisheries), courts have expanded the doctrine in cases dealing with both water and land-based public resources and an increasing array of public activities and interests where the existing regulatory framework was not sufficient to protect and preserve vital public resources. These contexts include but are not limited to: state parks,<sup>31</sup> fish,<sup>32</sup> marine life,<sup>33</sup> sand and gravel in water beds,<sup>34</sup> all waters capable of recreational use,<sup>35</sup> national parks,<sup>36</sup> wildlife,<sup>37</sup> and a historic battlefield.<sup>38</sup> States have recognized that the uses of public trust resources are sufficiently flexible to encompass the changing public needs<sup>39</sup> and held that those uses extend to ecological, scenic, and intrinsic public interests.<sup>40</sup> In addition, U.S. States have incorporated public trust principles into their laws and constitutions.<sup>41</sup> Finally, academic scholarship has

29 *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 433 (1892). In this landmark case, the Supreme Court held that a state legislature could not grant ownership of land under navigable water to a private party. In 1869, the Illinois legislature had granted the railroad more than 1000 acres of shoreline and underwater land. The Court ruled the grant invalid, holding that the State's 'abdication' of control over the underwater land was inconsistent with its responsibility 'to preserve such waters for the use of the public.'

30 Sax 'The Public Trust Doctrine' (n 28).

31 *Gould v. Greylock Reservation Comm'n*, 215 N. E. 2d 114, 121-26 (Mass. 1966).

32 *Nash v. Vaughn*, 182 So. 827, 828 (Fla. 1938).

33 *New Jersey Dep't of Env'tl. Protection v. Jersey Cent. Power & Light Co.*, 308 A. 2d 671, 673 (N.J. 1973).

34 *Warren Sand & Gravel Co. v. Commonwealth Dep't of Env'tl. Resources*, 341 A. 2d 556, 560 (Pa. 1975).

35 *Montana Coalition for Stream Access v. Curran*, 682 P. 2d 163, 167-71 (Mont. 1984).

36 *Sierra Club v. Department of Interior*, 398 F. Supp. 284, 287 (N.D. Cal. 1975).

37 *Wade v. Kramer*, 459 N.E. 2d 1025, 1027 (Ill. App. Ct. 1984).

38 *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*, 311 A. 2d 588, 591 (Pa. 1973).

39 *Marks v. Whitney* 6 Cal. 3d 251, 259 (Cal. 1971).

40 See *National Audubon Soc'y v. Alpine County*, 33 Cal. 3d 419, 435 (1983) (declaring that recreational and ecological values, such as scenic views of a lake and its shore, the purity of the air, and the use of a lake for nesting and feeding by birds, are protected by the public trust).

41 See eg *Owsicheck v. State Guide Licensing & Control Bd.*, 763 P.2d 488, 493 (Alaska 1988) (noting that the purpose of the Alaska Constitution's 'common use' clause 'was achieved by constitutionalizing common law principles imposing upon the state a public trust duty with regard to the management of fish, wildlife and waters'); Penn. Const. Art. 1, § 27 ('The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.')

28 See generally Zygmunt Plater ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY (West Group 1992 ) 365-412 (discussing the past and recent application of the public trust doctrine to traditional resources such as navigable waters as well as to non-navigable and non-water resources); Joseph L Sax 'The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention' 68 MICH. L. REV. 471 (1970) (providing a comprehensive survey of the public trust doctrine and its judicial development).

explored the doctrine's potential application to a myriad of additional environmental issues, including but not limited to: open ocean aquaculture or fish farming,<sup>42</sup> protection of coral reefs,<sup>43</sup> the environmental impacts of snow-making,<sup>44</sup> the protection of biodiversity,<sup>45</sup> the alleviation of agricultural irrigation and waste-caused water pollution,<sup>46</sup> the wireless electromagnetic spectrum,<sup>47</sup> and as nothing short of a governmental duty to maintain a healthy environment.<sup>48</sup>

### The *guardian ad litem* concept

A central problem for the idea of giving rights to the 'telos' of natural things or places as required under natural law is the problem of agency. A tree, mountain, insect or ecosystem cannot argue for itself in court. One solution to this might be an expanded use of the *guardian ad litem* (Latin for 'guardian at law') concept. A *guardian ad litem* is defined as a 'guardian, usually a lawyer, appointed by the court to appear in a lawsuit on behalf of an incompetent or minor party'.<sup>49</sup> For example, a *guardian ad litem* is often appointed by courts in divorce proceedings to represent the interests of minor children. The *guardian ad litem* is charged to represent the best interests of the minor child alone, separate from the position of the state or government agency or the interest of the parents. In addition, *guardians ad litem* can be appointed in probate matters to represent the interests of unknown or unlocated heirs to an estate.

This basic jurisprudential tool from divorce and probate law could be extrapolated and put to work in an amended or new environmental protection framework. One major current failing of U.S. constitutional law is that only people can file lawsuits or have constitutional 'standing' to sue. In general, in order to challenge any private or governmental action potentially damaging to some aspect of the environment in a court of law, environmental protection advocates must first meet a number of judicially-mandated procedural hurdles showing they have a sufficient interest in the dispute and their personal interest will be damaged.<sup>50</sup> These 'standing' prerequisites

include injury in fact, causation, and redressability.<sup>51</sup> Importantly, these requirements are jurisdictional; if they are not met, the case is tossed out. The result is that many actions cannot be challenged and are never adjudged on their merits because the interested humans are judged not to be closely enough connected to the action to challenge it.

A couple of examples may be helpful. Imagine two corporations are in litigation over ownership of a mountain property. One corporation wishes to strip-mine the mountain, the other to use it for recreational camping. Here a court in making its decision could appoint a *guardian ad litem* to represent the mountain's best long-term interest, and as in a divorce proceeding, the decision of the guardian could be dispositive. Another example might involve a federal agency determination that it must cut down an old-growth forest on a remote U.S. protectorate island in order to build a military base. This island is not inhabited by humans and is off-limits to public visitors. Very likely opponents of the clear-cutting would lack standing to challenge the action because they would be unable to show that they – rather than the forest itself – would be injured.<sup>52</sup> (If they could visit the island's forests they could argue their recreational and aesthetic enjoyment in the forest is sufficient interest to challenge.)

There is a further, connected problem. The second example above is an extreme one; normally some interested party can make a non-frivolous argument that their interest is damaged by the proposed action. Yet even in those cases the result is that the focus of the case (and often its outcome) turns on and emphasizes whether those artificial 'standing' benchmarks for human impact are met (are people impacted, is the action the cause of their injury, and will the revocation of the action redress the people's injury) and not whether an action will negatively impact the ecosystem in question, in and of itself. As noted, this was certainly the case with *Mass. v. EPA*, where the Justices on both sides focused a great deal on whether the petitioners had met the necessary standing hurdles before addressing the merits of the case.<sup>53</sup> This structural weakness in the U.S. jurisprudential framework creates a kind of legal fiction in which the injury alleged and analyzed is usually not the injury with which the parties are concerned.

In order to have a system of law that accounts for the interconnectedness of species and internalizes environmental impacts, the *guardian ad litem* concept could be useful. In this form, environmental advocates/scientific experts appointed by the court or chosen by the people would represent the interests of the natural

42 Hope Babcock 'Grotius, Ocean Fish Ranching, and The Public Trust Doctrine: Ride'em Charlie Tuna' 26 *STAN. ENVTL. L.J.* 3 (2007) (explaining why the doctrine could and should be expanded to apply to ocean fish ranching).

43 J.C. Sylvan 'How to Protect a Coral Reef: The Public Trust Doctrine and the Law of the Sea' 7 *SUSTAINABLE DEV. L. & POL'Y* 32 (2006).

44 Alethea O'Donnell 'Something Old, Something New: Applying the Public Trust Doctrine to Snowmaking' 24 *B.C. ENVTL. AFF. L. REV.* 159 (1996).

45 Ralph Johnson 'Protection of Biodiversity Under the Public Trust Doctrine' 8 *TUL. ENVTL. L.J.* 21 (1994).

46 Ralph Johnson 'Water Pollution and the Public Trust Doctrine' 19 *ENVTL. L.* 485 (1989).

47 Patrick Ryan 'Treating the Wireless Spectrum as a Natural Resource' 35 *ELR* 10620 (2005).

48 Peter Manus 'To a Candidate in Search of an Environmental Theme: Promote the Public Trust' 19 *STAN. ENVTL. L. J.* 315 (2000).

49 Garner *BLACK'S LAW DICTIONARY* (n 26).

50 On problems with standing doctrine generally, see, e.g., William A. Fletcher, 'The Structure of Standing', 98 *YALE L.J.* 221, 224 (1988); for a comparison with other nations' views on access to courts in

environmental cases, see Matt Handley 'Why Crocodiles, Elephants, and American Citizens Should Prefer Foreign Courts: A Comparative Analysis of Standing to Sue' 21 *REV. LITIG.* 97 (2002).

51 See generally *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 180–81 (2000).

52 See eg *Humane Soc'y of the United States v. Babbitt*, 46 F. 3d 93 (D.C. Cir. 1995) (holding no aesthetic injury where organizations' members had not visited the animal in question).

53 *ibid* at 1453–58; *ibid* at 1464–71 (Roberts, C.J., dissenting).

world – specific plants, animals, or ecosystem – impacted by the proposed action. This guardianship-for-the-environment model is not new: proponents include no less than U.S. Supreme Court Justices William Douglas and Harry Blackmun, who advocated for the concept in a famous 1972 environmental case, *Sierra Club v. Morton*.<sup>54</sup> Academic scholarship has also long explored the idea.<sup>55</sup> The idea is not without precedent: other non-human entities such as corporations, states, estates, and municipalities have standing to bring suit on their own behalf, though a representative.<sup>56</sup> (This uneven application creates the absurd result that currently inanimate objects such as corporations and ships possess more rights than beings that share key human characteristics: the capacity for rational thought and ability to feel pain.) The inclusion of the aforementioned citizen suit provisions in most U.S. environmental laws such as the Endangered Species Act is further evidence that Congress intended citizen participation in environmental protection litigation on behalf of wildlife. Finally, at least one other country, Italy, uses a type of guardian system in environmental disputes where certified environmental organizations possess a right to participate in environmental disputes without standing injury showings.<sup>57</sup>

### Citizen suit provisions

Perhaps the most available legal avenue to embody the ecological Natural Law approach would be by expanding the legal rights of citizens to protect the environment through citizen suit provisions in environmental legislation. Citizen suit provisions are statutory provisions that grant the right of private citizens to bring suit to enforce that

particular federal law in certain cases. They are also sometimes referred to as ‘private attorney general’ provisions.

Citizen suits provide private citizens with the right to bring a lawsuit against a citizen, corporation, or government body for engaging in conduct prohibited by the statute.<sup>58</sup> For example, a citizen can sue a private company under the Clean Water Act for illegally polluting a waterway. Alternatively or additionally, pursuant to some citizen suit provisions, a private citizen can bring a lawsuit against a government body for failing to perform a non-discretionary duty. For example, a private citizen could sue the Environmental Protection Agency for failing to promulgate regulations that the Clean Water Act required it to promulgate.

The main purpose of citizen suit provisions is twofold: to supplement and/or prod government enforcement actions and to prod violators to achieve statute compliance.<sup>59</sup> More generally, citizen suits foster environmental stewardship, agency accountability, representational democracy, and the rule of law.<sup>60</sup> There are normally two procedural prerequisites: citizen enforcement actions can only be commenced in the absence of appropriate state or federal enforcement and citizens must give notice to both the violator and the governmental enforcement authorities prior to filing suit.<sup>61</sup>

The Clean Air Act, passed in 1970, was the first citizen suit provision incorporated into U.S. federal law and is generally representative of the provisions. CAA § 304 allows any person to commence a civil action on his or her own behalf:

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of (A) an emission standard or limitation under this chapter, or (B) an order issued by the Administrator or a State with respect to such a standard or limitation.<sup>62</sup>

54 *Sierra Club v. Morton*, 405 U.S. 727, 741–55 (1972) (Douglas, J., dissenting) (‘The critical question of “standing” would be simplified and also put neatly in focus if we fashioned a federal rule that allowed environmental issues to be litigated before federal agencies or federal courts in the name of the inanimate object about to be despoiled, defaced, or invaded by roads and bulldozers and where injury is the subject of public outrage. 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.’); *ibid* at 755–59 (Blackmun, J., dissenting) (‘Do we need any further indication and proof that all this means that the area will no longer be one “of great natural beauty” and one “uncluttered by the products of civilization”? Are we to be rendered helpless to consider and evaluate allegations and challenges of this kind because of procedural limitations rooted in traditional concepts of standing?’).

55 See generally Christopher D. Stone ‘Should Trees Have Standing? – Toward Legal Rights for Natural Objects’ 45 S. CAL. L. REV. 450 (1972); see also Cass R. Sunstein ‘Standing for Animals (with Notes on Animal Rights)’ 47 UCLA L. REV. 1333 (2000); Joyce S. Tischler ‘Rights for Nonhuman Animals: A Guardianship Model for Dogs and Cats’ 14 SAN DIEGO L. REV. 484 (1977); Elizabeth L. Decoux ‘In the Valley of the Dry Bones: Reuniting the Word “Standing” with its Meaning in Animal Cases’ 29 WM. & MARY ENVTL. L. & POL’Y REV. 681 (2005); Lauren Magnotti ‘Pawing Open the Courthouse Door: Why Animals’ Interests Should Matter When Courts Grant Standing’ 80 ST. JOHN’S L. REV. 455 (2006).

56 *ibid* Stone at 464.

57 See Douglas L. Parker ‘Standing to Litigate “Abstract Social Interests” in the United States and Italy: Reexamining “Injury in Fact”’ 33 COLUM. J. TRANSNAT’L L. 259, 289–92 (1995).

58 See generally Michael Axline ENVIRONMENTAL CITIZEN SUITS (3rd edn Butterworth Legal Publishers 1993).

59 See eg Jeffrey Miller ‘Theme and Variations in Statutory Preclusions Against Successive Environmental Enforcement Actions By EPA and Citizens: Part One: Statutory Bars in Citizen Suit Provisions’ 28 HARV. ENVTL. L. REV. 401, 414–429, 424 (2004) (discussing the legislative history of citizen suit provisions and concluding that ‘One clear purpose was to be a vehicle for citizen participation in government, with broader goals of providing transparency and openness in government, in turn promoting public ownership of and trust in government. Another was to assure compliance with environmental statutes by encouraging government enforcement and providing default enforcers when the government chose not to enforce or lacked the resources to do so.’).

60 See David R. Hodas ‘Enforcement of Environmental Law in a Triangular Federal System: Can Three Not be a Crowd When Enforcement Authority is Shared by the United States, the States, and Their Citizens?’ 54 MD. L. REV. 1552 (1995).

61 See eg 42 U.S.C. § 7604(b)(1)(A-B).

62 42 U.S.C. § 7604(a)(1).

After the passage of the Clean Air Act, similar citizen suit provisions were included in all but one subsequently-enacted U.S. federal environmental statutes, in chronological order:<sup>63</sup>

1. The Clean Water Act (CWA), 33 U.S.C. § 1365 (enacted 1972)
2. The Marine Protection, Research, and Sanctuaries Act (Ocean Dumping Act), 33 U.S.C. § 1415(g) (enacted 1972)
3. The Noise Control Act of 1972, 42 U.S.C. § 4911 (enacted 1972)
4. The Endangered Species Act (ESA), 16 U.S.C. § 1540(g) (enacted 1973)
5. The Safe Drinking Water Act, 42 U.S.C. § 300j-8 (enacted 1974)
6. The Deepwater Port Act, 33 U.S.C. § 1515 (enacted 1975)
7. The Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6972 (enacted 1976)
8. The Toxic Substances Control Act (TSCA), 15 U.S.C. § 2619 (enacted 1976)
9. The Surface Mining Control and Reclamation Act, 30 U.S.C. § 1270 (enacted 1977)
10. The Outer Continental Shelf Lands Act, 43 U.S.C. § 1349 (enacted 1978)
11. The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9659 (enacted 1986)
12. The Emergency Planning and Community Right-to-Know Act, 42 U.S.C. § 11046(a)(1) (enacted 1986)
13. The Hazardous Liquid Pipeline Safety Act of 1979, 49 U.S.C. § 60121 (enacted 1994).<sup>64</sup>

In addition to federal statutes, 16 U.S. States have environmental citizen suit statutes in some form or another.<sup>65</sup>

Commentators and scholars have explored applying the concept and effects of citizen suits in various other related jurisprudential and socioeconomic arenas, including animal welfare,<sup>66</sup> climate change,<sup>67</sup> access to justice and environmental sustainability,<sup>68</sup> war and the military,<sup>69</sup> and international trade agreements.<sup>70</sup>

## Conclusion

The Supreme Court's decision *Mass v. EPA* is an important precedent for environmental law in the United States. Its ecologically sound view of plaintiff standing, holistic view of modern environmental problems, and willingness to challenge recalcitrant environmental agencies are all welcome precedents. However, the case also demonstrates the difficulties and pitfalls in using our current legal frameworks, in their current form and interpretations, to address the complex and interconnected environmental problems of our times. The ecological philosophy implicit in the Court's ruling could be used as a springboard for change, including the revitalization of the concept of Natural Law and its marriage to the laws of nature, as understood through modern ecology. Such rethinking should begin with tools which already exist in our laws and are ready to be redeployed in new and improved ways. These important new normative law advances and adaptations include new applications of the public trust doctrine, the *guardian ad litem* concept, and citizen suit standing.

63 The one substantive environmental protection statute sans citizen suit provision is the Federal Fungicide, Insecticide, and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136 *et seq.* (enacted 1947, substantially amended 1972 and again several times thereafter).

64 In addition, some non-environmental statutes also include citizen suit provisions, eg the False Claims Act, 31 U.S.C. § 3730(b) (enacted 1982) (allowing private enforcement to increase prevention of procurement fraud); the Americans with Disabilities Act, 42 U.S.C. § 12101 (enacted 1990).

65 State Environmental Resource Center, website, issue: citizen suits, at <http://www.serconline.org/citizensuits/stateactivity.html>.

66 Joshua E. Gardner 'At the Intersection of Constitutional Standing, Congressional Citizen Suits, and the Humane Treatment of Animals: Proposals to Strengthen the Animal Welfare Act' 68 GEO. WASH. L. REV. 330 (2000).

67 Richard W. Thackeray, Jr. 'Struggling for Air: The Kyoto Protocol, Citizens' Suits under the Clean Air Act, and the United States' Options for Addressing Global Climate Change' 14 IND. INT'L & COMP. L. REV. 855 (2004).

68 John C. Dernbach 'Citizen Suits and Sustainability' 10 WIDENER L. REV. 503 (2004).

69 Scott M. Palatucci 'The Effectiveness of Citizen Suits in Preventing the Environment from Becoming A Casualty of War' 10 WIDENER L. REV. 585 (2004).

70 Martha Siefert 'The NAFTA's Environmental Side Agreement: Is the Mandatory Arbitration Procedure Fact or Fiction? A Proposal to Allow for Citizen Suits in the Greening of Mexico' 3 SW. J.L. & TRADE AM. 467 (1996).