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Article

Liberalism and Rights of Nature: A Comparative Legal and Historical Perspective

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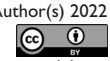

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Seth Epstein
Centre for Multidisciplinary Research on Religion and Society,
Department of Theology, Uppsala University, Sweden

Marianne Dahlén
Victoria Enkvist
Elin Boyer
Faculty of Law, Uppsala University, Sweden

Abstract

A growing number of jurisdictions have recently granted rights to nature. This article places the potential disruptions generated by this legal development in historical, comparative perspective. The questions that scholars are asking about rights of nature (RoN) are similar to many of those asked by historians and legal scholars about human rightsholders. These questions arise from some of the tensions within liberalism. Placing these tensions in comparative context offers a framework with which to interpret RoN developments. Doing so demonstrates, first, the capacity of the existing liberal order to incorporate challenges into already functioning structures and, second, that such efforts to manage the claims of new subjects of rights nonetheless can transform relations. In our conclusion, we argue that a comparative perspective may allay the tendency to exoticise rights of nature by examining the extent to which their development in sometime contentious and sometimes complementary relationship with democratic institutions is reflected in historical efforts to define and make meaningful the rights of human rightsholders.

Keywords

Rights of Nature, liberalism, Earth Jurisprudence, legal history, rights revolution

Corresponding author:
Seth Epstein, Centre for Multidisciplinary Research on Religion and Society, Department of Theology, Uppsala University, Box 511, Uppsala, 751 20, Sweden.
Email: seth.epstein@crs.uu.se

I. Introduction

Humans' relationship to nature has changed over time. Various cultures have at different times described themselves as sustaining kinship relationships with natural entities such as "[b]rother wildlife, mother waters, sacred mountains."[1] Over the last several centuries, Western cultures moved away from such kinship relationships and instead favored the conception of nature as an object and resource to be converted to the benefit of humans. This anthropocentric perspective supported and in turn drew authority from the emergence of two developments associated with the Enlightenment: liberal politics and capitalist exchange. This human-centered perspective on humanity's relationship to nature, however, is being reassessed. The boundaries and outcome of this reevaluation are not yet evident. Fostered by consciousness of the Anthropocene, perspectives that recognize the interdependency of humans and non-humans are gaining influence.[2] Greta Thunberg's criticism of world leaders' continued reliance on outdated assumptions like "fairy tales of eternal economic growth" in her remarks to the United Nations in September 2019 demonstrate how the climate crisis has inspired a reconsideration of the liberal values that have facilitated the objectification and exploitation of nature.[3]

Over the past decade and a half, public concern over the deleterious effects of climate change and discontent with development strategies that favor economic growth over "collective well-being" have combined with Indigenous peoples' objectives of self-determination to prompt the recognition in a growing number of jurisdictions of the independent legal presence of nature.[4] These jurisdictions have either defined specific rights held by nature or consider specific natural features to be legal persons. States have adopted laws, local municipalities have adopted ordinances, and courts in various countries have granted rights to nature, although some of these actions have been later reversed. These diverse developments, which have occurred over the previous twenty years in the United States, India, New Zealand, Canada, Ecuador, Bolivia, Columbia, Uganda, Bangladesh, and other states fall under the umbrella term Rights of Nature (RoN). This term signals these developments' contrast with "traditional" environmental law, which tends to consider nature in light of its relationship to humans and human rights.[5] The consequences of these initiatives to acknowledge rights of natural

1. Oliver A. Houck, "Noah's Second Voyage: The Rights of Nature as Law," *Tulane Environmental Law Journal* 31 (2017), 16.
2. Joshua C. Gellers, *Rights for Robots: Artificial Intelligence, Animal and Environmental Law* (London: Routledge, 2021), pp. 3–4.
3. National Public Radio, "Transcript: Greta Thunberg's Speech At The U.N. Climate Action Summit," September 23, 2019. Available at: https://www.npr.org/2019/09/23/763452863/transcript-greta-thunbergs-speech-at-the-u-n-climate-action-summit?t=1614404793990 (accessed November 11, 2021).
4. Randall S. Abate, *Climate Change and the Voiceless: Protecting Future Generations, Wildlife, and Natural Resources* (Cambridge, Cambridge University Press, 2020), pp. 11–12; Maria Akchurin, "Constructing the Right of Nature: Constitutional Reform, Mobilization, and Environmental Protection in Ecuador," *Law & Social Inquiry* 40 (2015), 959.
5. Joshua J. Bruckerhoff, "Giving Nature Constitutional Protection: A Less Anthropocentric Interpretation of Environmental Rights," *Texas Law Review* 86 (2008), 618.

non-humans are not yet apparent. This is in part because the future of RoN jurisprudence itself is hard to predict, as RoN cases usually respond to specific harms or conflicts. In addition, RoN cases borrow from a range of influences, and decisions may rely on "cultural ideas specific to each jurisdiction" as well as international sources of law.[6]

A key question that remains is how the existing liberal systems into which RoN are incorporated may constrain, channel, and contribute to the meaning and significance of these new legal recognitions. We contend that in order to most fully consider this question it is crucial to place the potential disruptions generated by the developing legal presence of nature within a historical and comparative perspective. It is unclear whether these RoN initiatives represent the continuation of liberal economic, political and legal norms and practices, a repudiation of them, or something in-between. In order to recognize the relation of nature's rights to established political, economic, legal and social order, it is necessary to consider the prior challenges presented by new legal subjects. This article constructs a comparative frame with which to do so by identifying tensions between rights of nature and liberalism.

Examining the very disparate histories of novel legal subjects will allow us to arrive at a larger understanding of the questions RoN scholars have raised regarding the contingent incorporation of rights of nature into legal, political, and economic systems, each of which have been heavily influenced by liberal assumptions. Liberalism has offered both encouragement and constraints to the challenges presented by new subjects while simultaneously disciplining them, sometimes in unexpected ways, into a dominant order. While some participants and scholars may consider RoN to be *sui generis* or, in the words of legal scholar David Boyd, a "legal revolution that could save the world," the questions that RoN scholars have asked are similar to those asked by historians and legal scholars about the status and impact of the human legal subjects that have emerged in the past.[7] These questions inescapably arise from tensions within liberalism. This article examines four such tensions. The first is the strain between RoN and property rights. The second lies in the ability of liberal democratic institutions and ideas such as representation to accommodate non-human legal subjects. The third tension is between the universalistic aspirations of liberalism and the exclusions, binaries, and biases on which this universalism has historically relied. The fourth tension is between the collective rights that RoN generally entail and the individual rights associated with liberalism. These tensions necessarily implicate human rights, which themselves have roots in western liberal thought.[8]

Placing these tensions in comparative and historical context offers a framework with which to interpret RoN developments. Difficulties in the realization of newly recognized rights are hardly unique to nature's rights. To contemplate prior challenges to the liberal paradigm presented by claims for human rights and legal subjectivity for groups of people previously excluded from those rights will, in the words of historian Timothy Snyder,

6. Gellers, *Rights for Robots*, p. 128.
7. David R. Boyd, *The Rights of Nature: A Legal Revolution That Could Save the World* (Toronto: ECW Press, 2017).
8. Makau Mutua, *Human Rights: A Political and Cultural Critique* (Philadelphia: University of Pennsylvania Press, 2002), p. 18.

"allow us to notice and conceptualize elements of the present that we might otherwise disregard and to think more broadly about future possibilities."[9] While we share with many other researchers the goal of examining the implementation of RoN in jurisdictions where it has been enacted, our approach as laid out in this article is comparative and historical. Most comparisons have thus far juxtaposed the current status of the rights of nature (and other emergent legal entities, such as artificial intelligence) in different jurisdictions. Few have focused on historical comparison, with the notable exception of historian Roderick Nash's *The Rights of Nature*, published almost twenty years before Ecuador's constitution recognized those rights.[10] Furthermore, this comparative perspective highlights the importance of liberalism as a frame and analytical tool. Scholars have critiqued RoN in relation to specific features of liberalism, whether explicitly identified as such or not, such as the valorization of particular notions of personhood or a reliance on rights. This paper builds on these efforts and aims to provide a framework that accounts for liberalism's multiple and interrelated facets. The examples highlighted in this article demonstrate, first, the capacity of the existing liberal order to incorporate challenges into already functioning structures and, second, that such efforts to manage claims produced through the recognition of new subjects of rights nonetheless can transform relations.

Considering nature as a legal entity with rights does not permit us to conjure a stable, unified human subject in opposition. The attribution and social construction of irreducible, ineradicable difference among humans has been intertwined with the recognition of the rights of those who personified the "universal" liberal subject. Ideologies of race and gender, for example, posited differences in the natures of women and men and of different races, creating hierarchies based on such notions as sentiment, ability to feel pain, self-control, and rationality. Such supposed differences were not eradicated upon recognition of the legal subjectivity of those who embodied them. Though by no means an exhaustive accounting, the histories of women, children, sexual and gender minorities, people with disabilities, formerly enslaved people, as well as citizens of newly independent postcolonial states, offer their own specific dynamics and material for comparison. To recognize potentially generative comparisons, it is necessary to attend to these subjects' radically divergent experiences in seeking to make their rights meaningful.

This article's first section identifies the influences of Earth Jurisprudence and liberalism on rights of nature and establishes the latter's function as an analytical frame for interpreting the evolving relationship of rights of nature to contemporary legal, political, and economic order. It then explores the relations between liberalism and rights of nature, distinguishing four particular tensions generated by their meeting, and demonstrating how the questions RoN scholars have asked in order to explore these tensions are akin to those asked by historians of previously recognized rightsholders. The historical examples highlight common questions scholars have raised about new legal subjects while

9. Timothy Snyder, "The American Abyss," *The New York Times Magazine*, January 9, 2021. Available at: https://www.nytimes.com/2021/01/09/magazine/trump-coup.html (accessed November 11, 2021).
10. Roderick Nash, *The Rights of Nature: A History of Environmental Ethics* (Madison: University of Wisconsin Press, 1989); Gellers, *Rights for Robots*, pp. 6–7.

also illustrating the dynamics specific to different times and places. By demonstrating the former, these examples collectively suggest the importance of examining the reciprocal influence of liberalism and nature's rights on one another. By demonstrating the latter, these examples suggest particular avenues of historical comparison and contemporary possibilities for nature's rights. The concluding section offers potential avenues for further investigation.

II. Foundations and Frames

Rights of nature initiatives draw from legal and social philosophies that are themselves in tension with one another. Among these are Earth Jurisprudence (EJ) and liberalism. EJ and the transnational networks that have promoted it have particularly influenced the rights of nature recognitions in Ecuador and, more indirectly, Bolivia.[11] Settlements in New Zealand between Indigenous Maori iwi (tribes) and the Crown government were made absent direct connections with EJ advocacy and take a legal personhood approach characteristic of liberalism. Scholars nonetheless have argued they echo concepts associated with EJ.[12]

While a single yet comprehensive understanding of liberalism is elusive, we adopt political philosopher Alan Ryan's definition of "a theory of the good life for individuals that is linked to a theory of the social, economic, and political arrangements within which they may lead that life." Those arrangements are meant to support the individual's drive towards self-creation and enable the individual to assume "responsibility for one's own life."[13] What has been considered necessary to secure these goals has changed with time and with place. However, according to philosopher John Gray, variations of liberalism share several defining characteristics. The first is an "individualist" outlook that sustains "the moral primacy of the person against the claims of any social collectivity." Second, it is "egalitarian" insofar as it recognizes an equality of "moral status" among all people and rejects attempts to allow supposed distinctions in the "moral worth among human beings" to affect "legal or political order." Third, liberalism is also "universalist," in that it recognizes "the moral unit of the human species" while subordinating "specific historic associations and cultural forms." Finally, it is "meliorist" in that it exhibits confidence that social organization and political structures can be bettered.[14]

RoN can be partly located within a long narrative about the creation of rights-bearing liberal legal subjects traceable to at least the 1789 Declaration of the Rights of Man and

11. David Humphreys, "Rights of Pachamama: The emergence of an earth jurisprudence in the Americas," *Journal of International Relations and Development* 20 (2017), 460.
12. Christopher Rodgers, "A new approach to protecting ecosystems: The Te Awa Tupua (Whanganui River Claims Settlement) Act 2017," *Environmental Law Review* 19 (2017), 275; Craig M. Kauffman, "Managing People for the Benefit of the Land: Practicing Earth Jurisprudence in Te Urewera, New Zealand," *ISLE: Interdisciplinary Studies in Literature and Environment* 27 (2020), 581.
13. Alan Ryan, *The Making of Modern Liberalism* (Princeton: Princeton University Press, 2012), pp. 35–36.
14. John Gray, *Liberalism* (London: Open University Press, 1995), p. xii, Second Edition.

of the Citizen at the beginning of the French Revolution. The twentieth century has added its own chapter to this story, including the advent of the "rights revolution," which historian Samuel Walker suggests can be traced in the United States to 1937.[15] It was only afterwards, according to legal historian Morton Horwitz, that "rights discourse could be used as a tool for the oppressed."[16] The rights revolution was characterized by the proliferation of individual rights claims made by previously acknowledged legal subjects as well as the emergence of novel legal subjects that had not previously been considered to possess the requisite rationality and will to represent their own interests, such as children.[17] Transnational movements like decolonization and supranational actors such as the United Nations and the European Court of Human Rights have helped to internationalize the rights revolution, while the end of the Cold War assisted the spread of the vocabulary of fundamental, universalistic rights that guarantee principles like dignity and equality.[18] The relatively recent acknowledgment of a human right to a healthy environment is an example of the anthropocentric thrust of the rights revolution.[19] RoN belies this anthropocentric focus while nonetheless contributing to the expansion of both rights and of rights-holders.[20] Nature's rights should thus be located within this longer history and yet at the same time as something that departs significantly from both anthropocentric assumptions and reliance on individual rights.

This departure can be understood in part by considering the influence of Earth Jurisprudence, which holds that humans should construct the arrangements that govern them in accordance with nature, which it considers the ultimate governing system.[21] The priorities that follow from this principle contrast with the features of liberalism. First, liberalism's egalitarianism typically has been limited to humans.[22] EJ, however, claims to recognize the "inherent value" in all entities and systems through recognition of their status as rights-bearing legal entities. Second, liberalism's individualist outlook clashes with the reciprocal relationships recognized by EJ, whose advocates have sought "legal recognition of the integral interdependency of all life."[23] Third, EJ supporters argue that their approach adequately reflects the "differentiation" exhibited through the broad

15. Samuel Walker, *The Rights Revolution: Rights and Community in Modern America* (New York: Oxford University Press, 1998), p. 33.
16. Morton J. Horwitz, "Rights," *Harvard Civil Right-Civil Liberties Law Review* 23 (1988), 396.
17. Walker, *The Rights Revolution*, p. 43.
18. Mitchel De S.-O.-I'E. Lasser, *Judicial Transformations: The Rights Revolution in the Courts of Europe* (New York: Oxford University Press, 2009), p. 3.
19. United Nations General Assembly, "Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment," A/73/188, July 19 2018, p. 11. Available at: https://undocs.org/A/73/188 (accessed November 11, 2021).
20. Susana Borras, "New Transitions from Human Rights to the Environment to the Rights of Nature," *Transnational Environmental Law* 5 (2016), 127–8.
21. Kauffman, "Managing People," 580.
22. Nash, *The Rights of Nature*, p. 6 (emphasis in original).
23. Mereana Barrett, Krushil Watene, and Patty McNicholas, "Legal Personality in Aotearoa New Zealand: An Example of Integrated Thinking on Sustainable Development," *Accounting, Auditing & Accountability Journal* 33 (2020), 1706.

"array of modes of being" found in the world.[24] This turn away from universalistic and standard categories acknowledges the "diversity of Earth's regulatory systems" and accordingly prioritizes proximity and the devolution of decision-making power wherever proper.[25] Finally, the liberal faith in the improvability of institutions contrasts with EJ, which holds that fundamental legal changes are necessary to successfully address contemporary environmental challenges.[26]

These distinct influences have helped to produce significantly different legal forms of RoN, although each considers nature as a rights-bearing legal subject.[27] Articles 71 and 72 of Ecuador's 2008 Constitution, for instance, recognize nature itself as possessing substantive rights of restoration and respect.[28] The Constitution equates this universal nature to *Pachamama*, an Andean Indigenous personification of "the totality of all biosocial relations in the cosmos."[29] In contrast, negotiations between the New Zealand Crown government and the Indigenous Maori resulted in settlements and legislation there in the past decade that recognized a former national park and a river as having the status, rights, and responsibilities of a legal person. This arrangement provides these natural systems with "procedural access" to domestic legal and political institutions, but makes no mention of the substantive rights that appear in the Ecuadorian Constitution.[30] These terms of legal subject and legal person, often used synonymously, obscure the uncertainty over the various forms of legal presence for nature that have developed over the previous twenty years. Different terms for natural legal entities used in law may reflect further legal differences. For our purposes, regardless of what the entity is called, what is important is its role or impact in its respective legal system, particularly in relation to other legal entities. Mihnea Tănăsescu suggests that a legal entity's "relations with other subjects" are its distinguishing marks.[31] By highlighting these relations, Tănăsescu draws attention to how the legal presence of these natural entities may alter the operation of power, which we understand as the "total structure of actions brought to bear upon possible actions."[32]

Liberalism provides a helpful analytical frame for understanding this impact for several reasons. First, we can identify the values associated with liberalism that may be potentially challenged by the recognition of natural legal entities. To challenge these values is to necessarily challenge power relations, which are a never entirely static

24. Judith E. Koons, "Key Principles to Transform Law for the Health of the Planet," in *Exploring Wild Law: The Philosophy of Earth Jurisprudence*, (Peter Burdon, ed.), (Kent Town, South Australia: Wakefield Press, 2011), p. 47.
25. Op. cit., p. 53.
26. Humphreys, "Rights of Pachamama," 462.
27. Craig M. Kauffman and Pamela L. Martin, *The Politics of Rights of Nature: Strategies for Building a More Sustainable Future* (Cambridge, MA: MIT Press, 2021), p. 62.
28. Mihnea Tănăsescu, "Rights of Nature, Legal Personality, and Indigenous Philosophies," *Transnational Environmental Law* 9 (2020), 450, 447.
29. Joe Quick and James T. Spartz, "Competing Models of Ecocultural Belonging in Highland Ecuador," in *Routledge Handbook of Ecocultural Identity* (Tema Milsein and José Castro-Sotomayor, eds.) (New York: Routledge, 2020), p. 358.
30. Kauffman and Martin, *The Politics of Rights of Nature*, p. 64.
31. Tănăsescu, "Rights of Nature," 438.
32. Michel Foucault, "The Subject and Power," *Critical Inquiry* 8 (1982), 789.

relation between subjects "that structures possibilities for action in a given domain."[33] Beliefs associated with liberalism, such as the distinction between public and private life, and the conviction, associated with nineteenth-century British sociologist Herbert Spencer, that state action interferes with the "natural course of affairs" that produce societal progress, have shaped relations.[34] For instance, beliefs influenced by natural law about the inability of law to dictate to social "sentiment, instinct, and affinity" helped to justify the *Plessy v. Ferguson* 1896 United States Supreme Court decision that declared racial segregation constitutional.[35]

Such assumptions do not only concern humans. They also underpin the distinction that law routinely makes between human subjects and non-human objects, which also implicates power relations. One example is corporate legal personhood, influentially recognized in the U.S. in the 1886 United States Supreme Court decision *Santa Clara County v. Southern Pacific Railroad.* Scholars have noted that courts have treated corporations as legal persons as a matter of convenience. Doing so, for instance, limits human liability and facilitates conflict resolution.[36] Various legal systems' treatment of nature is a mirror image: it is convenient to treat nature and natural entities as objects whose disposition is firmly under human control. For legal systems to treat nature instead as a legal person or legal subject in its own right may disrupt the relations that rely on particular values associated with liberalism. Conflicts that revolve around claims of freedom, for instance, abound in liberal order. These conflicts are primed by a widespread persistent belief in human capability and forged by the rights, such as those of property, deemed necessary to protect this capability. This understanding of the capable self suggests a particular orientation to the world and "a sense of power, of capacity, in being able to order our world and ourselves."[37] Such a perception relies on the notion of an objectified physical environment over which humans have asserted mastery.

Second, an analytical frame of liberalism highlights the liminal position of the acknowledgment of rights of natural entities, as this recognition affirms some of the animating ideas of liberalism while disavowing others. Locating the liminal position of rights of nature in relation to liberalism is an important task because liberalism has continued to inform strategies, such as notions of sustainable development, meant to manage ecological and economic challenges. As it has evolved since the economic crisis of the 1970s, the term

33. Linda Martín Alcoff, "Foucault's Normative Epistemology," in *A Companion to Foucault* (Christopher Falzon, Timothy O'Leary, and Jana Sawicki, eds.) (Oxford: Wiley-Blackwell, 2013), p. 214.
34. Naomi Beck, "The *Origin* and Political Thought: From Liberalism to Marxism," in *The Cambridge Companion to the "Origin of Species,"* (Michael Ruse and Robert J. Richards, eds.) (Cambridge: Cambridge University Press, 2008), pp. 296–7.
35. Saidiya V. Hartman, *Scenes of Subjection: Terror, Slavery, and Self-Making in Nineteenth-Century America* (New York: Oxford University Press, 1997), p. 192.
36. Arthur W. Machen, Jr., "Corporate Personality," *Harvard Law Review* 24 (1911), 253, 266; Morton J. Horwitz, "S*anta Clara* Revisited: The Development of Corporate Theory," *West Virginia Law Review* 88 (1985), 221; Gellers, *Rights for Robots*, p. 145.
37. Charles Taylor, *A Secular Age* (Cambridge: Belknap Press, 2007), p. 300.

represents an attempt to realize sustainability within economic and political norms of liberalism.[38] Sustainable development seeks to reconcile environmental protection with economic growth, all the while delivering social justice. These "three pillars" are echoed in the United Nations Sustainable Development Goals (SDGs) of 2030.[39] What sustainable development means in practice, though, is contested. It has been associated with alternative visions of progress, such as RoN, but has also been associated with neoliberalism, if only as a "cushion" to encourage "more humane" neoliberal policies. [40] On the one hand, Ecuador's 2008 Constitution offered rights of nature as a means of creating "an alternative model of sustainable development."[41] On the other hand, the UN SDGs 2030 agenda has garnered criticism for its adoption of discourses of neoliberalism and its placement of human well-being at the center of its vision.[42] The declaration of the UN SDGs presumes a version of sustainable development achievable without threatening established national and international order, within which the 2030 agenda is committed to working.[43] The Indigenous Peoples Major Group, an organization that aims to coordinate and amplify Indigenous people's influence on development decisions, has argued that the SDGs reliance on economic benchmarks to define quality of life ignores subsistence-oriented patterns of life, culture, and exchange.[44] Furthermore, in spite of the "egalitarian ethic" that they seek to communicate, political scientist Heloise Weber contends that the SDGs deliberately seek to enact controversial neoliberal programs. [45] Weber points out that the SDGs refrain from making "universal guarantees of entitlements to" the necessities of life, including water, food, medical treatment, and shelter.[46] Moreover, the SDGs collectively look to "*commercial law as the ordering principle of development*," empowering property rights and limiting what might be the countervailing force of nature rights.[47] Consequently sustainable development, despite its contingent association with rights of nature and influence

38. G.J. Paton, *Seeking Sustainability: On the prospect of an ecological liberalism* (New York: Routledge, 2011), p. 92.
39. Tammy L. Lewis, *Ecuador's Environmental Revolutions: Ecoimperialists, Ecodependents, and Ecoresisters* (Cambridge, MA: MIT Press, 2016), p. 5.
40. Todd A. Eisenstadt and Karleen Jones West, *Who Speaks for Nature? Indigenous Movements, Public Opinion, and the Petro-State in Ecuador* (New York: Oxford University Press, 2019), p. 44.
41. Kauffman and Martin, *The Politics of Rights of Nature*, p. 79.
42. Louis J Kotzé and Duncan French, "The Anthropocentric Ontology of International Environmental Law and the Sustainable Development Goals: Towards an Ecocentric Rule of Law in the Anthropocene," *Global Journal of Comparative Law* 7 (2018), 26.
43. United Nations Department of Economic and Social Affairs, "Transforming Our World: the 2030 Agenda for Sustainable Development." Available at: https://sdgs.un.org/2030agenda (accessed September 15, 2021).
44. United Nations Sustainable Development Goals Knowledge Platform, "Major Group for Indigenous Peoples 2016 High Level Political Forum Paper." Available at: https://sustainabledevelopment.un.org/index.php?page=view&type=30022&nr=282&menu=3170 (accessed November 11, 2021).
45. Heloise Weber, "The Politics of 'Leaving No One Behind': Contesting the 2030 Sustainable Development Goals Agenda," *Globalizations* 14 (2017), 401.
46. Op. cit., 403.
47. Op. cit., 407 (emphasis in original).

as a strategy for addressing ecological crisis, may not provide an exit from the present political-economic paradigm. Instead, the identification of neoliberalism in SDGs indicates the continued importance of engaging with the frame of liberalism for understanding the potential consequences of RoN.

III. Rights of Nature and Liberalism: Tensions and Questions

Employing liberalism as an analytical framework brings into sharp relief the tensions between it and the recognition of nature as a legal entity. We focus here on four in order to demonstrate how their exploration may be helpfully informed by a historical perspective. These tensions illustrate how RoN may complicate presumptions of exclusively human political representation, control over the property one claims ownership of, the primacy of individual rights, and the universalism on which liberal rights themselves typically depend. The first tension is between RoN and property rights. Property is central to what liberalism claims to accomplish. The liberal concept of "possessive individualism" identified by philosopher C.B. MacPherson locates the self in "one's ability to own property privately and dispose of it as one chooses."[48] Subjectivity is defined by one's capability to own.[49] More concretely, liberal thinking recognizes the authority of property owners to dispose of their goods as they see fit, with minimal interference from others.[50] Environmental law, furthermore, has not significantly altered the centrality or influence of property rights and therefore generally accedes to human efforts to govern non-human nature.[51]

Accordingly, one of the NGOs that has been most influential in helping to spread RoN strategies, Community Environmental Legal Defense Fund (CELDF), has cited how property rights set the terms for humans' understanding of their relationship to nature as a reason for the need to rethink environmental law.[52] Scholars Cameron La Follette and Chris Maser assert that any legal system that successfully incorporates RoN has to focus on human use rather than human ownership of land. The authors cite the Ecuadorian Constitution and Bolivia's 2010 Law of the Rights of Mother Earth as examples of a different approach to property rights. The former treats nature as an independent entity whose right to restoration does not depend on either "'natural persons or legal entities.'" Article two of the latter notes that a "binding principle" of the law is that "neither living systems nor processes that sustain them may be commercialized, nor serve anyone's private property."[53]

48. Grace Kyungwon Hong, *The Ruptures of American Capital: Women of Color Feminism and the Culture of Immigrant Labor* (Minneapolis: University of Minnesota Press, 2006), p. 6.
49. Op. cit., p. 3.
50. John P. Christman, *The Myth of Property: Toward an Egalitarian Theory of Ownership* (New York: Oxford University Press, 1994), p. 6; Lynda L. Butler, "The Pathology of Property Norms: Living Within Nature's Boundaries," *Southern California Law Review* 73, (2000), 983.
51. Geoffrey Garver, "Are Rights of Nature Radical Enough for Ecological Law?" in *From Environmental to Ecological Law* (Kirsten Anker et al. eds.) (New York: Routledge, 2021), p. 90.
52. Cristina Espinosa, "Interpretive Affinities: The Constitutionalization of Rights of Nature, *Pacha Mama*, in Ecuador," *Journal of Environmental Policy & Planning* 21 (2019), 612.
53. Cameron La Follette and Chris Maser, *Sustainability and the Rights of Nature: An Introduction* (Boca Raton: CRC Press, 2017), p. 162; World Future Fund, "Law of Mother Earth the Rights of Our Planet: A Vision From Bolivia." Available at: http://www.worldfuturefund.org/Projects/Indicators/motherearthbolivia.html (accessed November 11, 2021).

Scholars have accordingly asked whether the recognition of rights of nature may lead to a broad reconsideration of economic patterns, particularly the primacy of property rights and capitalist development. Geographer Sarah Radcliffe observes that Ecuador's constitutional rights of nature provisions facilitate for the first time in Latin America the significant influence on state economic programs of "nonwestern conceptions of development."[54] Carolina Valladares and Rutgerd Boelens argue, conversely, that those rights may nevertheless eventually be reconciled with "state-centrist and/or neoliberal rules and forces," the latter of which allows for difference that does not threaten the economic and political arrangements that complement capitalism.[55] Craig Kauffman and Pamela Martin claim in a more recent analysis of court decisions applying RoN there that although these rights did not alter the "extractivist development agenda" in the first decade after the constitutional recognition of nature's rights, after 2019 lawsuits challenging mining projects saw greater success in court.[56] These recent successes suggest that the rights which they cited in fact may "change the development dynamic to include a more biocentric approach."[57]

The previous extension of rights to other legal subjects, whose recognition almost always threatens the property rights of others, provides an important comparative dimension to assess this developing impact and potential of RoN. Indeed, the questions scholars have asked about each are similar. The emancipation of enslaved peoples in the U.S., Jamaica, Brazil, Cuba, and elsewhere represented a challenge to labor systems and property rights, including freedpeople's claims to land they had worked while enslaved. Scholars have scrutinized the extent to which these emancipations threatened plantation rationalities that accompanied racial slavery. These examples illustrate not only the importance of focusing on aspirations of those whose rights are newly recognized, but also the ways in which duress compatible with liberal notions of freedom was brought to bear on those aspirations, subordinating them to prevailing patterns of production.

The aspirations of freedpeople had the potential to disrupt patterns of production. Rather than work in the service of export economies as they had while enslaved laborers, former slaves in the U.S., Haiti, and elsewhere often expressed desires to be self-sufficient farmers focused on producing crops they themselves would largely consume, with minimal attention to cash crops.[58] Where they were able to resist efforts by others to leave them little choice but to produce commodities like sugar and cotton, they maintained this focus on self-sufficiency and local trading. Their desires thus represented a potential rupture in the global economy of credit and cash crops. Emancipating

54. Sarah A. Radcliffe, *Dilemmas of Difference: Indigenous Women and the Limits of Postcolonial Development Policy* (Durham: Duke University Press, 2015), p. 279.
55. Carolina Valladares and Rutgerd Boelens, "Extractivism and the rights of nature: governmentality, 'convenient communities' and epistemic pacts in Ecuador," *Environmental Politics* 26 (2017), 1029.
56. Kauffman and Martin, *The Politics of Rights of Nature*, p. 103.
57. Op. cit., p. 116.
58. Eric Foner, *Nothing But Freedom: Emancipation and Its Legacy* (Baton Rouge: Louisiana State University Press, 1983), pp. 12–13, 108; Foner, *Reconstruction: America's Unfinished Revolution, 1863–1877* (New York: Harper & Row, 1988), pp. 108–109.

governments often did what they could to limit such challenges. In the U.S. South, laws requiring landowners to fence their property initially often pertained solely to counties with high African American populations. Coupled with this new prohibition on the right to free grazing of livestock was the restriction of hunting and fishing rights. As historian Eric Foner observes, such measures raised obstacles to Blacks' opportunities "to obtain food or income without working on plantations."[59]

Post-emancipation histories highlight the importance of placing in comparative perspective understandings of the objectives of non-human subjects. The aspirations of formerly enslaved people, denigrated if not ignored in earlier historical treatments of post-emancipation societies, rightly play a central role in recent historians' own assembling of the past.[60] The aspirations of the one are incommensurate with those of the other; attempting to know the objectives of rivers presents a completely different set of challenges than attempting to know the objectives of historical human subjects. With the former task in mind it is possible to turn to Bruno Latour's prescient suggestion in the late 1990s, predating almost all rights of nature legal scholarship and efforts, that natural features cannot be treated as simply instrumental means for humans' plans. If the ends of formations such as rivers are not recognized, it will lead to quixotic human achievements like a "canalized river," which stands as an example of a physical formation being "treated as merely a means, instead of also being taken as an end."[61] Such natural non-humans should instead be respected as entities whose "ends" must be considered. Latour argues that this is no more than a recognition of the work done by ecologists to chart the functional relationships between humans and non-humans.[62]

A historical perspective on the potential of a new legal subject to foster different economic patterns also suggests that attention to formal rights should be balanced with scrutiny of the power relations and coercion that continue to populate post-emancipation liberal societies. The recognition of equal rights, historian Samuel Moyn observes, leaves undisturbed "all the forms of subordination that have proven compatible with formal emancipation."[63] The varieties of coercion still at play in a liberal society helps explain the limitations of rights-based liberation and change. While Marx himself considered the recognition of equal rights and creation of legal subjects to be a laudable goal, such "'political emancipation'" as he termed it only represented the "'final form of human emancipation within the hitherto existing world order,'" and thus helped to perfect rather than undermine liberal capitalism.[64] In Marx's eyes, the extension of equal rights was

59. Foner, *Reconstruction*, p. 203.
60. Michael Perman, "Eric Foner's *Reconstruction*: A Finished Revolution," *Reviews in American History* 17 (1989), 74.
61. Bruno Latour, "To Modernise or Ecologise? That is the Question," trans. Charis Cussins, in *Remaking Reality: Nature at the Millenium* (Bruce Braun and Noel Castree, eds.) (New York: Routledge, 1998), p. 232.
62. Op. cit., p. 230.
63. Samuel Moyn, "Putting Rights in Their Place," *Boston Review*, February 21, 2018. Available at: http://bostonreview.net/forum/remake-world-slavery-racial-capitalism-and-justice/samuel-moyn-putting-rights-their-place (accessed November 11, 2021).
64. Walter Johnson, "Agency's Ghost," in *Slavery's Ghost: The Problem of Freedom in the Age of Emancipation* (Baltimore: Johns Hopkins University Press, 2011), p. 30, citing Karl Marx, "On the Jewish Question," Marxists Internet Archive. Available at: www.marxists.org/archive/marx/works/1844/jewish-question (accessed November 11, 2021).

itself complicit in the hegemony of capitalism by helping to realize what he identified as the development of "abstract labor," which facilitated commodity exchange within capitalist systems.[65] A focus on the tools consonant with liberal freedom that nonetheless constricted freedpeople's abilities to fulfill their aspirations can generate comparisons with the instruments that have emerged in political collectives to attenuate the implications of the recent recognitions of the rights of natural non-humans.

The second tension is the ability of liberal democratic institutions and ideas such as representation, meant to empower "individual agency conceived as the capacity for rational self-determination," to accommodate non-human legal subjects.[66] Liberal political theory provides support for democratic states and institutions by emphasizing individuals' ability to give consent and thus demonstrate their capacity for rationality. Such consent is also necessary for governing institutions to claim to legitimately perform the function of representation.[67] As political theorist Philip Pettit notes, being representable is part of the definition of the people who belong to a liberal democratic polity.[68] Representation is thus central to liberalism and the legitimacy of liberal institutions.[69] However its meaning and role for "legal persons beyond the classical rational subject" remains contested and vulnerable to the abuse of the representative agent's power, what legal scholar Andreas Fischer-Lescano calls "representation's destructive potential."[70]

As scholars have noted, even when recognized by states, the rights claims of nature are not self-evident. People may use those claims as cover for their own desires.[71] This possibility for the exploitation of opportunities to represent nature can be amplified by specific representational arrangements. New Zealand and Ecuador have created significantly different structures for facilitating representational claims by humans on behalf of non-humans. New Zealand's recognition of specific entities has been coupled with a specific structure defining who can make representational claims about the interests of the entities. For instance, the institutional structure gives the Whanganui iwi's representational claims legal force while limiting the geographical scope of those claims to the river and its ecosystem. In contrast, Ecuador allows anyone to make representational claims to speak for an all-encompassing nature. While anyone may make such claims, each claim may not be equally credible or successful. Kauffman and Martin demonstrate

65. Dipesh Chakrabarty, *Provincializing Europe: Postcolonial Thought and Historical Difference* (Princeton: Princeton University Press, 2008), p. 91, New Edition.
66. Paul Fairfield, *Moral Selfhood in the Liberal Tradition* (Toronto: University of Toronto Press, 2000), p. 4.
67. Paulina Ochoa Espejo, *The Time of Popular Sovereignty: Process and the Democratic State* (University Park: Pennsylvania State University Press, 2011), p. 33.
68. Philip Pettit, "Rawls's Political Ontology," *Politics, Philosophy & Economics* 4 (2005), 166. Also see Ochoa Espejo, *The Time of Popular Sovereignty*, p. 37.
69. Karen Bird, Thomas Saalfeld and Andreas M. Wust, "Ethnic Diversity, Political Participation and Representation," in *The Political Representation of Immigrants and Minorities* (Bird, Saalfeld and Wust, eds.) (New York: Routledge, 2011), pp. 4–5.
70. Andreas Fischer-Lescano, "Nature as a Legal Person: Proxy Constellations in Law," *Law & Literature* 32 (2020), 254–5.
71. Mihnea Tănăsescu, *Environment, Political Representation, and the Challenge of Rights: Speaking for Nature* (New York: Palgrave Macmillan, 2016), p. 145.

that for the first seven years after the country's 2008 Constitution came into force, claims on behalf of RoN by civil society organizations was the least successful "pathway" to enforcement, implying that these nature protections are not necessarily furthering the creation of inclusive, responsive institutions. Furthermore, the Ecuadorian government has used its representational opportunities in what Kauffman and Martin term an "instrumental" manner.[72] The most infamous example came in 2011, when the government cited the rights of nature as what David Boyd calls a "pretext" for halting the prohibited mining of gold in the Amazon being practiced by thousands of distressed Ecuadorians.[73] Only one year later, however, the same government supported a large-scale mining project located "in an Amazonian biodiversity hotspot."[74]

Beyond the possibility of abuse of representative responsibilities and opportunities, there are questions as to how or even whether nature can be represented. Tănăsescu, for instance, is pessimistic about the limits of knowledge set by the representational conceit of recognizing rights of natural non-humans. Due to the constraints of what can be known about such an entity, it is impossible to be certain about "*how* this being is to be represented." Instead, in defining representational arrangements, the best-case scenario is to admit uncertainty about "what non-human subjects *are really like*." In effect, Tănăsescu advises that the lack of certainty is not a temporary condition to be overcome but rather a permanent condition associated with this right.[75]

As its potential for abuse suggests, representation has historically been tightly bound to power relations. The historical examples discussed here illustrate the ways that liberal representation does not so much transmit as mediate the aspirations of the represented. These examples highlight the effects of asymmetries of power between the represented and their representatives. Comparative analysis of human and non-human representation can draw our attention to notions of the perceived power of nature and how this perception may impact representation. Children, for instance, are ambiguous liberal subjects, and can provide an informative historical comparison for nature's rights. Article 3 of the nearly universally ratified United Nations Convention on the Rights of the Child lays out aspirational guidelines for the representation of children's rights, stating that "the best interest of the child shall be a primary consideration" in all action concerning children.[76] It does not, however, declare how this "best interest" is established. The debates between 1919 and 1973 that preceded the conventions on minimum age for admission to work within the ILO show that the best interest of the child was negotiable and subordinate in relation to the interests of more powerful players.[77] Concern for bottom-line economic arguments translated into policies that prioritized work for "male breadwinners" over women and children workers who needed the income generated by their own work, as

72. Kauffman and Martin, *The Politics of Rights of Nature*, p. 80.
73. Boyd, *The Rights of Nature*, p. 177.
74. Op. cit., p. 178.
75. Tănăsescu, *Environment*, p. 20 (emphasis in original).
76. United Nations, "Convention on the Rights of the Child," Article 3. Available at: https://www.unicef.org/child-rights-convention/convention-text (accessed November 9, 2021).
77. Marianne Dahlén, *The Negotiable Child: The ILO Child Labour Campaign 1919–1973* (law diss., Uppsala University, 2007).

poverty made it necessary that all family members contribute to the household economy, and school was not available for all. Effectively, then, the interests of adult male workers were represented, as children had little power to contest this interpretation of what their rights demanded.

The capability of humans to contest the terms and content of their representation, however, often does not remain static. The gap in the "social profiles" of movement leaders and grassroots members may widen depending on the conditions and structures of representation as well as the relative power of the represented, their representatives, and the audience to whom the claims are directed. During U.S. Reconstruction between 1865 and 1877, Black Republican state legislators largely did not address some of the most urgent concerns of Black agricultural workers, particularly the latter's ability to homestead land. A significant majority of these representatives did not farm themselves and, historian Steven Hahn argues, brought with them "bourgeois notions of respectability" that included respect for property rights.[78] Representational relationships continued after the near-complete disenfranchisement of African Americans in the Southern United States by the beginning of the 20th century. Those relationships necessarily changed shape, as the constituencies who could ultimately ratify those relationships, or accept those claims of representation, to use the influential terminology of Michael Saward, were no longer Black voters. Opportunities to affirm or reject representational claims of Blacks flowed instead to the audience rather than the objects of representation - those upper-class whites whom Jim Crow privileged, some of whom materially contributed to the claims of such "representative" African Americans as Booker T. Washington.[79]

By focusing on the dynamics created by such diminution of power, we can bring such historical examples into comparison with the representational responsibilities felt by Indigenous peoples in Ecuador. The pollution that harms a forest also affects Indigenous peoples' relations to it and thus their representation of it. Eisenstadt and Jones West note the views of Sarayaku shaman Sabino Gualinga, who observed that the Sarayku "'stop being people of the jungle'" when the jungle is grievously harmed.[80] In parts of Ecuador where the forests have not been harmed by economic development, "citizens care more about the environment per se."[81] Representation and degradation are related. Eisenstadt and Jones West have found that support for environmental protection is lower in places with a history of oil extraction than in places bypassed by this extractive process.[82] In the words of Achuar national president Tentets, when an area suffers pollution, "people think of ceasing to defend themselves. Those with a clean environment are going to keep defending it forever."[83]

78. Steven Hahn, *A Nation Under Our Feet: Black Political Struggles in the Rural South From Slavery to the Great Migration* (Cambridge: Harvard University Press, 2003), p. 261.
79. Aldon D. Morris, *The Scholar Denied: W.E.B. Du Bois and the Birth of Modern Sociology* (Berkeley: University of California Press, 2015), p. 12.
80. Eisenstadt and Jones West, *Who Speaks for Nature?*, p. 96.
81. Op. cit., p. 106.
82. Op. cit., p. 70.
83. Op. cit., p. 143.

The third tension reflects concerns over the universalistic aspirations associated with liberalism and the assumptions on which those aspirations rely. Ecuador's means of legal recognition of nature's rights highlights this concern. The legal personality that is accorded to all of nature there, according to political scientist Rafi Youatt, does not recognize the multiple natures that populate Amerindian ontologies.[84] Youatt frames the constitutionalization of nature's rights as a trade-off, where "the use of 'nature'" allows for the inclusion of Indigenous ideas within "state processes of law." This trade-off requires "making Pachamama into nature – a cultural variation on a thing already known to be a singular thing."[85] Other scholars appear more pessimistic about the effects of fitting an undifferentiated nature into legal subjectivity. Mihnea Tănăsescu, for instance, criticizes the "universalism" that has been applied to nature in Ecuador, as this universalism conceals particular presumed attributes of personhood. The Ecuadorian Constitution fashions its version of "nature on the model of the human person" with assumed "intrinsic characteristics and values."[86] The document's acknowledgment of nature's legal personhood is pernicious, because the model of the human person may restrict how "Indigenous philosophies manifest" in the rights of nature.[87] Similar to Tănăsescu, Geoffrey Garver argues that the concept of personhood cannot be detached from the human-centered perspective that nourished it.[88]

Humanity-inflected personhood may thus limit the ability of RoN to secure a place of public authority for alternatives to dominant ontologies and create new political opportunities in the process. Scholars have explored the disruptive impact that RoN may have on the dichotomy between humanity and nature and what Radcliffe identifies as the "liberal premise of development as human mastery over nature."[89] For instance, Valladares and Boelens argue that "as an act of intercultural translation," RoN in Ecuador may make possible an "epistemic coalition," encompassing non-Indigenous and Indigenous members, that may generate new political possibilities.[90] As part of this coalition, Indigenous and non-Indigenous collectives would support varied conceptions of the natural world, including ones that reject a strict separation between nature and culture, non-human and human.[91] Such alliances would make possible the revitalization of debate over discourses and decisions that state institutions have sought to "depoliticize," such as plans to extend extractive efforts.[92]

Much as the scholars discussed above have critiqued the universalism, norms and assumptions packed into the figure of the human who lends meaning to personhood,

84. Rafi Youatt, "Personhood and the Rights of Nature: The New Subjects of Contemporary Earth Politics," *International Political Sociology* 11 (2017), 52.
85. Op. cit., 50.
86. Tănăsescu, "Rights of Nature," 450–451.
87. Op. cit., 447.
88. Garver, "Are Rights of Nature Radical Enough," pp. 93–94.
89. Radcliffe, *Dilemmas of Difference*, pp. 277–278.
90. Valladares and Boelens, "Extractivism and the rights of nature," 1026 (first quote), 1031 (second quote).
91. Op. cit., 1019.
92. Op. cit., 1027–1029 (quotation on 1029).

historians have explored the gendered and racialized aspects of the exclusions internal to liberal universalism. Historian Joan Scott demonstrates the gendered limits of the "proclaimed universalism" of French republican faith since the First Republic's establishment.[93] In *The Second Sex* Simone de Beauvoir asserts that for the unfortunate French woman, her status was determined in the Napoleonic Code where republican rights were enshrined, and which for more than a century greatly held back her emancipation.[94] This contradiction was not dissolved by women's suffrage in 1944. Even after French women gained the right to vote, French feminists noted that citizenship "had failed to win for them autonomy – social, economic, or subjective." De Beauvoir believes that the "status of fully autonomous individuals" was impossible for women while they "continued to serve as 'others' to men."[95]

Scholars of liberalism in the U.S. have similarly argued that the supposedly universal liberal subject imagined by emancipation and the Reconstruction Acts was not neutral but rather gendered and racialized. How could a racialized person inhabit liberal subjectivity when, as scholar Grace Kyungwon Hong asserts, "to be racialized is to not own oneself"?[96] Although the "possessive individual" was a supposedly always accessible subject position, the United States "inherently privileged whiteness" as well as the gendered expectations attendant to "bourgeois domesticity."[97] The universalistic claims of liberalism and the universal liberal subject were themselves based on racialized and gendered norms.

Particularly important in a comparative context is the effects of this paradox, as the scholars of RoN discussed above have voiced concerns about the possible consequences of the universalism and universalistic rights with which some RoN laws attempt to encompass and protect nature. A recent history of policing in mid-19th century Baltimore, for instance, points to these norms as reasons that property-owning African American men increasingly came into conflict with police.[98] In Southern cities, freedpeople's conduct altered "racial boundaries. . .in ways unheard of" prior to the Civil War, shocking whites accustomed to African Americans" enforced deference during slavery.[99] Black people's public actions and movements defied conservative white people's assumed racial and gender hierarchy.[100] Historians have registered the political consequences of this epistemological shock. Conservative whites ultimately alleviated their distress by violently imposing Jim Crow political and social order, which encompassed "segregated spaces, racial discrimination, disfranchisement, and lynching."[101] This conservative reaction, which W.E.B.

93. Joan Scott, *Only Paradoxes to Offer: French Feminists and the Rights of Man* (Cambridge: Harvard University Press, 1997), p. 165.
94. Simone de Beauvoir, *The Second Sex* (New York: Vintage Books, 2011), pp. 139–141.
95. Scott, *Only Paradoxes to Offer*, p. 170.
96. Hong, *The Ruptures Of American Capital*, p. 8.
97. Op. cit., p. 5.
98. Adam Malka, *The Men of Mobtown: Policing Baltimore in the Age of Slavery and Emancipation* (Chapel Hill: University of North Carolina Press, 2018), p. 219.
99. Hannah Rosen, *Terror in the Heart of Freedom: Citizenship, Sexual Violence, and the Meaning of Race in the Postemancipation South* (Chapel Hill: University of North Carolina Press, 2009), p. 24.
100. Op. cit., p. 27.
101. Stephen A. Berrey, *The Jim Crow Routine: Everyday Performances of Race, Civil Rights, and Segregation in Mississippi* (Chapel Hill: University of North Carolina Press, 2015), p. 3.

Du Bois terms the "counter-revolution of property," enforced deference, segregation, and disenfranchisement upon the Black population, foreclosing the political possibility of a multiracial coalition of laborers that had arisen during Reconstruction.[102]

The recognition that Jim Crow was not a reversion to an antebellum order suggests possible avenues for comparison. Jim Crow was a new solution to what to conservative whites was a new problem at the close of the nineteenth century: competition with African Americans for urban space, economic opportunities, and political power, as well as a reaction to Blacks' efforts to defend their equal status and citizenship.[103] Segregation was the "new technique of racial control" they created.[104] To suppose unchanging opposition to new legal subjects, whether these be human or non-human, is to impoverish the subsequent analysis. The emergence of these subjects may alter which epistemologies exert influence and which political alliances are possible. These possibilities present themselves to all political actors, not only those hoping to make the new legal subject a foundation for a new order. Youatt recognizes this potential in regard to Ecuador, noting that the idea of nature as a rights-holding entity may motivate "opposition as well as support."[105]

A fourth tension is between individual and collective rights. Recognition of the rights of natural non-humans may carve out a larger role for collective rights in legal and political arrangements. The "ethical individualism" that highly values autonomy and informs liberalism appears to leave little room for collective rights in its legal imaginary.[106] Critiques by communitarian scholars in the 1980s and beyond, however prompted some to rethink the objections of liberalism to group rights, in particular the potential of such rights to impair the autonomy of the individual.[107] Philosopher Will Kymlicka, for instance, argued that cultural group identities were important for the development of the individual.[108] As political scientist Rochana Bajpai pointed out, Kymlicka's approach made room for collective rights in liberal theory by claiming to bolster rather than displace the centrality of values such as freedom and equality. This approach limited the "minority cultures" worthy of support to those that stoutly supported the liberal value of "individual autonomy."[109]

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102. Walter Johnson, *The Broken Heart of America: St. Louis and the Violent History of the United States* (New York: Basic Books, 2020), p. 155; W.E.B. Du Bois, *Black Reconstruction in America: An Essay Toward a History of the Part Which Black Folk Played in the Attempt to Reconstruct Democracy in America, 1860–1880* (New York: Russell & Russell, 1935), p. 572.
103. Sarah Haley, *No Mercy Here: Gender, Punishment, and the Making of Jim Crow Modernity* (Chapel Hill: University of North Carolina Press, 2016), p. 10.
104. Carl Nightingale, *Segregation: A Global History of Divided Cities* (Chicago: University of Chicago Press, 2012), p. 1.
105. Youatt, "Personhood and the Rights of Nature," 51.
106. Michael Seymour, *A Liberal Theory of Collective Rights* (Montreal: McGill-Queen's University Press, 2017), p. 27.
107. Christopher Heath Wellman, "Liberalism, Communitarianism, and Group Rights," *Law and Philosophy* 18 (1999), 13–14.
108. Will Kymlicka, *Liberalism, Community, and Culture* (New York: Oxford University Press, 1989), p. 165.
109. Rochana Bajpai, *Debating Difference: Group Rights and Liberal Democracy in India* (New York: Oxford University Press, 2011), p. 5.

The legal recognition of non-human natural entities, however, may broaden possibilities for collective rights even within this liberal framework. RoN may facilitate the claims of Indigenous peoples to be acknowledged without first forcing those claims into the language of individualism and individual property ownership. The rights of rivers have been at the forefront of the incorporation of collective rights in liberal states. As Sue Jackson observes, calls by Indigenous peoples for states to recognize their people's collective ownership of water resources have the effect of questioning established legal frameworks, which typically presume the state's prerogative to "govern the use and control, if not ownership of water."[110] The recent Whanganui river agreement illustrates a compromise between notions of state sovereignty and Indigenous collective rights. The compact provides the Maori Whanganui iwi with an important role, currently equal to that of the state government, to represent and advance the well-being of the Whanganui river.[111] It therefore recognizes the collective rights of the Whanganui iwi. This agreement illustrates how the acknowledgment of nature's rights may facilitate the acknowledgement of the political legitimacy of groups that aspire to ideals other than "liberal values of individual autonomy."[112]

In addition to potentially providing an avenue for the recognition of collective rights, RoN may also widen the populations within those collectives to include non-humans as well as humans. Visa Kurki has contended, for instance, that the settlement between the Crown government and the Whanganui iwi effectively created a collective legal person "constituted by the sentient beings that depend on the river in one way or another."[113] The ramifications of such a collective of humans and non-humans are unclear at this point. As political scientist Rafi Youatt points out, the granting of rights "to a collective ecological subject moves the practice of rights to a new frontier," which raises implications for liberal nation-states used to recognizing individual rights bearers and political actors.[114]

Comparison suggests, however, that the reinterpretation of concepts closely associated with liberalism have facilitated states' ability to absorb prior challenges posed by collective rights. Rochana Bajpai, for instance, has examined the process by which collective rights gained a greater foothold in India during the 1980s and 1990s in order to ask whether "group-differentiated rights" can "be reconciled with liberal democratic principles."[115] Bajpai finds that the established authoritative liberal principles invoked to justify particular policies were reinterpreted so as to be "more accommodating of group rights."[116] This was the case with the value of secularism, which has been associated with liberalism since the French Revolution.[117]

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110. Sue Jackson, "Water and Indigenous Rights: Mechanisms and Pathways of Recognition, Representation, and Redistribution," *WIREs Water* 5 (2018), 3, https://doi.org/10.1002/wat2.1314.
111. Op. cit., 10.
112. Miodrag A. Jovanovic, *Collective Rights: A Legal Theory* (Cambridge: Cambridge University Press, 2012), p. 6.
113. Visa Kurki, *A Theory of Legal Personhood* (New York: Oxford University Press, 2019), p. 173.
114. Youatt, "Personhood and the Rights of Nature," 40, 52.
115. Bajpai, *Debating Difference*, p. 1.
116. Op. cit., p. 15.
117. Shadia B. Drury, "The Liberal Betrayal of Secularism," in *The Oxford Handbook of Secularism* (Phil Zuckerman and John R. Shook, eds.) (New York: Oxford University Press, 2017), p. 293.

The debate over the exemption of the Muslim minority in India from laws regarding the support of divorced women in the 1980s, known as the Shah Bano case, shows that important alterations to meanings of secularity supported the adoption of more substantial multicultural protections. Secularism remained authoritative, as all sides involved in the debate invoked it, even while differing over what respect for the concept required.[118] During the debates in the Constituent Assembly that drafted independent India's constitution, the commanding understanding of secularism conveyed the idea of a political sphere free from religion.[119] This demanded that all persons, no matter their religious identification, possess identical rights.[120] In the 1980s, though, the governing Congress party that advanced the legislation known as the Muslim Women (Protection of Rights on Divorce) Bill insisted that secularism meant "equal respect for all religions and minority rights."[121] This definition in turn encompassed the liberty of religious minorities "to live by their personal laws."[122]

This historical example suggests further avenues for comparison focused on how values and identities are subject to reinterpretation. Rather than being discarded, they may be reformulated to enable actions earlier considered antagonistic to those values. This mix of change and continuity provides a useful frame for comparative analysis. The ability of liberalism to absorb challenges such as collective rights does not mean that this process is free of consequences, either for the state or the populations whose collective rights are recognized. In India, both were affected. First, as Bajpai notes, the Shah Bano episode eroded the sense of "rights as universal prerogatives of citizenship and to render these akin to" favors willingly conferred by the state. Group claims on the state gave the state greater latitude in the future to bestow or withhold rights to certain categories of people.[123] Second, Bajpai pointed out that the state recognition of Muslim private law empowered particular actors among Muslims. Traditional male religious authorities typically accrue greater influence over the interpretation of "community rules" when their communities receive more autonomy. The state recognition reinforced the distribution of power within the Muslim population as it existed when the law was enacted and ultimately bolstered the stature of its orthodox elements.[124]

IV. Concluding Thoughts

RoN are unique, but not uniquely so. A comparative and historical framework may allay the tendency to exoticize rights of nature by examining the extent to which their development in sometime contentious and sometimes complementary relationship with democratic institutions is reflected in historical efforts to define and make meaningful the rights of human rightsholders. To construct this framework, we have identified tensions

118. Bajpai, *Debating Difference*, pp. 24–25.
119. Op. cit., p. 178.
120. Op. cit., pp. 189–90.
121. Op. cit., p. 178.
122. Op. cit., p. 209.
123. Op. cit., p. 201.
124. Op. cit., p. 207.

that occur when this legal recognition meets liberal patterns of legal, political, and economic order. A focus on these tensions as an organizing scheme highlights two points. The first is the centrality of power relations. It is necessary to examine how rights "structure" the power relations within which people live, as legal scholar Jennifer Nedelsky has described.[125] Personal interactions are interpenetrated by economic, social, and political relationships and decisions. In this conception, "each set of relations is nested in the next, and all interact with each other." Nedelsky calls for scholars to interrogate "the nested structures of relations" that have shaped people's efforts to realize their aspirations in the past and in the present.[126]

Second, constitutional law offers an important entry point for analysis of the multiple and interlinked forces that shape power relations. Rights and rightsholders are recognized through a variety of processes, each of which generate implications for the force those rights may harness. Comparison must also be cognizant of the very different constitutional ecologies of which each is a part. If comparison is to consider subjects of rights on their own terms, this must also take constitutional settings on their own terms as well. What is more, not even within the same constitutional setting is the meaning of a specific right or freedom self-evident. For instance, in most cases, human rights emanate from different sources. These sources may be 'external' – for example the Universal Declaration on Human Rights and the European Convention on Human Rights, – or 'internal' – chapters or enumerations in a national constitution. In addition, the rights are embedded at multiple levels of the constitutional system. In this complex setting, both the origin of a right and its position in a constitutional system have consequences for the interpretation of its meaning and force.

Such considerations will help to make full sense of the "exercise of collective power" which constitutions diagram.[127] Analysis of the operation of this power encompasses the institutional context within which rights are often embedded. Furthermore, as legal scholar Mark Tushnet notes, the study of 'the organization and application of public power' implies the necessary study of 'political power' as well.[128] Attention to each of these interlinked dimensions – rights as they are textually inscribed, institutionally embedded, and politically permeated – helps to integrate constitutional law into a broader set of relations. Although constitutions may present an apparent single vision of legal order, by generating material that calls for interpretation they provide a foundation for conflict between what historian Hendrik Hartog refers to as "socially constituted visions of legal order."[129] Hartog suggests we approach law "as an arena of conflict within which alternative social visions" compete. This expansive understanding of law asks us to dig into the context surrounding the recognition of rights and rightsholders and consider the prospective impact of this recognition on the power relations that characterize contending legal and social orders.

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125. Jennifer Nedelsky, *Law's Relations: a Relational Theory of Self, Autonomy, and Law* (New York: Oxford University Press, 2011), p. 234.
126. Op. cit., pp. 30–31.
127. Mark Tushnet, "Introduction," in *Routledge Handbook of Constitutional Law* (Tushnet, Thomas Fleiner, and Cheryl Saunders eds.) (New York: Routledge, 2013), p. 1.
128. Op. cit., p. 2.
129. Hendrik Hartog, "Pigs and Positivism," *Wisconsin Law Review* 1985 (1985), 934.

Finally, here we sketch out two topics where we expect our approach to contribute insights to the critiques that scholars have previously made of RoN. These critiques represent a jumping-off point for comparative research into the ramifications of nature's rights for the transparency, accountability, and accessibility of democratic institutions and those institutions' work in mediating power relations. First, we will examine and place in historical perspective the concern with universalism that some critics of RoN have observed. As discussed above, some scholars are critical of Ecuador's RoN law for its universalism and embrace of "totality." This critique also opens up potential comparisons. Prior attempts to define a universal subject category like child and to fill it with a universal meaning of childhood entailed providing a very specific definition of both child and childhood. The effort to create a universal category reflected a particular viewpoint that owed a debt to Western European culture. The application of this ostensibly universal category to young people ignored the diverse meanings of childhood throughout the world. The creation of the categories of human and humanity has also imposed particular meanings. The notion of human personhood that is itself so important to rights claims is a "reduction," as historian Dipesh Chakrabarty has observed, "or an abstraction from the embodied and whole human being."[130] This avenue of comparison will analyze the consequences for subjects of rights – human, nature, child, and others, of the creation of the category that ostensibly empowers and benefits them.

The role of expert knowledge and technology in producing "truth" from legal subjects whose ability to express their interests and rights is suspect or compromised is another important challenge of RoN that can benefit from historical comparative analysis. As nature cannot speak, its interlocutors construct narratives of harm and regeneration. These techniques and their implications for democratic collectives can be placed in comparison with how the ability of other legal subjects to narrate truth and defend their own interests is facilitated. Accommodations for child witnesses in court, for instance, rely on expertise and judgments about what is needed to narrate "truth." Such accommodations as physical barriers in courtrooms or closed-circuit television that separate child witnesses from the accused, however, have the potential to infringe the rights of others because they arguably communicate a presumption of guilt, make it difficult for the defendant to challenge their accuser, and influence the perception of the message itself.[131] Comparing the effects of technology and expert knowledge on claims of truth, how these mediating interventions shape the narrative itself, and the extent to which they are perceived to threaten the rights of other subjects can help to clarify how expertise may help or hinder the implementation of rights of nature.

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130. Dipesh Chakrabarty, *The Climate of History in a Planetary Age* (Chicago: University of Chicago Press, 2021), p. 38.

131. Bradley D. McAuliff and Margaret Bull Kovera, "The Status of Evidentiary and Procedural Innovations in Child Abuse Proceedings," in *Children, Social Science, and the Law* (Bette L. Bottoms, Kovera, and McAuliff, eds.) (Cambridge: Cambridge University Press, 2002), p. 415.

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