Does the Climate Have Standing?

U.S.C. Law School Workshop
October 31, 2008

Notes on Presentation Version

The essay is part of a project to produce a 2d revised edition of my collected essays, *SHOULD TREES HAVE STANDING? AND OTHER ESSAYS ON LAW, MORALS AND THE ENVIRONMENT* (Oxford U. Press [forthcoming]). The publisher has asked for an original essay on climate change (the rest of the collection to be reprints of articles published elsewhere). The essay is intended to be read *mostly* on a stand-alone basis, but there are a very few references to the “Introduction,” “Epilogue” and the original essay in the collection. The formatting—textual material in lettered footnotes, references in endnotes—is the style carried forward from the earlier edition.

To orient the reader, the theses of the “core” essay, “Should Trees Have Standing?” are essentially (1) it is a coherent to instate non-humans into the legal system as jural persons and (2) there are reasons to do so (with some of them in some ways). As a brief recap, in *Trees*, I observed

The world of the lawyer is peopled with inanimate right-holders: trusts, corporations, joint ventures, municipalities, Subchapter R partnerships, and nation-states, to mention just a few. Ships, still referred to by courts in the feminine gender, have long had an independent jural life, often with striking consequences. We have become so accustomed to the idea of a corporation having "its" own rights, and being a "person" and "citizen" for so many statutory and constitutional purposes, that we forget how jarring the notion was to early jurists.

I then tried to minimize scorn by pleading:

Now, to say that the natural environment should have rights is not to say anything as silly as that no one should be allowed to cut down a tree. We say human beings have rights, but—at least as of the time of this writing—they can be executed. Corporations have rights, but they cannot plead the Fifth Amendment; *In re Gault* gave 15-year-olds certain rights in juvenile proceedings, but it did not give them the right to vote. Thus, to say that the environment should have rights is not to say that it should have every right we can imagine, or even the same body of rights that human beings have.
That out of the way, I proceeded to criterialize what I thought it took "for a thing to be a *holder of legal rights*." I used this illustration:

even as between two societies that condone slavery there is a fundamental difference between S1, in which a master can (if he chooses), go to court and collect reduced chattel value damages from someone who has beaten his slave, and S2, in which the slave can institute the proceedings himself, for his own recovery, damages being measured by, say, his pain and suffering. Notice that neither society is so structured as to leave wholly unprotected the slave's interests in not being beaten. But in S2 as opposed to S1 there are three operationally significant advantages that the slave has, and these make the slave in S2, albeit a slave, a holder of rights. . . .

In preparing this draft I have had wonderful support from Grace Tse, 2L, not only for getting a good grip on the case law, but as a bulwark against my lapses into colloquialism, and evidence that respect for the rules of the bluebook and grammar may yet survive in a world of text-messaging. A good deal of the climate change analysis builds on earlier research and many rewarding (continuing) conversations with Brian Rothschild, class of 2007, who has just returned from a year clerking on the Utah Supreme Court. And, as usual, the library staff has been just great: Brian, Paul, Jessica, Cindy, Rosanne.
I

The Climate as Client

Climate change has emerged as the world’s paramount environmental issue. Efforts to rein in emissions have failed to stanch the accumulation of greenhouse gases in the atmosphere. The Kyoto Protocol, the central mechanism in international efforts, is stalling, unable to collar any of the three major polluters. China and India, which are moving to displace the United States and become the worst offenders, have joined the agreement, but without assuming any commitments to curtail. The United States, which, as a developed country, would be subject to immediate costly reductions if it joined, refuses to ratify at least until China and India assent to some, even if only future, cuts.

The very architecture of the Protocol is off-putting. There are 182 parties, mostly minor polluters not required to curtail emissions, but each with a vote that can potentially frustrate consensus. Targets for individual developed nations are allocated by reference to prior national usage, with different greenhouse gases “indexed” for radiative blocking power to carbon dioxide, outputs of greenhouse gases adjusted to some extent by national “removal” of CO₂ via croplands and forests, and the resulting allowances then fitted into a Byzantine trading scheme riddled with qualifications. To account for “learning,” the regime is designed to be reconsidered and redrawn periodically (the first commitment period expires at the end of 2012), prompting uneasiness about stability and continuity of obligations across subsequent time periods. If Kyoto, as some predict, effectively collapses from the weight of its own ambitions and gadgetry, what can take its place? Or put the effort back on track?

I have been asked, in the course of preparing this edition, to say something about the potential application of the Trees thesis to climate change. In its loosest form, the question might be “Does the climate have standing?”

One senses immediately that the notion is absurd. But pursuing the question for a moment—to clarify why it is absurd—provides insights that carry over into the evaluation of standing’s role in more modest climate change challenges that are already working their way into the courts, and others that are on the horizon. These suits range from litigation on behalf of species, and of inhabitants whose environments are imperiled by climate change, to suits to
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force agencies to regulate greenhouse emissions, even to force a country to honor its obligations under Kyoto. Each avenue is promising but problematic.

The problems begin with the fact that “the climate” makes for a shifty client—“it” is more a set of parameters than a thing. And even if it is some sort of “thing,” it stretches the imagination to provide a coherent account of how “it” would be “injured” as distinct from injuries to climate-dependent things.

Even if we put definitional problems aside, recall the circumstances from which Trees grew. The allegations in *Sierra Club v. Morton* were brought against a uniquely situated “wrongdoer,” (Morton, as Secretary of Interior) for his failure to exercise lawful restraint on the one entity (Walt Disney Inc.) whose planned actions threatened the ecology of one locale (Mineral King Valley). By contrast, the risks of climate change fall everywhere on everyone, globally. And we are all, as well as prospective complainants, prospective defendant. Who among us has not cast our own emissions? (Haven’t we all “unclean hands”?)

If there is a court that can identify a culpable wrongdoer in all this, there arises the question of remedy. Curbing emissions across, say, the United States, is not like curbing goats on a small island. A court cannot fashion an ameliorating “remedy” without balancing the costs and benefits, presumably even unto future generations, of different levels of restriction. Courts are not unfamiliar with the calculations. They are deployed to some extent in tort litigation. But there, we are usually looking, ex post, to a realized injury, and asking in hindsight what a particular defendant ought to have done ex ante. With climate change, questions of acceptable levels of risk and discount become crucial, not to a particular buyer and seller, or factory and neighbor, but to virtually everyone, as a community.

If these are not political questions, then what is? Relative to the judiciary, Congress is the body more suited to reflect majority preferences. (This, we shall see, is one reason why some climate change litigators are framing their complaints in the language of “human rights” violations.) The federal agencies presumably have superior capacities to gather facts and to supervise. And potential frictions with the executive’s foreign policy are real. Some judges have expressed concern that judicial intervention—even in a partial area of concern, such as auto emissions—would undercut the executive’s bargaining hand when the U.S. seeks in earnest to advance multilateral negotiations.

Moreover, for a court to entertain a suit on behalf of the climate to, say, reduce fossil power generation, would present risks of a huge social error. It would make no big difference to just about anyone whether Walt Disney could go ahead and “develop” Mineral Valley, or
whether feral goats should triumph over the endangered Palila. But a decision that throttled the supply of energy would affect everyone’s way of life. Some decline to a lower level would almost certainly be right. But would it be right leaving that to a court to decide?

In addition, there is no one country whose courts have jurisdiction over all major polluters. The processes of U.S. courts can reach U.S. car makers, but cannot reach (and if they could reach, probably could not enforce a judgment against), the coal mines of China. The Chinese courts, in turn, cannot get at the Canadian oil shale operators, who are prospective emitters on a major scale.

And there is another nagging twist. Suppose these hurdles were overcome and a court in some country did entertain a suit, Climate v. [naming the world’s heaviest greenhouse gas emitters], and then, on the merits, held that the Climate lost. I presume that the loss would thereafter be considered res judicata, that is, the case having being brought in the name of the Climate as plaintiff, it could not permissibly be re-litigated in any other forum. The litigation could be maneuvered into a single anti-environmentalist (or highly skeptical) jurisdiction, which would have power to extinguish such an action globally. (If this appears far-fetched, a growing tactic of anti-environmental groups is to bring pre-emptive challenges to certain environmental regulation that favor developers, and then to enter into “sweetheart settlements” that leave the regulations in place, and bar further, more demanding review.)

II

The Law of Standing: An Overview

While the climate makes for an improbable client, climate change can make an appearance in indirect ways, in many of which issues of standing are crucial. To see why, we do well to review the present state of standing jurisprudence, as best as I can pin it down.

Standing, broadly understood, is the authority of someone to initiate an action. The term in its narrower “proper” use is probably limited to the right of non-governmental parties to institute judicial review, which will be our principal focus. But we shall also have reason to consider the right to institute action and review, judicial and otherwise, by nations and governmental agencies.

The term “standing” makes no appearance in the Constitution. Article III gets no closer than to limit the reach of the federal judicial power to “cases” and “controversies.”
What is required to constitute a “case or controversy” is not defined. But there is agreement that if, for example, the Senate were to send to the federal courts a question about the constitutionality of a bill it was considering, the courts could not hear the issue because it had yet to become seated in a real dispute, complete with an actual victim with an alleged wrongdoer to answer for it. Standing restrictions are part and parcel of the same process by which, for various reasons—a case may not be, “ripe” or it may be a “political question”—the judiciary stays its hand. The elements of standing did not originate in the Constitution. There are rules of standing in common law and under state codes that are generally similar. But the state courts are not bound by these limitations that derive from the U.S. Constitution. For example, some states permit certified questions from the legislature or administrative bodies without even a semblance of case or controversy. Most of the cases we will be looking at involve federal questions.

Contemporary attention to standing has probably been most strongly influenced by Justice Antonin Scalia. While his constitutional analysis has been unfavorably dissected by Cass Sunstein, I do not find much (more exactly, only one) reason to quarrel that Scalia’s formulation of the core elements of standing (if not always the application of the elements) represents current federal law, and would be an acceptable representation of the basic law in most state courts.

To achieve standing, a plaintiff must show that (1) through breach of a duty owed by defendant to it; (2) plaintiff has suffered an “injury in fact” that is (a) concrete and particularized and (b) “actual or imminent, not ‘conjectural’ or ‘hypothetical’; (3) the injury is fairly traceable to the challenged action of the defendant; and (4) it is “likely,” as opposed to merely “speculative,” that the injury will be redressed by a favorable decision.”

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A As discussed below, “Lujan holds that the requirement of an “injury in fact” is a limitation on congressional power.” Cass Sunstein, What’s Standing After Lujan? Of Citizen Suits, “Injuries,” And Article III, 91 MICH. L. REV. 163, 166 (1992). But Sunstein argues that “an ‘injury in fact,’ as the Court understands it, is neither a necessary nor a sufficient condition for standing. The relevant question is instead whether the law—governing statutes, the Constitution, or federal common law—has conferred on the plaintiffs a cause of action. An inquiry into ‘injury in fact’ will both allow standing where it should be denied and deny standing where it should be granted. More fundamentally, the very notion of ‘injury in fact’ is not merely a misinterpretation of the Administrative Procedure Act and Article III but also a large-scale conceptual mistake.” Id. at 166-67. While I generally agree with Sunstein, I do however believe he was premature in sounding the death knell of citizen suits (below).

B The language, although appearing originally in Justice Scalia’s opinion in Lujan in 1992 is quoted nearly verbatim as the law in Friends of the Earth, Inc. v. Laidlaw Envtl. Sys. (TOC), Inc., written by Justice Ginsburg, and joined by Rehnquist, C. J., and Justices Stevens, O’Connor, Kennedy, Souter, and Breyer. 528 U.S. 167, 180-81 (2000). On the application of these rules to the facts that are being presented, there is considerable disagreement. See for example the opinions of Justices Kennedy and Stewart in Lujan.
than to list these elements. Interpreting these words in the light of Separation of Powers Doctrine, he has opined that while some of the requirements for standing exist, and can expand and contract in response to “prudential” concerns in the management of the judiciary’s case flow, other requirements (or more likely certain levels of the same requirements), being constitutional in origin, fall beyond Congress’s power to modify. In fact, the field of non-malleable, Constitutional restrictions on standing remains largely theoretical: the Court has yet to strike down an act of Congress squarely on the grounds that Congress went too far in purporting to extend the judicial power. But as we shall be pressing the outer limits of standing—to the point where the potential is real—it is an issue with which we shall have to deal.

(1) “Duty owing” and “zone of interests.”

Scalia does not expressly single out duty owing and zone of interests as among the standing elements; his list includes only my second through fourth elements. But I assume he does not mean to exclude the most basic elements of a cause of action, an allegation that defendant breached a duty, and that the plaintiff was in the “zone of interests” that the duty-establishing rule was designed to protect.⁸

Played out in the environmental arena, the duty principle assumes considerable significance. For example, one cannot sue a government agency because some action or inaction has caused injury, as such. The plaintiff has to show that under some law, such as the Animal Welfare Act, the Clean Air Act, or the Marine Mammal Protection Act, the defendant agency had a duty (to prepare an environmental impact statement, to consult with other agencies before acting), which it did not perform. That is why, for example, in Massachusetts v. E.P.A., below, it was crucial to determine whether Congress, through the Clean Air Act, had included greenhouse gases to be within the Agency’s mandate to regulate “air pollutants.”

The closely-linked zone of interest element is equally elementary. The defendant must have a duty to the plaintiff. The statutory conflicts are not fundamentally different, in this regard, from the rules of torts. If you drive your car recklessly into Smith, and I, witnessing the incident, suffer nightmares, I have no suit against you. I am not in the zone protected by your breach of your duty to Smith. In the environmental realm, Congress can, and has diluted the force of this requirement favorably to environmentalists by expressly dilating the zone of

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⁸ Some may regard these as elements of a “cause of action” rather that of standing—that is, as belonging to substantive elements of a wrong, rather than as barriers to bringing an action—but the distinction has little difference for us.
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plaintiffs beyond where it would likely extend by common law principles. For example, under the Marine Mammal Protection Act (MMPA), which governs closely watched permits to “take” marine mammals, standing to review is available not only to the party awarded/denied the permit, but also “to any party opposed to such permit.” (This will lead to the questions, raised below: could a whale be interpreted as a party “opposed”? Could Congress grant whales standing within the constitutional limitations?)

*Animal Legal Defense Fund v. Glickman* illustrates how the “zone of interests” requirement has come into play as a barrier. In *Glickman*, several individuals and ALDF, a prominent animal rights group, argued that a United States Department of Agriculture regulation concerning the treatment of primates in human custody failed to comply with the requirements of the Animal Welfare Act (“AWA”). Individual plaintiffs alleged that they suffered “aesthetic and recreational injuries” while witnessing the physical and emotional conditions of captive primates. Of course it is only by some stretch that Congress can be thought to have intended the AWA to protect persons from the injuries of seeing animals suffer. The AWA was more plausibly written to protect animals. The animals not having been parties, however, a panel of the U.S. Court of Appeals for the District of Columbia determined, 2-1, that all plaintiffs lacked standing on several grounds (some of which are discussed below). But Judge Patricia Wald’s dissent marked the significance of the “zone” barrier. She observes, first, that the zone of interests test “is not meant to be especially demanding.” Then she proceeded to observe,

Twenty-five years ago, Justice Douglas argued in dissent that "[t]he critical question of 'standing' [in environmental cases] 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." *Sierra Club*, 405 U.S. at 741 (Douglas, J., dissenting). This case hardly requires us to recognize the independent standing of animals; Mr. Jurnove's allegations [an affiant for ALDF] fall well within the requirements of our existing precedent. But it is striking, particularly in a world in which animals cannot sue on their own behalf, how far the majority opinion goes toward making governmental action that regulates the lives of animals, and determines the experience of people who view them in exhibitions, unchallengeable.

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**Footnotes**


Significantly, after the defeat by the three judge panel, the plaintiffs were accorded a rehearing en banc, and while the panel’s decision to deny ALDF standing remained in effect, the court granted standing to the one of the individuals, Jurnove, on the basis of his personal aesthetic and recreational injury. This time, Justice Wald wrote for the majority. On the zone of interests issue, she opined, citing Supreme Court precedent, that, “[T]he zone of interests test is generous and relatively undemanding. ‘[T]here need be no indication of congressional purpose to benefit the would-be plaintiff.’” Judge Wald continued to emphasize that the interest to be protected need only be “arguably within the zone of interests to be protected by the statute.”

(2) “Injury in fact.”

Sierra Club v. Morton, where we began was, technically, an injury in fact controversy. The Sierra Club, sought to rely on its conservationist expertise alone for standing in its suit challenging the Department of Interior’s approval of the Disney proposal, dispensing with any allegations of injury either to the association itself or to its members. This posture reportedly irritated Justice White, prompting him to ask, “Why didn’t the Sierra Club have one goddamn member walk through the park and then there would have been standing to sue?” Indeed that is essentially what the Club proceeded, successfully, to replead, citing the looming frustration of named hikers.

Standards for injury received their most critical examination in Lujan v. Defenders of Wildlife. This case involved the Endangered Species Act (“ESA”), which obliges every federal agency to consult with the Secretary of Interior to insure that no action taken is “likely to jeopardize the continued existence of any endangered species or threatened species.” Although the Act was originally unlimited in geographic scope, a revised joint regulation reinterpreted the Act to require consultation only for actions taken in the United States or on the high seas. As a

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A After finding that Jurnove had standing to sue, the court declared, “We have no need to consider the standing of the other individual plaintiffs.” Glickman, 154 F.3d 445.
B Endangered Species Act, 16 U.S.C. §1536(a)(2). The ESA was passed with an intent to “provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of [the ESA].” Endangered Species Act, 16 U.S.C. §1531(b) (2006). To promote enforcement of the ESA, “any person may commence a civil suit on his own behalf—(A) to enjoin any person, including the United States and any other governmental instrumentality or agency…who is alleged to be in violation of [the ESA]…(B) to compel the Secretary to apply… the prohibitions set forth in or authorized… with respect to the taking of any resident endangered species or threatened species within any State; or (C) against the Secretary where there is alleged a failure of the Secretary to perform any act or duty… which is not discretionary with the Secretary.” Endangered Species Act, 16 U.S.C. § 1540(g) (2006).
result, federal co-funding of the Aswan High Dam in Egypt, a project which carried risks to the endangered Nile crocodile, was allowed to proceed without consultation. Several organizations dedicated to wildlife conservation and other environmental causes sought a declaratory judgment that the revised regulation was in error.

To secure standing, a member of one group testified that she had, in 1986, "‘observed the traditional habitat of the endangered Nile crocodile there and intend[s] to do so again, and hope[s] to observe the crocodile directly,’ and that she ‘will suffer harm in fact as the result of [the] American ... role ... in overseeing the rehabilitation of the Aswan High Dam.”

Before flagging the Constitutional issues we have recited, Justice Scalia introduced a somewhat novel variable. He says, uncontroversially, that one challenging the government action, or inaction, bears the burden of showing standing. Scalia continues by stating, “the plaintiff is himself an object of the action (or forgone action)... there is ordinarily little question that the action caused him injury, and that a judgment preventing or requiring the action will redress it.” It is otherwise when a plaintiff's asserted injury "arises from the government's allegedly unlawful regulation (or lack of regulation) of someone else." In those circumstances, “much more is needed.” Scalia then elaborates,” in that circumstance, causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction-and perhaps on the response of others as well.

To illustrate, if a licensing agency refuses to grant a permit to the proponent of a coal-fired plant, the rejected applicant has clear standing to obtain review. But if a neighbor affected by a decision favorable to the proponent seeks review, “standing is not precluded, but it is ordinarily ‘substantially more difficult’ to establish.” In other words, the more that the affected interest is only collateral to the objects of the regulatory scheme, the more concrete the injury has to be.

That is Scalia’s view. I do not, however, believe that the Court should be read (as Sunstein apparently does) as having reached the constitutional issue that would have been posed had Congress expressly eliminated the requirement for “concrete injury.” The plurality found grounds to deny standing both on the issue of “imminence” and of redressability (below), which is all that was required to affirm the dismissal. If it were necessary also to reach concreteness, then the normal disposition would be to suppose that Congress had not intended to grant standing to individuals whose interests were as minor as those which the individual parties presented, and thereby to avoid an unnecessary constitutional confrontation. At most we might say that the plaintiff in Lujan simply did not meet the burden of proof, rather than to characterize it as overruling an Act of Congress.
“Concrete and particularized.”

It is not enough for a plaintiff seeking standing to have, in some manner, suffered a loss of welfare. The Supreme Court has denied standing to a taxpayer seeking to challenge the secrecy of the CIA’s budget because, “the impact on [plaintiff] is plainly undifferentiated and ‘common to all members of the public.”17 On similar grounds the Court rejected a citizen suit to prevent a condemned criminal's execution on the basis of “‘the public interest protections of the Eighth Amendment.”18

Justice Scalia’s argument for placing some “concrete and particularized” barrier on a constitutional foundation is drawn from Separation of Powers considerations. The issue to him, as he states it in *Lujan*, is:

[W]hether the public interest in proper administration of the laws (specifically, in agencies' observance of a particular, statutorily prescribed procedure) can be converted into an individual right by a statute that denominates it as such, and that permits all citizens (or, for that matter, a subclass of citizens who suffer no distinctive concrete harm) to sue.19

His answer is that:

If the concrete injury requirement has the separation-of-powers significance we have always said, the answer must be obvious: To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an “individual right” vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to “take Care that the Laws be faithfully executed,” Art. II, § 3. It would enable the courts, with the permission of Congress, “to assume a position of authority over the governmental acts of another and co-equal department,” and to become “‘virtually continuing monitors of the wisdom and soundness of Executive action.”20

That said, and the wisdom acknowledged, the courts do not appear to have allowed these elements to bar environmental cases that appear colorably meritorious. In 1971 a group of George Washington law students calling themselves SCRAP (Students Challenging Regulatory Agency Procedures) challenged the Interstate Commerce Commission’s failure to perform an analysis of the environmental impact of certain railroad rates. SCRAP maintained that the rates discriminatorily favored the transport of raw materials over recycled materials, thereby dampening recycling efforts. Creative, certainly. But where was the concrete and particularized
injury? The Supreme Court was willing to find it in SCRAP’s claim that each of its members "(u)ses the forest, rivers, streams, mountains, and other natural resources of the Washington Metropolitan area and at his legal residence, for camping, hiking, fishing, sightseeing, and other recreational (and) aesthetic purposes,' and that these uses have been adversely affected by the increased freight rates….”

In fact, even Scalia, in his Lujan opinion, preserved an expansive notion of concrete harm, acknowledging, “[i]t is clear that the person who observes or works with a particular animal threatened by a federal decision is facing perceptible harm” and, “[of] course, the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing.”

The Glickman case, above, further illustrates how permeable the “concrete and particularized” barrier can be. The original panel’s 2-1 majority had ruled that “ALDF has failed to make the case that it has suffered a concrete injury as distinguished from the abstract procedural right to submit comments to USDA. Its articulated ‘injury’ amounts to no more than ‘a 'general interest [in the alleged procedural violation] common to all members of the public.’” But the subsequent, en banc ruling on the issue (with respect to the individual plaintiff) was otherwise. The Court now said “Mr. Jurnove has alleged far more than an abstract, and uncognizable, interest in seeing the law enforced.” “[T]he desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing.” “[T]he fact that many may share an aesthetic interest does not make it less cognizable, less ‘distinct and palpable.’”

More recent (2007) is Massachusetts v. Environmental Protection Agency (EPA) (discussed more fully below). There, a number of environmental groups and the attorneys-general for a number of states filed a petition to force the EPA to regulate greenhouse gases as an “air pollutant” under the Clean Air Act. But given the fragmentary evidence of where the injuries of climate change would fall, whose interest in stopping it could be viewed as concrete and particularized? The Supreme Court majority, without reaching the standing of other plaintiffs (one party’s good standing is enough to keep a case alive) found that Massachusetts had standing because as a state it had a special “stake in protecting its quasi-sovereign interests.” Moreover, Massachusetts’ argument had special force as a coastal state with actual ownership of (not merely sovereignty over) “a great deal of the ‘territory alleged to be affected’” by the risk of rising coastal waters on beachfront.

(4) “Actual and imminent”
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The requirement that the injury be “actual and imminent, rather than conjectural or hypothetical” has undergone a restrictive turn since “Trees.” In the 1996 edition, I pointed to the 1977 case of Animal Welfare Institute v. Kreps as the most “striking illustration of the improving climate for conventional, human-based standing.” In that case, several animal welfare groups sought to force the Secretary of Commerce to deny import permits to sealskins from the South African Cape, where they were slaughtered in conditions that did not meet the standards of the Marine Mammal Protection Act. To satisfy the standing requirement, the groups alleged—in lieu of injury to the seals—injury to the recreational, aesthetic, scientific and educational interests of individual group members. As to “imminence,” the Court of Appeals, reversing the District Court’s rejection, accepted an affidavit by one of the groups’ members expressing a plan to go to South Africa in the undetermined future. The court did this even though the area of the Cape that the seals inhabited was accessible only with the special permission of the apartheid South African government, permission not likely to be given to U.S. seal watchers.

A shift in the climate of standing jurisprudence since Kreps is suggested by a contrast with the Supreme Court’s decision in Lujan fifteen years later. Scalia wrote for the plurality:

[T]he affiants’ profession of an “inten[t]” to return to the places they had visited before—where they will presumably, this time, be deprived of the opportunity to observe animals of the endangered species—is simply not enough. Such “some day” intentions—without any description of concrete plans, or indeed even any specification of when the someday will be—do not support a finding of the “actual or imminent” injury that our cases require.

As is often the case, while the justices nominally agreed on the elements in Lujan, they differed widely—and significantly—on the application to the facts. Justice Stevens, for example, while concurring on the judgment (finding no intent by Congress to extend the EPA’s influence to foreign lands) took strong exception to Scalia both on “imminence” and “redressability” (below). On imminence, Stevens, demanded no more than demonstration that the plaintiff’s interest was “genuine.” For Scalia, Stevens proposal would engage the Court in an unworkable task, distinguishing genuine from non-genuine.

(5) “Causation.”

“Causation” will demand as much attention as “injury in fact” when we turn to climate change. The Glickman case, once more, serves as a good illustration. All agree that standing requires that a plaintiff’s injury be “caused” by a defendant’s action or inaction. Application of this requirement is relatively clear-cut in my example of a motor vehicle accident. But in the cases we are examining, at least where the suit is brought by, essentially, a third party—
ordinarily not the suffering animal but the suffering witness of the animal’s suffering—causation is more complex. It seems to depend on an uncertain counterfactual: If an agency, here the Department of Agriculture (USDA), had dutifully issued rules in the right way and of the right substance, the plaintiff would not have been injured. Thus, the USDA “caused” the plaintiff’s injury. Judge Wald did not frame it quite like this. She understood the plaintiff to claim that the conditions that caused him injury complied with current USDA regulations, but would have been eliminated had the regulations been conformed to the AWA.

(6) “Redressability.”

Redressability requires that the plaintiff “must show ‘substantial likelihood’ that the relief requested will redress” the injury complained of. In Lujan, Scalia called it “the most obvious problem in the present case.” It was true that the “lead agencies” funding the Egyptian water project had failed to consult with the Secretary of Interior as appeared to be required by the Endangered Species Act (assuming arguendo that the ESA’s provisions applied to U.S. agency actions in Egypt). Scalia found the redressability obstacle could not be scaled for two reasons.

First, Scalia reasoned that even if a court should order the Secretary of Interior to revise the regulations, “this would not remedy respondents' alleged injury unless the funding agencies were bound by the Secretary's regulation, which is very much an open question.” In other words, if the Agency chose not to follow the Court’s orders, what could the judiciary do about it? Scalia noted that the “action agencies” e.g., Agency for International Development, “cannot be required to undertake consultation with petitioner Secretary [of Interior], because they are not directly bound as parties to the suit and are otherwise not indirectly bound by being subject to petitioner Secretary's regulation.” But this point required apparent disregard (so said the dissenters) of the Secretary having “officially and publicly taken the position that his regulations regarding consultation… are binding on action agencies.”

Scalia’s second argument seems no more persuasive. Even if there were to be consultation, and that consultation resulted in withdrawal of U.S. funds for the dam project, “the

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*A Glickman, 154 F.3d at 438. Judge Sentelle, dissenting, declared “I find frightening at a constitutional level the majority's assumption that the government causes everything that it does not prevent,” but this seems to distort the majority’s causation analysis. His argument leans heavily on the majority’s use of “authorize” in its analysis, a term the majority does not in fact employ. Id. at 452.

*B Lujan, 504 U.S. at 595 (Blackmun, J. dissenting). Blackmun continues: “I find myself unable to agree with the plurality's analysis of redressability, based as it is on its invitation of executive lawlessness, ignorance of principles of collateral estoppel, unfounded assumptions about causation, and erroneous conclusions about what the record does not say.” Id. at 601.
[action] agencies generally supply only a fraction of the funding for a foreign project." So, the Nile crocodiles (and their potential watchers) would be at risk either way. The dissenters rejoined:

Even if the action agencies supply only a fraction of the funding for a particular foreign project, it remains at least a question for the finder of fact whether threatened withdrawal of that fraction would affect foreign government conduct sufficiently to avoid harm to listed species.  

I cannot conclude this section with any tidier summary of where the law of standing, generally, now stands—or does one say, sprawls? Different justices, and, as we shall see, different courts, are applying the same nominal elements to the facts in different ways. The Lujan decision has not, as Sunstein feared in 1992, come to rank “among the most important in history in terms of the sheer number of federal statutes that it apparently has invalidated.” I do not construe the Court to have invalidated any faux-standing statute in Lujan, or since. Certainly it was premature to read that opinion as sounding the death knell of the citizen suit. In Lujan, Justice Scalia actually firms up several strategies work to the advantage of environmental plaintiffs. Consider the tentative concession:

It is even plausible-though it goes to the outermost limit of plausibility-to think that a person who observes or works with animals of a particular species in the very area of the world where that species is threatened by a federal decision is facing such harm, since some animals that might have been the subject of his interest will no longer exist...

In fact, the citizen suit, and other mechanisms we shall examine to protect the environment, have in many ways become more readily available than when I wrote Trees. Ironically, intervening liberalization of standing requirements have made a suit in the name of a non-human less crucial than I imagined it might be in 1972, at the time of Morton.

On the other hand, suits designed to dampen Greenhouse Gas (GHG) emissions face considerable headwind, in whomever’s name the suit is brought. The plaintiff will have to contend with defenses (depending on how the suit is cast) based upon sovereign immunity; “political question”; causality; “zone of interest”; “injury in fact”; concrete and particularized; and redressability.

III

Standing to Force Disclosures
Thus, before we address plaintiff efforts to challenge emissions head-on, it is worth reviewing the standing problems that arise in cases with goals less ambitious than enjoining GHGs. The plaintiff can challenge the manner in which the government is reacting to climate change threats.

This is a strategy that takes its cue from a favorable footnote in Scalia’s *Lujan* opinion. There, Scalia suggested that a party whose complaint is aimed at vindicating a *procedural* right has an especially low hurdle to clear to achieve standing. The “injury” is complete when the right is violated.

The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy. Thus, under our case law, one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency’s failure to prepare an environmental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years...^A

Scalia thus holds out the possibility of a “low barrier” standing for advocates who want, for example, to force a government agency to consult with more environmentally sensitive agencies, or to account for climate change impacts in evaluating federal agency actions. The strategy has limits, as we shall see. “Winning” presumably consists in sending the lead agency back to do the job over, according to the right procedures, whatever they may be. B That is not as successful as achieving a favorable substantive outcome, such as removal of the goats (*Palila*), or dimming the lights on turtle nesting beaches (*Loggerhead*). Incidentally, both of those cases, and others, cast doubts on Scalia’s generalization: standing was not any easier to achieve in those

^A *Lujan*, 504 U.S. 555, 573 n.7. The footnote is quoted by the majority in *Mass. v. EPA*, 127 S. Ct. 1441. In addition to *Mass. v. EPA*, see, for example, *Sierra Club v. US Army Corps of Engineers*, in which the court addressed this issue when granting the Sierra Club standing to appeal a Finding of No Significant Impact (FONSI). The Court stated in *Sierra Club* that, “Injury under NEPA occurs when an agency fails to comply with that statute, for example, by failing to issue a required environmental impact statement. The injury-in-fact is increased risk of environmental harm stemming from the agency's allegedly uninformed decision-making.” 446 F.3d 808, 816 (8th Cir. 2006).

B Scalia is implying that the burden is otherwise in suits to compel a final substantive. “Final” is the key term here, since the immediate objective of the complainant is often a temporary injunction while the remedy, such as the failure to undertake an Environmental Impact Assessment (EIA), is corrected. I doubt that the line between procedural and substantive issues is any sharper here than in other fields of law. But the idea is that in some circumstances, where the agency has failed properly to consult with other agencies as prescribed, or has wrongly failed to account for something or other, a “victory” does not imply substantive relief. On Scalia’s account, the plaintiff seeking procedural relief—these sorts of corrections—faces a less burdensome standing requirement than does a party seeking to force a different substantive outcome.
cases, as witnessed by the court’s allowing animals standing. Be that as it may, procedure-correcting suits have been easy to file, and can be useful. The additional and broader input, the increased public attention, the additional time, and even the prospect of delays, can lead to more environment-friendly outcomes.

The impact statement requirements of the National Environmental Policy Act ("NEPA") constitute the most powerful procedural strategy. A Under NEPA, all federal agencies and anyone needing federal agency approval, permitting, or action that may "significantly [affect] the quality of the human environment" must submit an environmental impact statement ("EIS"), subject to public review, which assesses:

(i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man’s environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.45

An agency can avoid the cost of preparing an EIS if it makes a preliminary Environmental Assessment ("EA") that supports a Finding of No Significant Impact ("FONSI"). Under the existing law, courts have held that the proponent:

should normally be required to review the proposed action in the light of at least two relevant factors: (1) the extent to which the action will cause adverse environmental effects in excess of those created by existing uses in the area affected by it, and (2) the absolute quantitative adverse environmental effects of the action itself, including the cumulative harm that results from its contribution to existing adverse conditions or uses in the affected area.47

NEPA does not expressly provide for “citizen suits,” as ESA does, but allows challenges to FONSI s to be mounted under the “arbitrary and capricious” standard of the Administrative Procedure Act (APA) by any person who can attest to a relatively undemanding notion of “injury.” A As a result, environmental advocates have seized upon

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A A biological opinion prepared pursuant to the ESA can be challenged in much the same way that an EA or an EIS prepared pursuant to NEPA can be. The issuance of the biological opinion is considered final agency action and thus subject to judicial review under the APA. Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv., 481 F.3d 1224, 1231 (9th Cir. 2007). As we saw in Lujan, the ESA imposes a procedural consultation duty whenever a federal action may affect an ESA-listed species, whereby the agency planning the action ("action agency") must consult with a “consulting agency.” Nat’l Wildlife Fed’n, 481 F.3d at 1230.

B "An action is arbitrary and capricious if the agency fails to consider an important aspect of the problem, it offers an explanation that is contrary to the evidence, if the agency’s decision is so
these rules as a basis for forcing the government to determine and consider the GHG emission impact of alternative proposals, as part of the EA-EIS procedures.

A number of environmental challenges mounted under NEPA have failed, not from want of standing, but because, for example, even experts could not “reasonably forecast” long term impacts of noise and air pollution of a proposed new runway. Interestinly, one of the decisive factors in that case was the unknowable effect of investments in noise and air pollution research “which are likely to significantly reduce engine noise in new aircraft” in coming decades.

In one other suit of particular interest, Greenpeace v. National Marine Fisheries Service (NMFS) it was not the environmentalists but industry—specifically, the fishing industry—that raised a failure of the EIS adequately to account for climate change. There, the NMFS, whose Office of Protected Resources is de jure “trustee” for Marine Mammals (below) was required to prepare a broad programmatic environmental impact statement to identify and evaluate the pressure imposed on Steller sea lion populations by North Pacific groundfisheries. The sea lions’ principal prey are pollock, whose numbers have been declining. NMFS proposed drastically restricting the catch on the grounds that sea lions and the fisheries “competed” with each other for their “catches.” The industry objected, maintaining that NMFS had neglected to give due weight to either the “environmental changes and the resulting lack of appropriate prey,” or the “growing agreement in the scientific community that [the] general collapse is not associated with fishing activities but is due to a reduced ‘carrying capacity’ of the North Pacific ecosystem as a whole,” resulting from climate change.

In other litigation, Western Land Exchange Project v. U.S. Bureau of Land Management, in which the issue was the likely impact of desert groundwater pumping on four endangered species, the fact that these effects were “mostly unknown or inadequately known” required further studies to determine the exact extent of what was unknown. The agency could not make a FONSI based simply on the claim that the effects of the groundwater pumping were unknown or difficult to predict.

Both the “successes” and the limitations of NEPA-driven cases are illustrated by Border Power Plant Working Group v. Department of Energy (2003). There, plaintiffs complained that the Department of Energy (“DOE”), in approving the building of a transmission line between the United States and Mexico, had failed to consider carbon dioxide emissions that would be implausible that it could not be ascribed to a difference in view or be the product of agency expertise, or if the agency’s decision is contrary to the governing law.” Northwestern Envtl. Advocates v. Nat’l Marine Fisheries Serv., 460 F.3d 1125, 1132 (9th Cir. 2006).
generated from the Mexican power plants being constructed to transmit energy along the proposed power lines.\textsuperscript{55} The court held that, although carbon dioxide is not a “criteria pollutant” under the Clean Air Act (“CAA”), it is an emission which has a potential environmental impact, and therefore should have been considered.\textsuperscript{56} For this and other reasons, the court found the DOE filing a FONSI to have been improper.\textsuperscript{A}

But to say that GHG emissions must be considered does not necessarily mean that the impacts of GHGs (i.e. global warming and its consequences) must be evaluated—much less abandoned. After the court’s rebuff, the DOE went to the expense of preparing a full EIS which, while noting that carbon dioxide would be emitted on all studied alternatives including the “no-action alternative,” found that the “power plants would produce an estimated 5,186,000 tons of CO$_2$ per year, which would be a very small fraction of total U.S. (0.088%) and global emissions (0.023%).”\textsuperscript{57} Based on this, the EIS concluded that the impacts on global climate change from all alternatives “are expected to be negligible.”\textsuperscript{58} The plaintiffs did not challenge the revised EIS on GHG emissions or their impacts.\textsuperscript{59}

This illustrates the limitations of challenges to environmental reviews. Standing requirements may be relaxed, but NEPA’s aim is to eliminate (as the Supreme Court has put it) “uninformed – rather than unwise – agency action.”\textsuperscript{60} That does not mean that such suits are bootless exercises in delay. The review process can contribute to the “carbon footprint” education both of the public and of the agencies themselves. Certainly the impact should not be judged by the number of successful challenges; presumably there are agency decisions—selection of alternatives—that are made with an eye towards avoiding GHG-regarding challenges.

There is one other “information”-forcing context into which climate change is being drawn. Aside from impacts on the environment, climate change may have, for some companies, adverse effects on share value. A heavy GHG-emitter could conceivably face some reputational loss if it is exposed as anonymously backing climate change denials in public media. More tangibly, a heavy emitter faces the financial risk of a stronger regulatory environment which, through cap-and-trade or tax mechanisms, would raise costs and lower profits. There is even a low-probability prospect (discussed more fully below) that the firm could be liable for GHG-attributable damages.

\textsuperscript{A} The EA-FONSI failed to review the project’s effects on the increased salinity of the Salton Sea, consider the project as controversial, disclose and analyze the significance of the carbon dioxide emissions from the electrical plant, and consider the cumulative impact of the permits. \textit{Border Power Plant Working Group v. Department of Energy}, 260 F. Supp. 2d 997 at 1028-29.
One route to exploiting these possibilities is through the federal securities laws, which apply to all firms with securities “listed” on the Stock Exchanges. Under the “proxy rules,” a shareholder may demand that the Board circulate to the other shareholders a proposal, for example, to require the company to identify and publish its carbon imprint. The proponent has “standing” if she continuously held at least $2,000 in market value, or 1%, of the company's voting securities for at least one year prior. The law governing whether the Board can in turn refuse to include the proposal is too complex to explain in detail here. If the corporation excludes the proposed disclosure, the proponent can appeal to the SEC, but the SEC’s decisions regarding climate change shareholder proposals during the years 1998-2005 have been called “inconsistent and even contradictory.” Even if the proposal is included, then there is the question of whether the other shareholders will back it. One study reviewing climate change-linked shareholder proposals at eighty-one United States corporations during the years 2000-2003 found that they received an average support of thirteen percent over the four year period. And finally, even if some proposal does pass, the effects on corporate behavior are uncertain. Having, for example, inventoried its “footprint,” will the corporation reduce it? That does not mean that the process is not, in some hard to gauge manner, productive of a more environment-sensitive environment. In May 2005, fourteen leading investors and other organizations worldwide launched a new effort, the Climate Risk Disclosure Initiative to improve corporate disclosure of the risks and opportunities posed by global climate change. It remains to be seen what pressure the Initiative can bring.

The more viable leverage of the securities laws is to raise the specter of liability for omitting or even misstating the corporation’s financial position in the face of prospective climate change regulation. This could become increasingly worrisome for corporate managers, who have to consider their own exposure to litigation. Specifically, in certain circumstances a shareholder has standing to sue a corporation in which it holds shares, or even corporate officers, for omissions or misleading representations in various corporate “statements,” such as prospectuses for sale of its securities, or quarterly reports. If, for example, I buy shares in a mining company in reliance on a claim in the firm’s prospectus that the company had discovered a commercially viable deposit, there are both federal and state laws under which I may be able to recover damages if that representation was material, false or misleading, and reasonably relied on in my purchase decision. To bring such a case based on climate change misrepresentation would not be easy. A plaintiff would have to show that she purchased shares at an inflated price as a result of the false or misleading claims that understated potential climate impact. The prices of a firm’s shares reflect myriad likelihoods, and I am not aware of any shares that would be diminished.

A For example, a company may exclude shareholder proposals that deal with matters relating to the company’s “ordinary business operations.” Mining coal might be such, for a coal company. 17 C.F.R. § 240.14a-8(i)(7).
materially if the “full story” of their vulnerability to regulation and subsidized competition were to be taken fully into account; with or without such disclosures, the market is presumably taking those possibilities into some account.

Significantly, the leading corporate disclosure case to date was brought by the state of New York, under New York law. Attorney-General Cuomo sued four major emitters—including Xcel, a major energy company with $6 billion in sales—to increase “transparency and full disclosure of global warming financial risks to investors. Selectively revealing favorable facts or intentionally concealing unfavorable information about climate change is misleading and must be stopped.”

Xcel settled on terms which included an agreement to provide, in its federal "Form 10-K" filings (annual summary report on a company's performance required by the SEC), detailed disclosure of financial risks from climate change related to:

- Present and probable future climate change regulation and legislation;
- Climate-change related litigation; and
- Physical impacts of climate change.

Additionally, the agreement commits Xcel to a broad array of climate change disclosures, including:

- Current carbon emissions;
- Projected increases in carbon emissions from planned coal-fired power plants;
- Company strategies for reducing, offsetting, limiting, or otherwise managing its global warming pollution emissions and expected global warming emissions reductions from these actions; and
- Corporate governance actions related to climate change, including whether environmental performance is incorporated into officer compensation

The Attorney General's investigation of the remaining companies is ongoing. It remains to be seen whether laws designed to protect the investment community will not play as large a role as those framed to protect the environment.

IV
Standing’s Many Fronts

Thus far I have tried to review the law of standing generally, and to examine its workings in federal cases aimed at holding agencies to the procedural, most frequently disclosure-related, requirements of the environmental laws. But standing can be an issue in
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many ways. Among others, it can be vested in the executive; in an independent agency, as
designated “trustee” of a protected resource; or in the entities themselves (the Trees notion),
through guardians, seeking relief from their “own” injuries. (If no one has standing, the gate
to courts and other adjudicative bodies is closed, and the problem is left to the non-reviewable
discretion of legislatures.) The standards for standing are not the same in each setting. For
example, counsel for the Inuit and Maldives in the cases pending before the Inter-American
Commission on Human Rights (IACHR) (below) inform me the Court appears to operate
without any standing jurisprudence.

Let me illustrate the many circumstances under which standing can arise, with special
attention to its relevance to climate change, by reference to the regulation of whale
populations.

The United States is party to the International Convention on the Regulation of
Whaling (ICRW). In 2008, the principal issue that came before its functioning body, the
International Whaling Commission (IWC), was a proposal by Denmark for a strike limit of 10
humpback whales annually for the period 2008-2012. The Scientific Committee had agreed
that that level of activity would not harm the population. However, the Scientific Committee
is also undertaking a study of, but has yet to issue a report on, the controversial impact of
climate change on cetaceans. Some argue that, in the face of climate change uncertainty, any
level of harvest must be considered a threat to stocks.

This is where standing comes in. Who might challenge this hypothetical decision to
disregard the threat and authorize the petitioned hunt? And what do the possibilities tell us
about the prospect of climate-change affecting litigation?

(1) Ordinary standing for “ordinary” economic injury.

Before pressing ahead to examine more complex strategies, the most straightforward
suit would be by someone claiming economic damages from the tortious acts of another. For
example, the owner of a whale-watching business that took people to watch humpback whales
that were in the affected stock could almost certainly demonstrate imminent concrete financial
losses—and of course causality—adequate to support allegations against Denmark. The suit
would likely lose on a number of grounds, however, including sovereign immunity, and even
were that waived, on grounds that the harvest having been approved by the IWC, Denmark
had no duty to Plaintiff.

A That is, they wanted the right to strike a harpoon into up to 10 whales, whether or not the animal was
successfully landed.
Straightforward torts suits have also been brought in the climate change area. There are all sorts of impediments, of which standing is not the most frustrating. One is that, even if the Plaintiff can get into court, there are daunting problems of proof. Efforts to establish causal links and prove climate change driven damages draws us into probabilities. It is true that the Intergovernmental Panel on Climate Change (IPCC) and its experts deal with probabilities as a regular matter. But the probabilities a court requires to meet a plaintiff’s burden of proof go beyond those the world’s leaders, and lawmaking bodies need, which are hard enough to provide. The plaintiff in a lawsuit has to demonstrate the risk or damage are attributable she faces from the named defendants. It is one thing to show, with a high level of confidence, that business-as-usual emissions policies pose a high risk of net damage to property, and to economies and ecosystems globally, and perhaps even in identified regions. But it is quite another matter—still beyond the reach of our most powerful computer simulations—to say with confidence what the law ideally wants—that the contributions of this defendant over there put at risk the plaintiff here.

Public nuisance suits have been tried. In *Connecticut v. American Electric Power Company*, environmental groups several states’ attorneys general brought suit against electric power companies alleging that the defendants’ GHG emissions contributed to the "public nuisance" of global warming. But among the other problems plaintiffs ran into, public nuisance—like almost all common-law torts, including, private nuisance, negligence, trespass and their statutory embodiments—require the plaintiff to prove that, in one phrasing or another, the defendant acted *unreasonably*. Deployed in the GHG context, a plaintiff is hard put to demonstrate that the marginal damage of a power plant’s production is greater than the marginal benefit. And even if the plaintiff can show unreasonableness, there is a monumental challenge of remedy. In *Connecticut v. American Electric Power Company* the court explained its reticence in ordering a proposed injunction:

> Such relief would, at a minimum, require this Court to: (1) determine the appropriate level at which to cap the carbon dioxide emissions of these Defendants; (2) determine the appropriate percentage reduction to impose upon Defendants; (3) create a schedule to implement those reductions; (4) determine and balance the implications of such relief on the United States’ ongoing negotiations with other nations concerning global climate change; (5) assess and measure available alternative energy resources; and (6) determine and balance the

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[^1]: “Where an act is one which a reasonable man would recognize as involving a risk of harm to another, the risk is unreasonable and the act is negligent if the risk is of such magnitude as to outweigh what the law regards as the utility of the act or of the particular manner in which it is done.” *Restatement (Second) of Torts*, § 291.
implications of such relief on the United States' energy sufficiency and thus its national security—all without an "initial policy determination" having been made by the elected branches.  

The court ultimately dismissed the claim on the basis that it presented a non-justiciable political question—no one had standing.  

In California, a public nuisance suit brought by the State of California against major auto companies, *California v. General Motors Corporation* was dismissed on the same ground in 2007. The evasive “balancing of utilities” was never even reached.

(2) Rights-based claims.

There is one way to avoid the task of identifying and balancing costs and benefits: for the plaintiff to ground its claim on violated *rights*. A criminal defendant need not play about with cost-benefit analysis to secure a trial by jury. She has a right under the Constitution. In the whaling context, the Makah tribe of the Pacific Northwest showed the benefit of playing a rights card. The Makah are the only tribe within the United States that can evidence a right to whale based on a treaty—in this case a treaty with the Franklin Pierce administration in 1855. Although by the 1990s the Makah had ceased whaling for seventy years, making their “need” for whales doubtful, the Makah were able to parlay their unique treaty based right into a quota of up to five grey whales at the 1997 meeting of the IWC. Essentially, while the Makah could not themselves negotiate before the IWC, they prodded their treaty partner, the United States, to get the IWC to honor the Makah’s right under the 1855 agreement.

At least two rights-based claims have been made in the climate change context. In 2005 Earthjustice and the Inuit Circumpolar Conference (ICC), with support from the Center for International Environmental Law (CIEL), filed a petition on behalf of the Inuit before the Washington, D.C.-based Inter-American Commission on Human Rights (IACHR), one of two bodies within the Organization of American States authorized to oversee the operation of the OAS Inter-American Human Rights System. The petition seeks unspecified relief from global warming impacts alleged to infringe, among other rights recognized in the American Declaration of the Rights and Duties of Man, the right to residence and movement, the right to inviolability of the home, the right to preservation of health and well-being, and the rights to benefits of culture. The other suit, similar in nature but technically a “submission”, was filed in 2008 by the Republic of the Maldives, before the United Nations Commission on Human Rights (UNCHR),

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in response to a Declaration if UNHRC requesting study into the relationship between human rights and climate change. (The Maldives consists of approximately 1,200 low-lying islands, and is expected to experience severe impacts.)

The Inuit suit sounds (is) audacious. It names as respondent the United States, at the time of filing still the largest emitter of GHGs. Redressability, should the case have gone that far, was of course highly problematic: how much time would even shutting down the U.S. economy buy the Maldives? But as a way of getting climate change into court, including the court of public opinion, there is much to be said in favor of the strategy adopted.

First, the suit broadcasts the impacts of climate change in the language of rights, thereby skirting, hopefully cost-benefit analyses. Second, suing on behalf of the Inuit makes a lot of sense. Nowhere on Earth has global warming had a more severe impact than the Arctic. And there is no other group (of humans) as vulnerable to global warming: their homes and culture are at risk, may one not say, “imminently”? Their property and culture are melting away now. As the Petition recites:

Like many indigenous peoples, the Inuit are the product of the physical environment in which they live. The Inuit have fine-tuned tools, techniques and knowledge over thousands of years to adapt to the arctic environment. They have developed an intimate relationship with their surroundings, using their understanding of the arctic environment to develop a complex culture that has enabled them to thrive on scarce resources. The culture, economy and identity of the Inuit as an indigenous people depend upon the ice and snow.

Third, the IACHR appears to be a relatively inviting forum, making up in liberalized standing what it may lack in ultimate clout. Most international tribunals recognize standing for nations exclusively. The Inuit are not, in that parlance, a “nation,” but an indigenous people whose sovereignty has been taken away and parcelled out to “real” nations. The IACHR, however, has opened its doors to the grievances of indigenous and other local communities, including the Awas Tingni in Nicaragua, the Mapuche/Pehuenche in Chile, the Sarayaku in Ecuador, the Maya in Belize, and the San Mateo de Huanchor in Peru. The actions of the Commission and Court have helped protect those communities from practices, such as large scale logging, mining, oil development, and damming of rivers.

The IACHR stood off the petition without prejudice in November 2006, on the cryptic grounds that “the information provided does not enable us to determine whether the alleged facts would tend to characterize a violation of rights protected by the American Declaration
In January 2007, the ICC requested a hearing with the IAHCR, which was granted and has taken place. The suit, although not likely to result in an order enjoining the U.S., must be considered still in limbo, and thus part of the continuing pressure to keep climate change remediation visible in many fronts and in many venues.

By far the most important “rights-based” area—although it is not often thought of as such—is generated by the ESA. The effect of listing a species as “endangered” or “threatened” is akin to giving the species a “right,” that is, an interest that can be infringed, if at all, only on the strongest showing of necessity. As a model, think of suspending the writ of habeas corpus. To put it another way, just as the First Amendment establishes your right that the government not interfere with your speech, assembly or religion, so the ESA provides a listed species a right that the government do nothing likely to jeopardize its existence or modify its critical habitat. In fact, the ESA goes beyond establishing negative liberties by creating an affirmative government duty to protect the species from third parties and to take positive measures to ensure the species’ survival, such as to prepare a recovery plan. These rights are not absolute; nor is any ordinary human right. The point is that further endangerment cannot be defended on utilitarian grounds, such as that protecting the Xs costs “more than it is worth.” In the famous snail darter case, a major dam-centered project had to be halted, without any consideration of the economic impact of the decision, because it threatened the endangered snail darter. Exceptions can be made, but the burden is strongly in favor of the species. (The issue of standing in the ESA cases is one we will turn to shortly.)

(3) Executive Standing in International Affairs.

If some courts shy away from controversies as too “political” for adjudication, there is always the alternative power of the Executive to consider. To continue with the whaling illustration, the Executive, represented at the IWC meeting by the authorized delegates, has the exclusive authority to vote on the Danish proposal. Suppose the proposal had been approved by the Commission, notwithstanding the United States’ determination to table it until after a report had been received on climate change impact. In those circumstances, if the United States could ground its position on a colorable interpretation of the Whaling Convention that the majority had rejected, or if it could portray the action as in some manner in conflict with the United Nations Convention on the Law of the Sea, the United States,

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B Denmark’s proposal was rejected on the [shaky] grounds that it had failed to demonstrate a “need” for the whales.
through its executive branch, has standing to institute review in a number of venues. These might include the International Tribunal for the Law of the Sea (ITLOS), a specialized arbitral tribunal, or the International Court of Justice (ICJ). The power of the executive to invoke standing, exclusive of any other interested party, follows from the fact that only nations (and some international organizations) are qualified “players” on the international legal field. Viewed through the prism of domestic law, one notes that there is no act of Congress colorably mandating the Executive to institute proceedings against the IWC or Denmark in these circumstances; if there were, the law would almost certainly be held to invade the Executive’s Article II power to “conduct foreign affairs,” immune from Congressional limitation.

The situation is similar with international negotiations over climate change. Whether the United States joins Kyoto or tries to establish a new separate framework is under the control of the White House—up to the point of Congressional approval, assuming the arrangement constitutes a “treaty.” This is another reason why Connecticut’s suit against AEP was dismissed—the executive, not the judicial, was deemed the branch of government principally empowered to determine what the United States’ obligations are under international law.

(4) Citizens’ Standing to Force the Executive’s Hand in Foreign Affairs

Suppose that the Danish humpback proposal had been approved. And suppose also that the United States had elected not to appeal. Would an interested individual or group have standing to sue in U.S. courts to require the government to take further action, either to seek reconsideration within the IWC or to appeal to some global tribunal—in other words, to force the executive’s hand in this climate-affecting matter?

The answer is, “not likely.” In 1977 the IWC, alarmed by the decline of the bowhead whale, voted to ban the fall hunt and impose a zero quota for 1978. When the United States was formally notified, the Secretary of State announced that the U.S. would not exercise its right to object but would seek “reconsideration” at the next IWC meeting, a course of action approved by the President. The Inuit sued in United States District Court to compel the Secretary to file an objection, citing U.S. obligations under U.S. treaties and laws to the act as “trustees” for natives’ interests. The District Court granted the Inuit’s request for relief. But the Court of Appeals reversed, based on a judicial unwillingness to invade “core concerns of

^ I am assuming the U.S. would allege an actionable wrong under the Vienna Convention on Treaties.
the executive branch,” particularly via a mandatory injunction when the executive was “in the very midst of delicate negotiations.”

The United States Supreme Court responded similarly in its 1986 decision in Japan Whaling Association v. American Cetacean Society. That case arose out of Congressional legislation that said the Secretary of Commerce “shall” certify to the President when any nation’s whaling practices are found to be undermining the effectiveness of the ICRW, such certification then to trigger trade sanctions. A consortium of wildlife conservation groups sued to the Secretary to certify Japan, whose harvest exceeded its IWC quota. Standing was allowed the organizations on the claim that the “whale watching and studying of their members [would] be adversely affected by continued whale harvesting…” The Supreme Court even rejected the government’s contention that judicial review was barred by the “political question” doctrine. But the Court ultimately held against the conservation groups on the grounds that the Secretary of Commerce’s decision to negotiate an executive agreement between the U.S. and Japan, and to secure Japanese concessions on future whaling in the process, constituted a reasonable alternative means of meeting the Secretary’s statutory obligations.

Assuming these cases reflect the current law, could a citizen sue to force the executive to exercise climate-improving rights under a treaty? Something of the sort may be tested in Canada—although not to exercise rights, but to honor duties. Unlike the United States, Canada has signed the Kyoto Protocol, and its legislature has enacted a Kyoto Protocol Implementation Act (KPIA). The Canadian branch of Friends of the Earth (FOE) has filed lawsuits against the Canadian Governor in Council and Ministry of the Environment to compel compliance with the KPIA. But at least formally, the actions, which are currently pending, rest on Kyoto only indirectly, insofar as the Kyoto obligations have been embraced by the KPIA. However the case comes out, I doubt the suits would have gotten far if they had to rest on Kyoto, directly. Nor am I confident that a contrary outcome would hold for environmentalists a positive advantage on balance. If such suits were permitted, countries considering whether to join international environmental agreements such as Kyoto, or to toughen up the terms, would be all the more hesitant to do so.

(5) Citizens’ Standing to Force the Executive’s Hand in Domestic Affairs.

When we turn to purely domestic matters, the presumption in favor of the executive is less of a barrier, particularly where the plaintiff is basing the claim on legislation. We have already reviewed cases in which a citizen sought to force one particular form of government action, the preparation of an EA or an EIS that the lead agency in the area has not delivered,
such as via a FONSI. In those cases, standing is fairly easily established. The ESA provides for challenge by “any person” to any action (or inaction); under NEPA, alleged EIS and EA deficiencies can be challenged under the not unfavorable review standards of the Administrative Procedure Act. But we are considering here standing by a plaintiff who wants some result beyond further investigation, assessment of alternatives, or inter-agency consultation.

Some indication is to be found in the highly publicized 2007 Supreme Court decision in Massachusetts v. E.P.A. The case arose in 1999, when a number of environmental groups filed an administrative rulemaking petition requesting that the Environmental Protection Agency (EPA) set GHG emission levels for new automobiles, as they were allegedly obliged to do under the Clean Air Act (CAA). The CAA reads (emphasis added):

The Administrator shall by regulation prescribe . . . standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.

The CAA defines “air pollutant” as:

. . . any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive (including source material, special nuclear material, and byproduct material) substance or matter which is emitted into or otherwise enters the ambient air.

The EPA denied the petition and the original plaintiffs, joined by attorneys general for various states and local governments as interveners, demanded review. On the standing issue, the EPA argued that none of the state plaintiffs could demonstrate an injury particularized, that is, of “such a personal stake in the outcome,” as to satisfy the adversarial demands of Article III.

The Supreme Court majority drew considerable public attention by weighing in on the scientific issue. The majority, through Justice Stevens, stated that, “The harms associated with climate change are serious and well recognized,” and that the “EPA does not dispute the existence of a causal connection between man-made greenhouse gas emissions and global warming.” In a landmark qualification of Lujan, it proceeded to rule that Massachusetts (at least) had standing to force the EPA to consider whether GHGs were “pollutants.” For one thing, as a state, it had a special “stake in protecting its quasi-sovereign interests,” and even had actual ownership of “a great deal of the ‘territory alleged to be affected’” by the risk of
rising coastal waters. In addition—in a gloss of broader implication, not limited to a state as plaintiff—the Court said that, “a litigant to whom Congress has accorded a procedural right to protect his concrete interests,” here, the right to challenge agency action unlawfully withheld, “can assert that right without meeting all the normal standards for redressability and immediacy.”

The actual impact of the holding has not been well grasped. When all was said and done, the Court held only that auto GHG emissions being “pollutants,” the EPA had to decide whether the emissions, in the language of the CAA, “may reasonably be anticipated to endanger public health or welfare” through climate change. If the EPA says “no,” that there is not enough evidence, or that the evidence is too conflicting, it need not regulate GHGs (at least pending further litigation). Worse, one available option is for the EPA to decide that they do have the power to regulate auto emissions, and to regulate them only “lightly.” The light federal regulation would then raise the specter of pre-empting (blocking) efforts by more activist states, such as California, to clamp down more stringently.

Interestingly, while the Supreme Court suggests in Lujan, Mass. v. EPA, and elsewhere that plaintiffs seeking standing to right a procedural wrong face a lower burden, the cases, at least in the environmental area, display no consistent pattern. The generalization may be borne out in comparing Connecticut v. AEP (seems substantive—no standing) with Mass. v. EPA (procedural—standing found). But we report in the Introduction and Epilogue several cases brought in the name of threatened or endangered species that have awarded substantive relief. In the Palila case, the birds wanted, and got, the goats removed. Similarly, Marbled Murrelet sought successfully to enjoin lumbering operations. In Loggerhead, the 11th Circuit left no doubt that the turtles could force the beachfront municipalities to come up with turtle-friendly regulation of artificial lighting in the nesting areas. In none of these cases did the courts suggest they were raising the barrier because something beyond information or some other “procedure” was at stake.

(6) Standing by a Designated Trustee.

Thus far we have emphasized standing by individuals and (the legal equivalent) environmental defense groups. But there is another way to provide for standing. Congress can authorize a “trustee” for non-humans, with express power to take legal or administrative action to protect their beneficiaries. Current law does just that, requiring the President to designate those federal officials who are to act on behalf of the public as trustees for “natural resources” that fall under federal sovereignty. Where damage occurs to natural resources, the trustee may be empowered to carry out damage assessments, and to devise and carry out a
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plan for restoration, rehabilitation, replacement, or acquisition of equivalent natural
resources.  

The practice is not limited to the environmental arena—lawyers themselves are stand-
ins, often guardians ad litem, for those unable to speak in court; in various types of claims,
trustees speak on behalf of dead, unborn, minority, or even future claimants. In the Piper
Aircraft bankruptcy, the court even appointed an attorney as the legal representative to
advocate assets to be set aside to satisfy the estimated claims of future, yet to be identified
claimants who might be injured (as in an air accident) after the proceedings had otherwise
closed. 

Whales and their supporting ecosystems fall under the trusteeship of the National
Oceanic and Atmospheric Administration (NOAA) (ordinarily through NOAA’s Office of
Protected Resources (OPR)). For example, if whale watchers harass migrating whales,
NOAA has express standing to institute administrative action (civil penalties). If toxic
releases damage the whale-supporting ecosystem, it would be in the province of NOAA to
refer the matter to the Department of Justice to litigate.

To illustrate the operation of the system, as evidence mounted that the Atlantic Right
whale population was suffering from collision with ships, it was NOAA, as trustee, that came
to the rescue. NOAA has devised a Ship Strike Reduction Rule (2008) that would impose a
10-knot speed limit applicable to Right whale feeding and calving grounds. If, closer to our
climate change hypothetical, a stock of whale appeared to be threatened by climate change, or
perhaps if hunting quotas (as permitted by the IWC for the Alaska Inuit) appeared excessive

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A The bankruptcy court defined this class to include: “All persons, whether known or unknown, born or unborn,
who may, after the date of confirmation of Piper’s Chapter 11 plan of reorganization, assert a claim or claims for
personal injury, property damages, wrongful death, damages, contribution and/or indemnification, based in
whole or in part upon events occurring or arising after the Confirmation Date, including claims based on the law
of product liability, against Piper or its successor arising out of or relating to aircraft or parts manufactured and
sold, designed, distributed or supported by Piper prior to the Confirmation Date.” Epstein v. Official Comm. of
Unsecured Creditors of the Estate of Piper Aircraft Corp., 58 F.3d 1573, 1575 (11th Cir. 1995).

B See United States v. Glenn-Colusa Irrigation District, 788 F. Supp. 1126 (E.D. Cal 1992) (United States
awarded injunction prohibiting the District from taking fingerling salmon in the course of pumping water from
the Sacramento River after prolonged negotiations with NMFS fail).

C “The new rule requires vessels to travel at ten knots or less during the seasons whales are expected to be
present, in designated areas along the East Coast. It will be up for renewal in five years, after scientists
assess its effectiveness… In the mid-Atlantic area, the 10-knot speed restrictions will extend out to 20
nautical miles around major ports… The rule is part of NOAA’s broader ship strike reduction efforts.
Existing protective actions include surveying whale migration routes by aircraft and mandatory ship
reporting.” Press Release, National Oceanic and Atmospheric Administration, Ship Strike Reduction Rule
Aims to Protect North Atlantic Right Whales (Oct. 8, 2008), available at
in the light of climate change pressures, it would be NOAA’s job, in the first instance, to take action: recommending the “listing” under the Endangered Species Act, or recommending to the U.S. delegation to the IWC that it back a reduced quota.

(7) Citizens’ Standing to Force the Trustee’s Hand.

If the trustee with standing fails to act, then the standing issue shifts to the eligibility of someone to challenge the trustee. As we have seen, one of the most crucial contexts involves the “listing” of a species as threatened or endangered under the ESA, because of the rights-like character of the listing. (A species is listed as “threatened” when it is at risk of becoming “endangered” within the foreseeable future throughout all or a significant portion of its range; a species is “endangered” when it is currently in danger of extinction throughout all or a significant portion of its range.) The listing is a government function, ordinarily via consultation among a number of agencies, coordinated by the “lead” agency, which acts as trustee. But challenges by environmentalists to non-listing (as well as to listing, by landowners and developers) are common.

For example, in 2003 NOAA (through its National Marine Fisheries Service (NMFS)) refused to list the Cook Inlet Beluga whale population as endangered under the ESA, maintaining that regulation on native hunts would be adequate to arrest the decline. By 2006, with a new limit on native hunting in place, and there having been no slowing of population pressure, a number of conservation organizations and one individual petitioned for a listing. In 2007, NMFS, prodded by the U.S. Marine Mammal Commission (another layer of “guardian” charged with overseeing the adequacy of marine mammal protection by the first-line responsible agencies) reconsidered, agreeing to the listing. If NMFS had not agreed, then a petition for judicial review might have been brought, governed by the standing rules we discussed earlier. For example, a scientist whose lifetime work was involved in studying belugas would likely have standing, even in Justice Scalia’s eyes, to raise the issue whether climate change consideration ought to have been given more weight.

By far the most dramatic case of this genre is still unfolding, and it bears directly on climate change. In 2005, the Center for Biological Diversity (CBD) filed a petition to force the U.S. Fish & Wildlife Service (F&WS) to list the polar bear under the ESA. The species’ well-documented decline has been attributed principally to the increasingly rapid, and increasingly early, melting of the perennial marine sea ice habitats that serve as a platform for hunting, feeding, traveling, resting, and occasionally denning. Dangers from oil exploration if Alaskan development expands constitute another threat—although the oil
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industry’s record to date is well documented as remarkably benign. A When F&WS declined to act, the CBD, joined by other groups, brought suit. In 2008, frustrated by continued foot dragging by the government, the United States District Court for the Northern District of California ordered the Department of Interior (DOI) to publish the final determination on whether the polar bear should be listed as an endangered or threatened species by May 15, 2008.  

In a dramatic announcement on May 14, the day before expiration of the period to comply, Secretary of Interior Dirk Kempthorne capitulated, announcing the decision to list the bears as “threatened.”  At the accompanying press conference, Secretary Kempthorne reiterated President George W. Bush’s statement that the ESA was never intended to regulate global climate change. “Listing the polar bear as threatened can reduce avoidable losses of polar bears. But it should not open the door to use of the ESA to regulate greenhouse gas emissions from automobiles, power plants, and other sources. . . That would be a wholly inappropriate use of the ESA law. The ESA is not the right tool to set U.S. climate policy.”  

Notwithstanding the Administration’s not unfounded policy sentiment—the ESA is hardly the tool of choice—it is not clear how to avoid climate change implications entirely. Under the ESA, once a species is listed, federal agencies normally must ensure that any action they authorize, fund, or carry out will not jeopardize the animal’s existence or adversely modify their critical habitat, based on—in terms of the ESA— “the best scientific and commercial data available.”  

One might think the best available science to be represented by the Intergovernmental Panel on Climate Change (IPCC), which goes a step further back in the causal chain than “increased temperatures” noted by DOI, unambiguously linking the increased melting to the increased temperature to the increased GHG emissions. Then, what about federal agency action in the licensing of a fossil fuel burning power plant? One might think that the provision to consider “commercial data” might open the window to cost-benefit analysis. But the snail darter case suggests otherwise, that the listing of a species can halt construction of a dam 

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A “Polar bears are particularly vulnerable to oil spills due to their inability to effectively thermoregulate when their fur is oiled, and to poisoning that may occur from ingestion of oil while from grooming or eating contaminated prey.” Final Rule, Department of the Interior Fish and Wildlife Service, Endangered and Threatened Wildlife and Plants; Determination of Threatened Status for the Polar Bear (Ursus maritimus) Throughout Its Range, p. 307, available at http://www.interior.gov/issues/polar_bears/Polar%20Bear%20Final%20Rule_to%20FEDERAL%20REGISTE%20Final_05-14-08.pdf. Two bears have been killed in industry encounters in U.S. territory over the many years, both in self-defense, which is only a fraction of the total human lethal impact across the bears’ entire range, which includes killings from sport hunting and cultural and subsistence (Inuit and Cree) allowances, almost entirely in Canadian territory. Id., at 258-259.
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cost benefit be damned.\(^{A}\) In addition, listing will require the F&WS to prepare a recovery plan for the polar bear. How “recover” without severe limits on hydrocarbons? Indeed, how can a court or an agency create a plan for recovery without ordering global sources of emissions—sources over which the court has no jurisdiction—to cease emitting? Or at least to know what their emissions will be? DOI has pointed out that for many of the risks, such as oil spills, hunting, and “trophies,” there are already regulatory mechanisms in place, which can be modified even more favorably to the species. But DOI goes on to say:

We have also determined that there are no known regulatory mechanisms in place, and none that we are aware of that could be put in place, at the national or international level, that directly and effectively address the rangewide loss of sea ice habitat within the foreseeable future…\(^{94}\) We also acknowledged that there are some existing regulatory mechanisms to address anthropogenic causes of climate change, and these mechanisms are not expected to be effective in counteracting the worldwide growth of GHG emissions within the foreseeable future.\(^{95}\)

The implication seems to be that unless the listing is reversed, Kyoto, or something more effective, has to be fashioned. Most likely is an extended standoff. No wonder suits have been filed to delist the polar bear and to throw out even some modest requirements in the initial and still fragmentary regulations.\(^{96}\)

\(^{A}\) In *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978) The Supreme Court agreed that a nearly completed dam on the Little Tennessee River had to be put on hold when it appeared that the project would endanger a the snail darter, protected under the ESA. Chief Justice Berger wrote that “Congress has spoken in the plainest words, making it clear that endangered species are to be accorded the highest priorities. Since that legislative power has been exercised, it is up to the Executive Branch to administer the law and for the Judiciary to enforce it when, as here, enforcement has been sought.” *Id.* at 155. A month after the decision, the ESA was amended by Congress to include a process by which economic impacts could be reviewed and projects exempted from the restrictions that otherwise would apply.
A case currently before the California courts provides a good illustration. Plaintiffs, Center for Biological Diversity and its conservation director, sued the owners and operators of wind turbine electric generators in the Altamont Pass Wind Resource Area for killing and injuring birds; since the 1980s the death toll was alleged to have mounted to between 17,000 and 26,000 raptors—falcons, owls, hawks and more than a thousand golden eagles. There were a number of laws that the taking of these birds may have violated, including the Migratory Bird Treaty Act of 1918; but uncorrected violations of that Bird Treaty were for, say, Canada, to complain of. As a consequence, plaintiffs leaned on the Public Trust doctrine. The trial court dismissed on the grounds that “[n]o statutory or common law authority supports a cause of action by a private party for violation of the public trust doctrine.”

On appeal, the Appellate Division rejected the defendants’ claim that the public trust doctrine was limited (as under Roman and earlier U.S. law) to protection of navigable waters and tide lands. The state’s wildlife is also to be included in its scope, and citizens, as well as the government, have the right to sue under it. But the court ruled that the proper party for the plaintiffs to have sued was not the operators of the windmills—those harming the property—but Alameda County, the trustee with responsibility to protect the trust property. It described plaintiff’s suit against the operators as an attempt to “bypass” the expertise that has been brought to bear on the subject in the permit proceedings, open to public participation, before the Alameda County authorities.

The outcome of Public Trust based litigation is thus unsurprisingly similar to emerging law where a government agency, such as NOAA, is trustee of the natural resource. A window for citizen standing is open—but essentially limited to questioning whether the “lead” agency with coordinating authority and expertise is acting in a procedurally correct manner.

(9) Standing of Non-citizens.

Although examples are thus far sparse, there is a potential for foreign citizens to challenge U.S. action abroad in federal courts. In Okinawa Dugong v. Gates, three Japanese citizens and six environmental groups brought suit against Secretary of Defense Robert Gates and the U.S. Department of Defense (DOD) for approving plans for a military air station off the coast of Okinawa without taking into account the affect on the Okinawa dugong, a “critically
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endangered” marine mammal of historical significance to the Japanese. Plaintiffs relied on the Administrative Procedure Act and the National Historic Preservation Act (NHPA), which, amended to accord with the Convention Concerning the Protection of World Cultural and National Heritage, requires that:

[p]rior to the approval of any Federal undertaking outside the United States which may directly and adversely affect a property which is on the World Heritage List or on the applicable country's equivalent of the National Register, the head of a Federal agency having direct or indirect jurisdiction over such undertaking shall take into account the effect of the undertaking on such property for purposes of avoiding or mitigating any adverse effects.101

Although there existed reports providing scientific knowledge on the dugong’s behavior, feeding patterns, and migratory patterns, the available data was deemed insufficient to satisfy NHPA.102 The DOD was ordered to suspend the project pending submission of additional documentation adequate to a proper assessment of the impacts.

V

Suits in the Name of Natural Objects

To return now to where this all started, what about supplementing those various strategies with suits in the name of a “natural object” itself? The question raises three issues. First, are such suits presently possible under existing law? Second, as a constitutional matter, could they be provided for more robustly? And, if so, third, would reliance on them offer any marginal strategic advantages at this point, in light of the alternatives we have seen above?

(1) Existing law.

First, as to the state of the law: There is a conflict in the federal circuits. The Ninth Circuit, in Cetacean Community v. Bush (2004), unambiguously disowned the expansive language in Palila, B labeling it “non-binding dicta.”103 Although Palila had been invoked by the Ninth Circuit earlier in the Marbled Murrelet litigation,104 this retraction had been foreshadowed in Coho Salmon v. Pacific Lumber Company (1999).105 In Coho, the district

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A Okinawa Dugong v. Gates, 543 F.Supp.2d 1082, 1083-84 (N.D. Cal. 2008). The Dugong itself was captioned as plaintiff, but counsel conceded that its standing conflicted with Cetacean Community v. Bush, and was dismissed accordingly.

B Palila v. Hawaii Dept. of Land and Natural Res., 852 F.2d 1106, 1107 (9th Cir. 1988). Judge O'Scannlain writes, “As an endangered species under the Endangered Species Act… the bird… has legal status and wings its way into federal court as a plaintiff in its own right.”
court allowed standing, but based it expressly on the claims of the human co-plaintiffs with the jibe, “the court notes that, to swim its way into federal court in this action, the coho salmon would have to battle a strong current and leap barriers greater than a waterfall or the occasional fallen tree.”

In the Eleventh Circuit, *Loggerhead* remains unchallenged. There, the court clearly relied on the turtles for standing. The court not only cited *Palila*, it permitted the complaint to be amended to add the Leatherback Sea Turtle as a party, which would have been doubtful had the court not considered that the turtles merited independent standing on their own fins. Moreover, in disposing of the defendant’s challenge to the individual human plaintiffs—that they were really motivated by their own interests in keeping motor vehicles off the beach nesting areas—the court said that “[s]ince both the Loggerhead sea turtle . . . and the Green sea turtle . . . are named Plaintiffs in this action, the case will proceed regardless of the motivations of “the human plaintiffs.”

The Third Circuit, in *Hawksbill Sea Turtle v. FEMA*, refused to consider the status of animal plaintiffs, dismissing the claims of the Hawksbill and Green Sea Turtles for procedural reasons (failure to give proper notice), but opining “in passing” that “the standing to sue of the animals protected under the ESA is far from clear.”

Even in this meager precedent, there is less than meets the eye. All the non-human naming federal cases that have passed through the courtroom door thus far have captioned a human as “insurance,” one presumes, against dismissal of the non-human. The same “back-up” existed in the Israeli Supreme Court’s recent decision invoking *Israeli Gazelle* as co-plaintiff. (The scattering of state cases filled without benefit of human co-plaintiffs are reviewed in the *Introduction.*). Even in *Loggerhead* there were individual plaintiffs; although the court disavowed reliance on them, the holding could in good conscience be narrowed by future courts. What is more, all these cases, just to get as far as they did—through the court-house door-- were based on the ESA. They thus have to be viewed as favorably broad interpretations of the statutory language of the ESA, which vests standing in *any person* and *entity.* Neither the analogous standing provision of the APA (“a person”) or of the MMPA (“any party opposed to such

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B 5 U.S.C. § 702 (2006) (“A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.”)
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permit”) has been accorded similar breadth. In Animal Suffering and Exploitation v. New England Aquarium, conservation organizations joined with Kama, a dolphin, to challenge Kama’s transfer from the New England Aquarium to the Navy, presumably for naval training. The court rejected the argument to fit Kama within the meaning of “any party opposed to such permit.” However, the Court went on to say:

If Congress and the President intended to take the extraordinary step of authorizing animals as well as people and legal entities to sue, they could, and should, have said so plainly.

(2) Could standing for non-humans be expanded?

Was the Kama court right? Could Congress legislate animal standing? A number of objections could be raised, from incoherence to a violation of the Constitution.

The incoherence argument leans less on whether a dolphin could be fitted to a “party” than whether it could be “opposed.” In other words, even if Congress were explicitly to provide standing to “any person or animal opposed, etc.” there would be a question of how the trier (or even its guardian) could know whether the dolphin would prefer a life in the confines of an aquarium to a life in the Navy? (I actually raised the question with Kama’s counsel at the time.) But I don’t think the issue of an animal’s, or even a species’ interests are problematical in all circumstances. Marine biologists do know, from what whales eat, many actions we can safely say whales oppose. And while I’ve confessed I have no idea what a mountain wants, I have no such hesitation stating on the polar bears’ behalf many things they are opposed to, starting with the loss of prey and habitat.

The constitutional argument is more problematic than the Kama court’s breezy dictum suggests. Congress has, constitutionally, considerable leeway under Article I to contract or expand the “Cases” or “Controversies” that are justiciable under Article III. Congress could quite likely reduce the class of those with standing by eliminating the “any person” provision of the APA, as it could to curtail the Eleventh Circuit’s expansive reading of the same term in the ESA. How far could Congress go in the expansive direction—not, as it were, to deny whales standing but to give it to them expressly?

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^ 16 U.S.C. 1372(d)(6) (2006) (“Any applicant for a permit, or any party opposed to such permit, may obtain judicial review of the terms and conditions of any permit…”)

^ Justice Kennedy’s basis for concurrence in Lujan is not discouraging. “In my view, Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before, and I do not read the Court’s opinion to suggest a contrary view. In exercising this power, however, Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit.” Lujan, 504 U.S. at 580 (citations omitted).
Cass Sunstein suggests as a possible objection that:

what qualifies as a “case or controversy” should be based on an inquiry into what the founding generation understood to count as such. To say the least, the founding generation did not anticipate that dogs or chimpanzees could bring suit in their own name. Ideas of this kind have been used to limit the class of disputes that Congress can place in an Article III court...115

But Sunstein goes on to offer his own refutation:

A central problem with this objection is that Congress is frequently permitted to create juridical persons, and to allow them to bring suit in their own right. Corporations are the most obvious example. But legal rights are also given to trusts, municipalities, partnerships, and even ships. . . . In the same way, Congress might say that animals at risk of injury or mistreatment have a right to bring suit in their own name. Nothing in the requirement of a “case or controversy” should be read to forbid Congress from treating animals as owners of legal rights. . . . To be sure, the framers anticipated that plaintiffs would ordinarily be human beings. But nothing in the Constitution limits Congress’ power to give standing to others.116

I am not as sure as Sunstein is that the Court would accept a law expressly providing for non-human plaintiffs. One could rejoin to Sunstein that suits in which corporate bodies, trusts, ships and so on were parties are of long standing and must have been well known to the Founders. If the meaning of the constitution is confined to what the Founders most likely believed (“originalism”), it could relevantly be said that standing by animals would never have occurred to them. On the other hand, the same could be said of quite a number of modern practices that have found haven under language written in 1789. Did the authors who vested Congress with powers over “interstate commerce” picture federal regulation of airplanes and television? One could take up the issue, as Scalia does, from Separation of Powers considerations and ask whether any power of the executive would be infringed if Congress did empower the courts to hear cases brought by whales.117 If Congress has the power to make NOAA a virtual trustee, why not, at least as a constitutional matter, countenance the Congress providing for guardians ad litem?

(3) Would expanded standing in the name of non-humans make any difference?

On the other hand, even if standing were expanded to increase the range of cases in which nonhumans could be captioned plaintiff, would it make any difference? From the perspective of the environmental advocate, it is unclear that a suit in the name of a non-human
presents any strategic advantages over a suit brought in the name of an individual under the fairly liberal rules for demonstrating “injury in fact.”

The whale sonar cases provide good illustration. In *Cetacean Society v. Bush*, Larry Sinkin, the attorney challenging the Navy, named “the Cetacean Community” as sole plaintiff, and was rebuffed. In *NRDC v. Winter*, a number of conservation groups, seeking to fight essentially the same fight, sued in their own names and that of a few group members—and have succeeded thus far on the standing issue. A sampling of the individuals’ affidavits provides a glimpse into how easily standing requirements are being met in federal environmental cases.

The first declarant says:

5. I have been diving in southern California for about fifteen years. I generally dive in the Channel Islands or elsewhere off the coast . . .

6. One aspect of diving that I find particularly fulfilling is the opportunity to observe and interact with marine species.

11. My enjoyment of the marine environment is harmed by the failure of the Navy to follow the mandatory procedures established by the National Environmental Policy Act, the Endangered Species Act, and the Coastal Zone Management Act in undertaking these exercises . . ..

The second declares:

4. Visiting the beach to swim, tidepool [sic], and bird watch are staple activities in my daily life. I normally walk on the beach once or twice a week, and greatly enjoy beach-walking as an opportunity to observe shorebirds, seabirds, and other marine species. . . . I regularly see the seals at the Children's Pool in La Jolla, and occasionally see sea lions as well. In the past, I observed whale spouts from shore relatively frequently, but find that I no longer see whale spouts as often.

5. I am also a regular docent on whale-watching trips off the San Diego coast. . . . As part of my duties as a docent, I educate passengers about the gray whales' migration, behavior, and biology. Out of 20 whale-watching outings on the Hornblower last season, I saw gray whales during at least 18 of the outings. The opportunity to observe whales on a regular basis is one that I greatly value. Besides my own enjoyment, I find it extremely rewarding to share my knowledge of marine mammals with visitors from all over the U.S. and from abroad, especially since many of them have never seen whales before. . .
There were altogether nineteen declarants. But these “injuries” are not unrepresentative
of the “injuries” alleged.

At the time of this writing, the case is, before the U.S. Supreme Court. But it says a lot
about the law that at no stage in the proceedings has the government challenged the plaintiff’s
standing to sue the Navy over the disturbances to the whales.

In fact, there are circumstances in which it may be possible, using Scalia’s broad
“wildlife observer” test, to get an observer standing when it is unavailable for the natural object
or wildlife itself. Imagine that the Navy conducts sonar exercises in foreign waters, endangering
cetaceans there. Even if the cetaceans had been given explicit standing by Congress, and such
legislation been upheld as constitutional, the foreign cetaceans would be beyond the jurisdiction
of a U.S. court. But not so the human observer. Recall that the plaintiffs in Lujan failed because
while they asserted plans to go abroad to eye-witness the crucial events their travel plans were
vague. The court ruled that “[s]uch ‘some day’ intentions--without any description of concrete
plans, or indeed even any specification of when the some day will be” were not enough.118 But
as Justice Kennedy stated in his concurring opinion, this call for concrete plans may be little
more than an “empty formality.”119 One of NRDC’s affiants—say, a Californian dolphin
watcher—could overcome the failure of the plaintiffs in Lujan by purchasing an airplane ticket
and perhaps making a hotel reservation for good measure. A whale-watcher who resides in the
U.S. so ticketed, or, at least, a U.S. resident who conducts cetacean research in a U.S. university
who has her lodging abroad so booked, has a cognizable injury, the situs of which is within U.S.
jurisdiction.

 Nonetheless, there are reasons for which it remains useful to put non-human standing in
the environmentalists’ tool box.

(1) Filing suits on behalf of Nature is a better fit with the real grievances

I have never thought, and still don’t consider, my view to be the strained or silly one or
the (in some unflattering way) “ingenious” one. What is strained, silly and “ingenious” is the
theory of lawyers (!) that a suit to stop the Navy from killing whales is on behalf, not of the
whales who may disappear, but of people piqued about no longer getting the thrill of “see[ing]
whale spouts as often.” How grotesque. The beach walker’s affidavit having been filed, she is
thereafter forgotten, never to take the stand with her lost thrill, or in any other way reappear. It is
the whales the court is going to focus on. Commentators on the criminal law have remarked that
the law has, among its other functions, an educative one. What is the education value of
environmental law, when it so twists what should be our real thinking? We should be looking for

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occaisions to make Nature plaintiff. Cases in which she really is the interest at stake seem like a good start.

(2) Suits on behalf of Nature are better suited to moral development

The law’s tortured reasoning gets worse. In a number of cases including Gilman, above, founded on the inhumane way in which animals were being caged, the courts granted standing to Jurnove, the animal welfare groups’ individual plaintiff, but did so based on his aesthetic injury. We are to presume Jurnove suffered from seeing the animals as Oscar Wilde might have suffered from a poorly worded tritely sentimental epigraph. Of course, no one can seriously believe that aesthetics played any role whatsoever in motivating Congress to pass the Animal Welfare Act. The fragility of the majority’s argument inspired the dissenters to rejoin with a hypothetical counter-plaintiff, “a sadist with an interest in seeing animals kept under inhumane conditions.” The law was inspired by a widespread intuition that mistreating animals is immoral. The court system has not shied away from trying to help the society to draw out other moral intuitions—“fundamental fairness” and such—to see where they lead and to give them shape. Courts have cited Bentham and Mill and John Rawls. There are more than a handful of philosophers, most eminently Peter Singer, whose writings are similarly available to draw upon.

(3) Is legal representation (really) on behalf of animals and nature really feasible?

Yes. We know that because we already have it. Right now the government’s representation of protected resources comes just about as close to representation of the protected resources as would be provided by a good house counsel. By that I mean the “lawyer” is not there just for litigation, but also to negotiate. In seeking protection of Atlantic whales, NOAA sought out and negotiated changes in dangerous practices without suit. Fish and Wildlife Service’s biological assessment of the polar bear’s jeopardy, and its tenacity in face of tough political opposition, is of a quality unlikely to be equaled by all but the nation’s most pricey law firms. And when suit has been brought, as in the case of protected species or harassment of individual marine mammals for “taking” (usually harassment), the cases might as well be, or, I would say, would better be, captioned NOAA ex rel Beluga Whales v. so and so. In other words, we already have de facto guardians in the form of certain agencies; we have just stopped short of naming them as such.

(4) Why is the institutional trusteeship system just described inadequate?

The institutional trusteeship has two shortcomings. First, some “objects” may fall outside the “beneficiaries” for which Congress was plausibly providing. This is a situation illustrated in
Trees by the dog whose owner has willed that it be “put down” on her death. That strikes me as quite a good illustration of where a court would be well-advised to appoint a petitioner who had the dog’s interests in mind a guardian ad litem to “oppose” the executor, if it comes to that. I suspect that under most state codes no more would be required than a generous reading of “any person.” Guardianships ad litem have their own drawbacks. Courts are not likely to be comfortable with case by case judicial proceeding for appointment and disqualification. Who can speak for a forest—for what it wants? What if someone intervenes wanting to represent the beetles? And so on. My guess is that considering the moral and financial incentives (who will pay the fees for the beetles’ counsel?) the real problems would prove far fewer than those we can invent. Nonetheless, there is much to be said for legislating institutional guardians, leaving less need for special court appointed guardians.

The other drawback of the legislated guardian framework is that the government guardians might not be steadfast enough to satisfy public preferences for the environment. If this is a concern, there is a third alternative to government trustee on the one hand, and ad hoc proceedings to establish a guardian ad litem, on the other. That is to adopt and expand the German system in which qualified non-profit associations, designated by the government, enjoy wide ranging opportunities to participate in environment affecting activities beginning with the planning stage and carrying over into litigation.\(^{A}\)

(5) *The guardian approach may be superior to the alternative standing strategies from the perspective of subsequent preclusion doctrines*

There is a potential problem with “animal nexus” and similar approaches to standing that have yet to be crystallized. The Supreme Court has rightly demanded that a plaintiff display an injury that is concrete and particularized. Without that, a party is less likely to make a strong advocate. This is particularly important when we take into account potential collateral effects of the litigation, most particularly res judicata. To illustrate, imagine that NRDC suit in the whale sonar matter proceeds to a result favorable to the Navy. That suit clearly bars on res judicata

\(^{A}\) Associations that have been granted recognition by Federal Länder are permitted to participate prior to the granting of exemptions from prohibitions and orders relating to the protection of *Naturschutzgebiete* (‘nature conservation areas’), *Nationalparke* (‘national parks’), and *Biosphärenreservate* (‘biosphere reserves’) and other protected areas; exemptions from prohibitions and orders relating to the protection of ‘nature conservation areas’ (*Naturschutzgebiete*), ‘national parks’ (*Nationalparke*) and other protected areas; in certain circumstances they enjoy special guardian power to sue, viz., too challenge decisions of ‘plan establishment procedures’ relating to projects involving intervention in nature and landscape as well as ‘plan approvals’ (*Plangenehmigungen*) where the involvement of the general public has been provided for in relevant provisions. See Bundesnaturschutzgesetz, Articles 58-61 available at Institut für Naturschutz und Naturschutzrecht available at [http://www.naturschutzrecht.net/naturschutzgesetze.htm](http://www.naturschutzrecht.net/naturschutzgesetze.htm).
grounds another suit in the name of the same plaintiffs against the Navy on the same matters. But what if after the final judgment against the NRDC, another group comes along to mount a challenge to the same activities, but in the name of different plaintiffs with their allegations of their injury arising from the same facts? I am not sure how that would be dealt with; but surely from the point of judicial management bringing the first suit in the name of the whales threatened in the test area is superior.

(6) Advance warning: The “canary in the mine” rationale

Many people suppose that legal rights for nonhumans has to stand or fall on the credibility of the claim that these “things” have moral rights, underneath the law as it were, which the legal system then adopts. The idea gains support from by the fact that many of our most fundamental rights, such as the constitutional rights to freedom of religion and speech, are often plausibly portrayed as the law’s instantiation of pre-constitutional rights. And, indeed, much support for legal protection of Nature does look for support in from the literature of moral standing of Nature. But not all legal rights are constructed on top of moral rights. No one claims that we have provided corporations, trusts, and other intangible bodies legal rights because they morally deserve them. We arrange for lawyers to argue “their” cases because doing so simply produces a better legal system from a utilitarian point of view. The same reasoning may support giving legal rights to certain objects-- because it is the most sensible way of promoting our own ends, without ever reaching questions about whether the thing possesses an independent "moral right."

To illustrate, suppose that Congress wants to establish an early-warning system to guard against major collapse of the life support system. I am not thinking of the loss of a charismatic species, but more likely—depending on what scientists told us—the collapsing of something like phytoplankton or even colonies of anaerobic bacteria. If Congress were persuaded that some such life forms were the equivalent of miner’s canaries, it would make sense, as part of the response, to give them legal rights—to make it possible for lawyers to argue their case. When I suggest this, the immediate reaction is usually: isn’t such a move designed simply to benefit humans, and doesn’t it therefore create human legal rights? The answers are yes, but no. Yes, the Congressional motive would be to protect humans, not phytoplankton or whatever. But no, the legal right would be that of the phytoplankton in important senses. The court would be authorized to enjoin defendants (if we could find them) on a showing that did not require causal link to human damage. In other words, a precautionary law might provide that proof of damage to some $x$ was enough for the law to intercede, without finding a plaintiff who could show that his fishing business faced imminent financial threat, or that phytoplankton-watching was a hobby.
(7) Protecting “third party” interests in negotiations and settlements

It is worth recalling here an illustration from *Trees*. Suits among rights-holders may operate to the advantage in a derivative way. Providing the slave owner standing to sue someone who has beaten her slave benefits slaves as “third parties” outside the litigation. Allowing owners of river-side (riparian) properties to sue an upstream polluter works to the benefit of the river’s turtles. But in neither case is it the same as giving the third party its own rights. The slave owner may accept a gentlemanly settlement if the slave beater apologizes to her (the owner). The riparians will ordinarily settle for something less than their full damages, much less the turtles’, who have no one to speak for them in the negotiations. And so on. Such third party benefits exist even when there is a designated government agency speaking for the “third parties,” such as we now have for “protected resources.” There is at least a slight conflict of interest in that situation that can be repaired by making available either the designated environmental group, as under the German law, or an ad litem guardianship under expanded common law principles.

VI

So, Where Do We Stand on Climate Change?

This brings us back to the beginning. What can—must—be done about climate change? And where do these exotic litigation strategies fit into the larger picture of regulatory options? Nothing we have seen alters my original declaration: no litigation, of any sort, is going to have a major impact on climate policy—certainly not any suit on behalf of the “climate.” The bulk of the efforts will require concerted and cooperative action among nations, of a sort that can be achieved only through diplomacy, legislation, and administrative action. But progress on diplomatic efforts at the highest and most inclusive level—through the Kyoto process, on which so much else has been hinged to depend—has been hard to achieve. To understand (A) why this is so provides a background for understanding (B) the potential role of climate related lawsuits.

A

The efforts to negotiate a diplomatic solution have produced a commentary that is imaginative, rigorous, and hardened by the mounting experience. What has emerged is considerable consensus, not on the solutions, but at least on the challenges. A sampling of the unresolved issues and barriers that have been identified includes:
(1) **Strategy.** Strategic questions include how much to emphasize prevention (emission reduction) and how much, mitigation of impacts (geo-engineering) and adaptation to unmitigated changes (sea-walls and irrigation systems).

(2) **Targets.** GHG emissions are on the increase. How much accumulating congestion, at what price, are we (variously) willing to tolerate tolerable over different time frames? Is elimination of a marginal metric ton of carbon equivalent worth $100 or $300?

(3) **Distributional issues.** Obviously the “target,” whether expressed in quantities or costs, will vary from country to country. This is because countries vary with respect to discount rate, vulnerability to climate change damage, and ability to pay to fend off their risks. Distributional issues also arise from conflicts over who is to blame for the current condition, and how it should matter. Do we adopt a “bygones are bygones” policy, or account for the historical contributions? Should national allowances be apportioned to size of population (per capita) or size of the economy (per $ value added)?

(4) **Mechanisms.** Insofar as emission reduction is the strategy of choice, there is the question whether to achieve the desired reduction by raising the price of emissions (through a carbon tax), or by putting a lid on the permissible quantity emitted (through cap and trade), or through some hybrid combination of taxes and tradable emissions permits that enables mid-course corrections. Cap and trade is emerging as preferred over taxes, but there remain numerous issues. How many permits (representing a certain permissible level) are going to be issued? This decision involves edgy risks. An original allocation that turns out to be “too low” (permit prices rising higher than the efficient level) risks dragging down economies. Errors, moreover, and the resultant possibility any one participant create will pull out, increase the likelihood that other countries will follow. How are permits to be allocated? Should trading be unrestricted world-wide, or made subject to some percentage and territorial restrictions? Suppose that a firm X that holds permits to emit 10 tons sells 5 tons worth to Y in another country, but continues to emit 10: How should excesses over the permitted level be enforced, and against whom: the nation of X’s domicile, that was derelict in monitoring and enforcement? X, the derelict polluter (seller) that neglected to cut back, as promised in the sale? Or Y, the holder of the permit that is in violation? Arguments for all these positions exist.

(5) **Overcoming Strategic behavior.** Even if a large number of prospective parties could agree on the value of curtailing emissions, and on the ideal strategy and mechanisms
for achieving the curtailment, they still might be unable to come to the “ideal” agreement. Each country has some incentive to “free ride” on the efforts of others. The atmosphere is a public good, whose benefits are enjoyed by co-operators and non-cooperators, alike. If nations $A$ and $B$ each agree to cut their emissions in half, the benefits are enjoyed by $C$, whether or not it contributes. By the same token, $C$’s unrestrained emissions of $q$ tons will impose costs on $A$ and $B$, no less than on $C$. One must keep in mind, too, that, any limitation by $A$ and $B$ on their emissions, whether driven by a domestic carbon tax or by caps, will put their carbon intensive industries at a competitive disadvantage against the firms of $C$, if $C$ is less stringent. $C$ might even hold itself out as a carbon haven, offering regulatory laxness to attract migration of investments in carbon intensive industries. These and other like strategic policies make cooperation difficult to achieve and sustain.

(6) **Conflicts with other multilateral agreements (with trade law in particular).** There are easily imagined counter-strategies to support cooperation. For example, Nations $A$ and $B$ could deter $C$ from gaining competitive advantage for its products by imposing on $C$’s exports a Border Tax Adjustment (a sort of tariff) equal to the cost advantage the exporters realized by dint of $C$’s laxness. $A$ and $B$ might even want to impose trade sanctions on $C$ until $C$ imposes comparable regulations, thereby stanching recruitment of heavily polluting industries. The problem with deploying these and other similarly motivated counter-measures is that they are likely to get entangled with, and probably violate, the WTO agreement, triggering counter-measures by countries targeted. Thus trade law is an obstacle to the devices that would most effectively give “teeth” to multilateral climate efforts. The obvious response is to undertake a parallel campaign to make it more accommodating to climate-related trade measures. But the developing countries, most significantly China and India, have already signaled their opposition to “anti-development” measures within the WTO—an opposition that is virtually dooming, given the requirement of consensus to make the necessary amendments. And even if that resistance could be overcome, many worry that the availability of such exceptions would provide cover for disguised protectionism, and lead to a series of tit-for-tat retaliations on a scale that would derail the progress of global trade.

(7) **Institutional design.** These complex and controversial problems raise issues of institutional architecture. It seems premature to write off Kyoto as “collapsed”; an enormous investment of effort has gone into getting it in place, and it has continuing services to provide. But Kyoto’s grand vision of all nations engaging in one big emissions trading market has certainly been called into question. Would it be better to
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put less hope in a single, universal membership structure, hobbled by the need to garner consensus among a large number of parties before any action can be taken? There are a number of supplementary options. Options at the international scale include fostering the growth of more flexible groupings of similarly situated countries much as, in the trade area, we have the WTO side by side with smaller, regional pacts. In fact, as David Victor points out, we are already witnessing the evolution of at least six different carbon markets, each with its own rules and prices. Victor encourages this trend, supporting a more extensive use of nonbinding targets and time-tables, and vesting more power in nation states and “clubs” of states, and less in traditionally feeble global institutions. On this view, the locus of power might move back up towards Kyoto, but the source of regulation, at least in transition, would be distinctly “bottom up” rather than top-down. A surprisingly strong case can be made even for trading on a bilateral level, between, for example, China and the United States, or India and Japan. The argument goes that the direct pairing of a low abatement cost country with a high abatement cost country has special advantages for the partiers. With the appearance of a new, well-heeled buyer, the low cost abater can anticipate higher prices for its credits; the high cost abater gets more risk reduction per dollar than it can either through unilateral domestic reductions or by searching out bargains with Kyoto members under Kyoto limitations.

(8) “Upstream” versus “downstream” responses. By far most of the regulatory effort, and literature, has emphasized bringing the costs of activities more in line with their climate change impact. The dominant assumption is that as a carbon tax or cap and trade system raises the “price” of GHG emissions (to reflect their full social costs) consumers will modify their choices accordingly. This approach fits neatly with the top-down conception: nations agree to limit their emissions; the nations, in turn, tax or permit producers in select sectors, such as energy production; and then, at the next level, energy consumers, reading their bills, conserve or switch to more climate friendly alternatives. But the case for bi-directional attacks turns out to be quite strong. Consider, for example, the potential for action at the municipality level. One might imagine the influence of cities to be slight and fragmentary, and that ‘downstream” regulation that enlisted municipal governments would even undermine development of better coordinated upstream mechanisms. But it turns out that residential and commercial structures consume 68 percent of the electricity used in the United States, a demand that creates 38 percent of U.S. carbon dioxide emissions. Municipalities have considerable sway over these figures in their traditional role as authors and enforcers of building codes, which deal with matters such as insulation; indeed, cities have a direct impact as major proprietors of buildings in their own right.
Moreover, in their roles as city planners and zoning administrators, municipalities can deploy transportation affecting strategies, such as mixed (non-Euclidean) use districts, and improved municipal transit, so as to reduce vehicle miles travelled by reducing urban-suburban sprawl. In other words, rather than to wait for upstream mechanisms to be established, and for the adjusted price signals to work their way downward through the economy, municipalities can, and many already are, promoting existing efficient technology. “Below” municipalities, there is growing interest in measures that individuals, spurred by the hike in gas prices, can take at the household level. Michael Vandenbergh et al identify a number of simple “low-hanging fruit” opportunities that they claim have the potential to achieve large reductions at less than half the cost of the leading current federal legislation, require limited up-front government expenditures, and generate net savings for individuals.\(^A\)

\[B\]

In sum, the regulatory mechanisms are still taking shape in the face of a considerable range of options and barriers. We can fairly assume that, at least over the foreseeable near term, much of the progress of climate change regulation will not emanate downward from Kyoto, at an apex, but from nations, states, cities, socially conscious corporations, and greening individuals at the base. It is easy to identify ways in which this fragmented tableau is less than ideal, even as an interim measure. Patchy lower level efforts may forestall the gelling of upstream components, and reduce pressure on the non-cooperators to pitch in. In fact, the smaller the number of cooperators and the smaller the scale of cooperation, the harder it will be to coax parties into making deep commitments which, by their very nature, are likely to put the cooperators at competitive disadvantage. On the other hand, an ideal solution, whatever it may be, will continue to be elusive. What we must settle for are improvements at the margin.\(^{126}\) And in this process of marginal improvements, climate related litigation—suits alleging climate-induced impact or risk—have significant roles to play.

To begin with, dependence on grass roots support increases the importance of an educated public, in its capacity both of elector and consumer. The various sorts of GHG-related suits—and the publicity they generate—educate, even when they lose. (Recall the impact of the Seehunde case in Germany: the seals lost, but in reaction to public exposure the dumping of heavy metals ceased.)\(^{127}\) The suits give environmental groups a chance to cast a

light on low visibility risks. Second, such suits, particularly those brought in the interests of endangered people and other creatures, put a face and an immediacy on the abstract and sober path comparisons of the IPCC scenarios. Consider as an illustration Kavalina v. ExxonMobil, now pending in California federal court.\textsuperscript{128} The village (not the villagers)\textsuperscript{A} is suing. In 2006, the U.S. Army Corps of Engineers concluded that the Arctic village of Kivalina, inhabited by 400 Inuit, would be uninhabitable in as few as 10 years. Global climate change, the Corps concluded, had shortened the season during which the sea was frozen, leaving the community more vulnerable to winter storms. The first charge, brought against 24 oil, coal, and electric companies, claims that their emissions are partially responsible for the coastal destruction. The second charge alleges conspiracy among eight of the companies:

\begin{quote}
to cover up the threat of man-made climate change, in much the same way the tobacco industry tried to conceal the risks of smoking—by using a series of think tanks and other organizations to falsely sow public doubt in an emerging scientific consensus.\textsuperscript{129}
\end{quote}

By adding the conspiracy count, the plaintiff’s lawyers (not incidentally including veterans of the tobacco wars) hope to get around many of the difficulties we have reviewed, such as a balancing of the social costs and benefits of defendants’ emission levels. A victim of conspiracy—if the plaintiffs can provide legal proof—can prevail without being subject to any weighing of utilities. Win or lose, such suits cart into public consciousness a victim identified, a position taken, a challenge issued. They become not only part of the information dynamic, but in their own way they dramatize, motivate, and cut channels for the new-found energies.

An energized public, in turn, is more likely not only to watch its own footprint, but to award action groups and politicians who deliver on climate change.\textsuperscript{B} But there is more to these suits than publicity and electoral reward. Some of the filings, remember, win in court. Victories have come across a broad front. \textit{Border Power Plant Working Group v. Dept of}

\begin{flushleft}\textsuperscript{A} The complaint states, “This challenge is brought pursuant to Kivalina’s independent constitutional, common law, and statutory authority to represent the public interest of the Kivalina community.” Complaint at 4, \textit{Native Village of Kivalina and the City of Kivalina v. ExxonMobil}, 2008 WL 2951523 (C.D. Cal. 2008), available at http://www.climatelaw.org/cases/country/us/kivalina/Kivalina%20Complaint.pdf.
\textsuperscript{B} A recent poll of polls conducted around the world showed that in 15 out of 21 countries, majorities felt that it was necessary to take “major steps, starting very soon” to address climate change. In the other six countries polled, opinion was divided over whether “major” or “modest steps” were needed. Only small minorities thought no steps were necessary. This data antedates the market decline of 2008. WorldPublicOpinion.org, \textit{International Polling on Climate Change}, December 6, 2007, http://www.worldpublicopinion.org/pipa/pdf/dec07/CCDigest_Dec07_rpt.pdf.
\end{flushleft}
Energy (above) suggests that licensing authorities may have to take climate change impacts into account before they make a FONSI. Stockholder litigation is destined to give impetus to mounting pressures on corporations to disclose emissions data and control plans. The 2008 settlement of the polar bear litigation provides for the government to designate a "critical habitat" for the bears off Alaska's coast, a decision that adds constrictions to offshore petroleum exploration and drilling, and could even spell trouble for major GHG-emitting projects in the lower 48—not an easily defensible permanent prospect. The whales, courtesy Natural Resources Defense Counsel, have taken their sonar grievances all the way to the Supreme Court, tying up naval maneuvers in a time of war. At less dramatic levels, suits by activists have kept developers and permitting authorities on their guard to minimize environmental impact. This impact cannot be measured in the cases won, such as Palila, Marbled Murrelet, and Leatherback. For each court-room victory, there must be dozens of other situations that never resulted in reported court filings because projects were modified satisfactorily at design and review stages in reaction to or anticipation of environmental objections.

“Funny,” cutting edge suits, like the Kivalina litigation, and that over the polar bear listing may have another advantage: a lower bar to meeting elements of a suit, such as the “imminence of threat” needed for a tort, and the “irrevocability of harm” required for a temporary restraining order. True, for some remote damage we can construct a present value. The distant prospect of rising seas may cause coastal landowners, such as Massachusetts, to suffer present damage in the form of an uptick in property insurance premiums. Farmers in regions that suffer increased draughts will see land values decline and crop insurance rise. Those may suffice as “injuries in fact” qualifying for standing under some law or other. But even a plaintiff who can clear the damage requirements to get into court still faces proof of damages necessary to support a tort, or the irreparability required to obtain a temporary restraining order. That is why a coastal resident, say, a Malibu beach-front homeowner, may not be in as good a legal position as an Inuit village, or a stock of bears. The Malibu homeowner can move (and probably will when the property becomes uninsurable). For the others, the damage is real, immediate, and not something the plaintiffs can as easily avoid or

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B The implication might be that every project could be delayed pending inquiry into the impact on all 1900 threatened and endangered species, animals and plants, domestic and foreign. For a summary of endangered and threatened species worldwide, see http://ecos.fws.gov/tess_public/TESSBoxscore. I assume Congress would find that unacceptable, and could initiate an unraveling of the whole ESA framework.

C One has to grant that none of the cases in the United States thus far has accounted for climate change in framing substantive outcome.
be compensated for. The villagers can pull up stakes, but it is less clear that the village, with its culture and connection to place, can survive.

This suggests still another role for suits on behalf of prospective victims of climate change. I argued in Trees that there may be good reason to establish trust funds to manage the damages suffered by an ecosystem, to “make it whole,” as best we can. In fact, today that would not be considered unusual practice. The response to the wreck of the oil tanker Exxon Valdez in 1989 is a prime example. Roughly 11 million gallons of oil were spilled into Prince William Sound and the Gulf of Alaska, devastating fish and wildlife. Exxon was forced to place $900 million into a repair fund to be administered by a Trustee Council, consisting of state and federal trustees. Under the Oil Pollution Act of 1990, the party responsible for a discharge of oil is responsible for natural resource damages that result from the incident. The mechanism has been expanded to fund restoration even when the precise damager, or damagers, cannot be identified. For example, In August 2000, oil tar balls and oil mats began to appear on beaches from North Miami Beach northward to near Pompano Beach, impacting natural resources including threatened and endangered sea turtles and their habitats, as well as fish and birds. Although no wrongdoer could be identified, NOAA and the Florida Department of Environmental Protection applied to the Oil Spill Liability Trust Fund, whose primary source of revenue is a five cents per barrel fee on imported and domestic oil. Other revenue sources include interest on the fund, cost recovery from parties responsible for the spills, and any fines or civil penalties collected for oil spills. It seems to me that climate change might incline us to take one further step. We could establish a fund from charges on emissions, one that would not only help defray damages ex post, but which would be available to defend against damages before they occurred. Such, defensive measures may loom as more crucial than ex post damages, because, across the world, there is increasing likelihood that mitigation and avoidance policies are going to dominate prevention. We may have to face some large scale triage endeavors, in which many biological populations can be saved only at reduced levels, and even then only if protected areas are established and maintained through funds underwritten by user charges and lawsuits.

And finally there are the symbols these cases reinforce. For one, the fact we can bring a suit on behalf of loggerheads and leatherbacks is an affirmation of who we are, or may become, as a people. Then, too, there are the images. The climate change movement has found its most valuable icon in the haunting photos of polar bears trying to keep a grip on dwindling ice floes;

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The U.S. Army Corps of Engineers and the U.S. Government Accountability Office have both concluded that Kivalina must be relocated due to global warming and have estimated the cost to be from $95 million to $400 million. Complaint at 1, Native Village of Kivalina and the City of Kivalina v. ExxonMobil, 2008 WL 2951523 (C.D. Cal. 2008), available at http://www.climatelaw.org/cases/country/us/kivalina/Kivalina%20Complaint.pdf.
the listing litigation has helped deliver these images into public consciousness. Even those not moved (from their SUVs) by reports of the bears cannibalizing their cubs care at least for themselves. We are not there beside the bears and Inuit, yet. But these happenings, together with the collapsing glaciers and vanishing frogs, are offered to us the way a sly God scatters omens—black cats and thunderclaps—to test whether a people is really worth saving, offering them a final chance, if they will only make the right interpretation, to mend their ways. It should not take an oracle to read our signs.

Los Angeles, October, 2008

3 Id. at 471.
4 Id. at 475 (Citing Akins v. Fed. Election Comm’n, 101 F.3d 731, 739 (D.C. Cir. 1996) (en banc)). "[I]n cases where the plaintiff is not itself the subject of the contested regulatory action, the [zone of interests] test denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit. The test is not meant to be especially demanding; in particular, there need be no indication of congressional purpose to benefit the would-be plaintiff."
5 Glickman, 130 F.3d at 476
6 Id. at 471.
7 Glickman, 154 F.3d at 445.
8 Id. at 444.
11 Id. at 563 (quoting the affidavit of Joyce Kelly).
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12 Id. at 561.
13 Id. at 562.
14 Id.
15 Id.
16 Id. (citing to Allen v. Wright, 468 U.S. 737, 758 (1984).
19 Lujan, 504 U.S. at 576.
20 Id. at 577.
22 Lujan, 504 U.S. at 566.
23 Id. at 562 (citing Sierra Club v. Morton, 405 U.S. 727, 734 (1972)).
25 Id. at 432.
26 Id. at 473 (quoting Allen v. Wright, 469 U.S. at 73, 751 (1998).
27 Id. (quoting Lujan, 504 U.S. at 562-63).
29 Id. at 1454.
30 Id.
31 [cite-left open until completion of Trees]
33 Id. at 1007.
35 Id. at 583 (Stevens, J., concurring).
36 Id. at 567.
38 Lujan, 504 U.S. at 568.
39 Id.
40 Id. at 595.
41 Id. at 571.
42 Id. at 599 (Blackmun, J., dissenting).
44 Lujan, 504 U.S. at 566.
45 42 U.S.C. § 4332(C).
47 Hanly v. Kleindienst, 471 F.2d 823, 830-31 (2d Cir. 1972) (emphasis added).
49 Id.
51 Id at 1261.
53 Id.
55 Id. at 1028.
56 Id. at 1028-29.
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58 Id.
72 Id. at 1.
76 Restriction on Importation of Fishery or Wildlife Products From Countries Which Violate International Fishery or Endangered or Threatened Species Programs, 22 U.S.C. § 1978(a)(1).
77 Japan Whaling Ass’n at 240 n.4.
78 Id. at 241.
82 Massachusetts v. E.P.A., 127 S. Ct. at 1453.
83 Id. at 1455, 1457.
84 Id. at 1454.
85 Id. at 1441.
86 Id. at 1463.
87 Responsibilities of Trustees, 40 CFR §300.615. This applies to damages under CERCLA.
88 Defenders of Wildlife v. Gutierrez, 484 F.Supp.2d 44 (D.C. Cir. 2007)
89 Center for Biological Diversity v. Kempthorne, No. C 08-1339 CW, slip op. at 3 (N.D. Cal. 20 ordered Apr. 28, 2008).
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90 50 C.F.R. §17.40(b) 307
91 Press Release, U.S. Dept. of the Interior, Secretary Kempthorne Announces Decision to Protect Polar Bears under Endangered Species Act (May 14, 2008), available at http://www.doi.gov/news/08_News_Releases/080514a.html. The Secretary also noted that Canada, with two-thirds of the world’s population of polar bears, has not listed polar bears as threatened. Id.
92 Endangered Species Act, 16 U.S.C. 1533(b)(1)(A)
93 BERT METZ ET AL., INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE FOURTH ASSESSMENT REPORT, MITIGATION OF CLIMATE CHANGE, 226 (2007).
98 The plaintiffs also tried unsuccessfully to fit their claim under the California Unfair Competition Law.
102 Id. at 1111 (quoting 16 U.S.C. § 470a-2).
103 Cetacean Cnty. v. Bush, 386 F.3d 1169, 1173 (9th Cir. 2004).
104 Marbled Murrelet v. Babbitt, 83 F.3d 1060 (9th Cir. 1996).
106 Id. at 1008 n.2.
107 Loggerhead Turtle v. County Council of Volusia County, Fla., 148 F.3d 1231 (11th Cir. 1998).
108 Id.
110 Hawkshill Sea Turtle v. FEMA, 126 F.3d 461, 466 n.2 (3d Cir. 1997).
111 Loggerhead, 896 F.Supp. at 1177.
113 Id. at 49.
114 Christopher D. Stone, Does a Dolphin have Rights? BOSTON GLOBE, September 16, 1990.
116 Id. at 30.
117 Lujan, 504 U.S. at 572.
118 Id. at 564.
119 Id. at 592 (Kennedy, J., dissenting).
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121 For a strong argument favoring buyer liability, see Robert Keohane and Kal Raustiala, Toward a Post Kyoto Climate Change Architecture: a Political Analysis in [ARCHITECTURE FOR AGREEMENTS, REVISED ed. Forthcoming?]
122 The most thorough and incisive treatment is Steve Charnovitz, Gary Clyde Hufbauer, and Jisun Kim, RECONCILING GHG LIMITS WITH THE GLOBAL TRADING SYSTEM (IIE PRESS, FORTHCOMING).
123 Victor, Fragmented Markets at 133.
127 Introduction, page --
130 Page – supra. [will fill these in when remainder of footnotes formatted in essay, to get correct # to reference to]
131 Page -- supra
133 Exxon Valdez Oil Spill Trustee Council: People, http://www.evostc.state.ak.us/People/index.cfm. For more information on the spill and the trust created, see Exxon Valdez Oil Spill Trustee Council, http://www.evostc.state.ak.us/.
136 Id.