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Devon Alexandra Berman
American University Washington College of Law

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LAKE ERIE BILL OF RIGHTS GETS THE AX: IS LEGAL PERSONHOOD FOR NATURE DEAD IN THE WATER?

By Devon Alexandra Berman*

"W e must no longer view the natural world as a mere warehouse of commodities for humans to exploit, but rather a remarkable community to which we belong to and to whom we owe responsibilities."¹

On February 26, 2019, the citizens of Toledo voted to amend the city's charter to grant the Lake Erie ecosystem the legally enforceable "right to exist, flourish and naturally evolve," establishing the Lake Erie Bill of Rights (LEBOR).² Seeking to protect the watershed from further degradation, the LEBOR gave citizens standing to sue polluters on its behalf.³ The LEBOR deemed invalid any existing or future permit issued to a corporation by any federal or state entity that would violate Lake Erie's rights.⁴ The LEBOR is just one example of the developing trend of communities taking a rights-based approach to protect local resources.⁵

Less than twenty-four hours after the citizens of Toledo voted to adopt LEBOR, a local farm partnership filed a complaint in the North District Court of Ohio claiming that LEBOR's enactment exceeded the city's authority and was preempted by state and federal law.⁶ The case was ultimately rendered moot in July 2019, when Governor Mike DeWine delivered a fatal blow to LEBOR by signing into law a provision stating that an ecosystem does not have standing in Ohio court.⁷

The legislature's swift precemption of LEBOR illustrates the inherent shortcomings of a municipal approach.⁸ This Article surveys the legal barriers to extending personhood to nature in the United States and concludes that they are likely insurmountable. The Supreme Court's narrow interpretation of constitutional standing requirements precludes citizens from bringing an action alleging direct injury to an ecosystem itself, irrespective of citizen suit language like that contained in LEBOR and other environmental legislation.⁹ These institutional barriers support arguments for a state-level approach to environmental protection.

BACKGROUND: GRANTING RIGHTS TO NATURE HAS INTERNATIONAL PRECEDENT

There is a growing trend of countries adopting rights of nature legislation.¹⁰ In 2008, Ecuador became the first country to pass a constitutional amendment enabling any "natural or legal person" to bring an action seeking for the government to comply with its duty to "respect and actualize" nature's right to "legal restoration."¹¹ When the provincial government widened a road without conducting an impact study, resulting in flooding, two landowners successfully invoked constitutional rights of nature and sued on behalf of the river, and the government was ordered to "restore the riparian ecosystems."¹² In 2015, the Constitutional Court of Columbia upheld standing for plaintiffs opposing mining operations in their communities on the grounds that "standing existed in terms of legitimate representation," and that the right to a healthy environment permeated all other constitutional rights.¹³

LEGAL STANDING FOR NATURE IN THE U.S. IS FRUSTRATED BY CONSTITUTIONAL STANDING REQUIREMENTS

Article III, § 2 of the Constitution provides that "[t]he judicial Power" of the federal courts of the United States only extends to specified "cases" and "controversies."¹⁴ The Article III standing doctrine limits the category of litigants empowered to sue in federal court to seek redress for a legal wrong. The Supreme Court has held the "irreducible constitutional minimum of standing" requires the plaintiff to "allege personal injury fairly traceable to defendant's allegedly unlawful conduct and likely to be redressed by the requested relief."¹⁵ In environmental enforcement actions, general grievances based on harm to the environment do not meet standing requirements unless the plaintiff can establish a concrete, personal injury that will likely be redressed by a court remedy.¹⁶ For example, environmental groups in Lujan v. Defenders of Wildlife claimed that the government’s funding of overseas projects threatened the plaintiffs’ ability to observe endangered species. The court rejected the “ecosystem nexus” argument, precluding generalized adverse environmental effects as a basis for standing to challenge the activity.¹⁷ As a result, citizen suit provisions of environmental statutes empower people to seek enforcement of environmental laws, but they cannot be used to circumvent Article III requirements. Based on the narrow interpretation of standing requirements, it is unlikely that the Supreme Court will recognize standing for injuries alleged on nature’s behalf.¹⁸

SECURING A CONSTITUTIONAL RIGHT TO A HEALTHY ENVIRONMENT AT THE STATE LEVEL

Several states are taking a rights-based approach to preventing environmental degradation by amending their constitutions to include a right to a healthy environment.¹⁹ By framing environmental degradation as a violation of citizens’ rights, these amendments require governments to prioritize environmental protection when regulating industrial activity. In

*Joint J.D./J.D. Candidate, American University Washington College of Law and University of Ottawa, Common Law Section 2020
1972, Pennsylvanians voted to amend the state constitution and became the first state to enshrine environmental rights to clean air and water through the Environmental Rights Amendment (ERA). The amendment states that the Commonwealth is the trustee of the state’s natural resources, “common property of all people, including generations yet to come.” In 2013, the ERA was successfully invoked to defeat key provisions of a bill that would have afforded the fracking industry broad powers and exemptions. The Court held that the provisions violated the ERA by preempting local regulation of oil and gas activities and precluding local governments from fulfilling their trustee obligations.

This landmark Pennsylvania Supreme Court ruling demonstrated the legal potency of enshrining citizens’ rights to a healthy environment in state constitutions. In 2017, a landmark case was brought under the ERA against the legislature for allegedly misappropriating environmental protection funds for other uses. In ruling against the legislature, the Court expanded its interpretation of the ERA and held that laws are unconstitutional if they “unreasonably impair” a citizen’s ability to exercise their constitutional rights to “clean air, pure water and environmental preservation.” The Court reaffirmed that the ERA commits the government to two duties: (1) to prohibit state or private action that results in the depletion of public natural resources; and (2) to take affirmative legislative action towards environmental concerns.

Drawing on Pennsylvania’s experience, a constitutional amendment to the Ohio Constitution that secures its citizens’ right to clean water is a more practical approach for protecting Lake Erie than attempting to confer legal standing through municipal legislation that has limited enforceability.

**Conclusion**

Extreme environmental degradation presents an unprecedented threat to human existence. Environmental policy rollbacks under the Trump Administration have decreased environmental regulation and stripped clean water protections. The Supreme Court of Pennsylvania’s interpretation of the ERA compels the state government to take positive legislative to prioritize environmental protection. In the meantime, it is becoming increasingly clear that society needs to undergo a radical shift in values in order to effectively mitigate the human impact on the environment.

**Endnotes**

1. Anna V. Smith, *The Klamath River Now Has the Legal Rights of a Person*, HIGH COUNTRY NEWS (Sept. 24, 2019) (David R. Boyd, United Nations Special Rapporteur on human rights and the environment, commenting on a resolution passed by the Yurok Tribe in California to allow cases to be brought in the name of the Klamath River in tribal court).
3. See Lake Erie Bill, § 3(b).
4. Id. at § 5.
6. The complaint alleged that LEBOR exceeded the city of Toledo’s limited legislative authority and unlawfully intruded on federal and state power by invalidating permits, altering the rights of corporations, and creating new causes of action in state courts. The plaintiff also claimed LEBOR violated its constitutional rights and would result in irreparable injury to the plaintiff’s business. See Drewes Farms v. Toledo, No. 31:19 CV 434, 2019 WCL 125401 (N.D. Ohio, Mar. 18, 2019); see also Drewes Farms v. Toledo, No. 31:19 CV 434, 2019 WCL 1 (N.D. Ohio, Feb. 27, 2018) (granting preliminary injunction to halt LEBOR from taking effect until case is decided on the merits).
9. See Friends of the Earth, Inc. v. Laidlaw Envtl Servs. Inc., 528 U.S. 167, 183 (2000) (holding that environmental plaintiffs adequately alleged injury in fact because they are persons who use the affected area and “for whom the aesthetic and recreational values of the area will be lessened” by the challenged activity).
10. In 2017, New Zealand granted legal personhood to the Whanganui River. The legislation created human representatives entrusted with managing the relationships with various stakeholders while “promot[ing] and protect[ing]” the River’s well-being. Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, cl 3, § 18 (N.Z.); see e.g., the Ganges and Yamuna Rivers were granted legal personhood.
12. Id. at 797.
13. Id. at 806-07.
17. Lujan v. Defenders of Wildlife, 504 U.S. 555, 566 (1992) (holding that conservation organizations lacked standing under the Endangered Species Act to challenge a federal regulation because the groups failed to assert a sufficiently imminent, direct injury that would likely be redressable by a judicial remedy).
18. See, e.g., Colorado River v. Colorado, (holding that alleged injuries to the Colorado River ecosystem could not be fairly traced sufficiently concrete.

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