

# A Wrong Turn with the Rights of Nature Movement

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## ABSTRACT

*Governments in the United States and abroad are enacting Rights of Nature laws, which give enforceable legal rights to organisms and ecosystems, and many scholars have championed this burgeoning movement as one of the best hopes for preserving the environment.*

*Legal rights for nature seem visionary, but policymakers and scholars are overlooking considerable problems with this approach. This Article spotlights these problems, including the vague and incoherent content of nature’s rights, the difficulty of defining the boundaries of natural entities, the absence of limiting principles for the rights, and the legislation’s lack of guidance for humans. Because the Rights of Nature movement relies on ad hoc litigation to enforce nebulous rights in court, it will likely lead to arbitrary and oppressive outcomes for humans while under-protecting nature. For these reasons, Rights of Nature is a wrong turn for environmental law and policy.*

*While showing why the Rights of Nature project is likely to be ineffective and even unjust, this Article also examines possible reforms to make it palatable. I conclude that none of the reforms are workable. Rights of Nature offers a resonant battle cry for activists, but it is the wrong approach for addressing the global environmental crisis—and it could take us backward to a more polluted, degraded environment.*

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## INTRODUCTION

Environmental scholars and activists are increasingly supporting Rights of Nature (RoN) legislation that grants legal rights to animals, plants, inanimate natural features (rivers, forests, parks), or nature as a whole. What was once a fringe idea is moving to the mainstream, and lawmakers in the United States and abroad are now writing RoN provisions into legislation. In the United States, the movement is gaining traction at the local level, with more than fifty U.S. municipalities enacting RoN ordinances in the past decade.<sup>1</sup> More than a dozen nations have enacted RoN legislation or constitutional provisions,<sup>2</sup> and U.N. Secretary-General António Guterres has labeled RoN the “fastest growing legal movement of the twenty-first century.”<sup>3</sup>

With so many governments enacting RoN legislation, the academic community should take a hard look at RoN’s promises and drawbacks. RoN legislation is

1. Alexandra Huneus, *The Legal Struggle for Rights of Nature in the United States*, 133 WIS. L. REV. 133, 134 (2022). The municipalities include Pittsburgh, Pennsylvania; Santa Monica, California; Orange County, Florida; Tamaqua Borough, Pennsylvania; Mora County, New Mexico; Toledo and Athens, Ohio; and Mountain Lake Park, Maryland. *Id.* Four Native American Nations have also enacted RoN laws. *Id.* See also Katie Surma, *Does Nature Have Rights? A Burgeoning Legal Movement Says Rivers, Forests and Wildlife Have Standing, Too*, INSIDE CLIMATE NEWS (Sept. 19, 2021), <https://perma.cc/BR6D-RSX5>; Robin Kundis Craig, *Rights of Nature Is Becoming a U.S. Reality*, 37 NAT. RES. & ENV’T 50, 51 (2022) (listing jurisdictions).

2. Alex Putzer et al., *Putting the Rights of Nature on the Map: A Quantitative Analysis of Rights of Nature Initiatives Across the World*, 18 J. MAPS 89 (2022); Mihnea Tănăsescu, *Rights of Nature, Legal Personality, and Indigenous Philosophies*, 9 TRANSNAT’L ENVTL. L. 429 (2020).

3. U.N. Secretary-General, *Harmony with Nature*, ¶ 129, U.N. Doc. A/74/236 (July 26, 2019).

designed to be enforced through injunctions and damage awards, so it is more than symbolic. Proponents' goal is for natural entities to become plaintiffs, asserting their new legal rights (with the assistance of guardians) against humans. Many proponents believe that RoN legislation will eventually challenge entrenched legal systems, disrupt everything from environmental law to corporate law, and transform humans' relationship to the natural world.<sup>4</sup>

In embracing this seemingly visionary rights-based approach, both policy-makers and scholars have blind spots about whether the RoN project is a workable legal program. Their inattention to practical implementation is worrisome because many see RoN laws as a potential replacement for the vast body of state and federal environmental statutes already in place.<sup>5</sup> Conferring legal rights on nature, in the view of many proponents, is not just a complement to existing environmental law. It is a substitute for it.

This vague rights-based approach, however, is utterly ill-equipped to perform the in-the-trenches legal work (e.g., rulemaking, standard-setting, inspections, investigations, and enforcement) that is essential to meaningful environmental protection. Conferring rights on nature is unlikely to protect nature effectively.

This Article explores, with an environmental lawyer's perspective, these drawbacks of the RoN movement. Focusing on the United States, I explain how the rights that municipalities are now granting to nature, such as rights to "exist" or "flourish,"<sup>6</sup> would be implemented in practice. I show why a rights-based approach is likely to create arbitrary and oppressive outcomes for humans while weakening protections for nature. In the end, I conclude that the Rights of Nature movement is a wrong turn for environmental law and policy.

The problems with RoN's effectiveness begin with the vague and vacuous content of the rights themselves. The existing RoN ordinances in the United States create vast uncertainty about the scope of nature's rights, how judges would implement them, and what human activities would be prohibited. Although the recent legislation is *about* the legal rights of nature, it has to be *directed* at humans. Effective environmental statutes should provide guidance to humans about how to conform behavior to law, but the existing vague RoN ordinances do not.

A second, related problem is that the RoN movement has no limiting principle regarding granting rights to nature. To proclaim that "nature should have legal rights" is to dodge the hard questions: which components of nature? And what is the substance of the rights? Many RoN proponents take the maximalist position that *all* living things have legal rights, but they never acknowledge that the

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4. CRAIG M. KAUFFMAN & PAMELA L. MARTIN, THE POLITICS OF RIGHTS OF NATURE: STRATEGIES FOR BUILDING A MORE SUSTAINABLE FUTURE 222 (2021) (arguing that the legislation will transform "the DNA of Western legal systems and society").

5. See section I.D *infra*.

6. See ordinances in section I.B *infra*.

number of species on Earth ranges from an estimated 8.7 million to more than one *trillion* (if microbial organisms are included).<sup>7</sup> Most RoN advocates want to grant enforceable legal rights not only to every species, but to *every organism* within each species.<sup>8</sup> Many seek to grant legal rights to innumerable ecosystems and non-living entities as well. It is hardly straightforward, or presumptively desirable, to grant legal rights to nature when that agenda means conferring an amorphous set of legal rights on trillions of new rights-holders in the United States alone.

A third problem hindering the effectiveness of RoN is that the movement judicializes environmental protection, relying on the courts to adjudicate tort-like suits that would be brought on behalf of a natural entity against some purported human or corporate wrongdoer. But judicialization is a poor response to the environmental crisis. Judges lack the technical expertise to take the lead role in addressing complex and diffuse environmental harms, from biodiversity loss to climate change. Because courts hear only cases brought by litigants, they have no way to prioritize the most serious kinds of environmental damage.

Finally, the RoN movement will likely lead to oppressive outcomes for humans and few offsetting benefits for nature. The movement seeks to demote humans' constitutional and statutory rights in favor of the countervailing legal rights of rivers, plants, and insects.<sup>9</sup> The demotion of human rights, needs, and interests—championed as an end to anthropocentrism in law—is the essence of the RoN movement.<sup>10</sup> This kneecapping of human aspirations and enterprises is unjustified, and the legal fallout will be ugly. If RoN legislation gains traction in the United States, we are likely to see scattershot lawsuits against human activities that modify nature in some way, including farming, fishing, and construction. Almost every human activity, including eating, involves *some* harm to living organisms.

Nature's new legal rights will likely be weaponized by humans against other humans: to harass enemies, harm business competitors, bog down government initiatives in court, or block needed housing and infrastructure projects. The

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7. Camilo Mora et al., *How Many Species are There on Earth and in the Ocean?* 9 PLOS BIOLOGY 1, 2 (2011); Kenneth J. Locey & Jay T. Lennon, *Scaling Laws Predict Global Microbial Diversity*, 113 PROC. NAT'L ACAD. SCI. U.S. 5970, 5973 (2016) (estimating upward of one trillion microbial species, of which only 1.2 million have been cataloged).

8. See, e.g., Thomas Berry, *The Origin, Differentiation, and Role of Rights* (2001), <https://perma.cc/G437-GT87> [hereinafter Berry, *The Origin*] (“Since species exist only in the form of individuals, rights refer to individuals, not simply in a general way to species.”).

9. See Peter Burdon, *The Rights of Nature: Reconsidered*, 49 AUSTL. HUMANS. REV. 69, 85 (2010) [hereinafter Burdon, *The Rights of Nature*] (“[T]he greatest consequence from recognising the rights of nature is that it contextualises and places limits on human property rights.”); Oliver A. Houck, *Noah's Second Voyage: The Rights of Nature as Law*, 31 TUL. ENVTL. L.J. 1, 34-35 (2017).

10. DAVID R. BOYD, *THE RIGHTS OF NATURE: A LEGAL REVOLUTION THAT COULD SAVE THE WORLD* xxv (2017) (“The notion that humans are distinct from, and superior to, other animals permeates Western legal systems, producing outcomes that are at odds with reality.”). See also *id.* at xxviii-xxix (“We're the only species with rights to the land, water, wildlife, and ecosystems of the planet.”).

political backlash will be swift. After all, who would want to live under a system of laws that threatens liability at every turn but gives no guidance on how to avoid it?

Courts in the United States are beginning to recognize these problems with RoN legislation. They have invalidated every municipal RoN ordinance that has been challenged.<sup>11</sup> Courts have held that these ordinances exceed local authority, strip away constitutionally guaranteed rights, or conflict with state statutes or constitutions.<sup>12</sup> These smack-downs from both state and federal courts should prompt some strategic reconsideration, yet there is no sign that the RoN movement is folding up its tent.

In questioning the viability, practicality, and effectiveness of the RoN project, I am by no means minimizing the scale of national and global environmental problems. I share the views of RoN scholars on the severity of the environmental crisis,<sup>13</sup> but I disagree with their legal response. It is precisely *because of* the severity of the crisis that progressive lawmakers and scholars should reject RoN. The scale of interlocking environmental problems should lead policymakers to focus on effective, workable solutions. We need innovative legal tools to combat climate change, biodiversity loss, water pollution, and the spread of toxic chemicals.<sup>14</sup> We also need a stronger cultural commitment to co-existing with the more-than-human world. But granting enforceable legal rights to every living thing is not the path to these goals.

This Article focuses on the RoN movement in the United States, but my analysis is not limited to the municipal RoN ordinances enacted to date. I also critique the larger objectives of the RoN movement, challenging the view that RoN legislation offers a viable alternative paradigm for environmental protection. I aim to influence the growing group of scholars and policymakers invested in building out RoN legislation in the United States.

I purposely do not discuss the possibilities for RoN legislation abroad. Other countries have embraced RoN legislation far more extensively than the United States, and there are dozens of scholars who have analyzed RoN legislation

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11. Surma, *supra* note 1; Drewes Farms P'ship v. City of Toledo, 441 F. Supp. 3d 551, 558 (N.D. Ohio 2020), *appeal dismissed*, No. 20-3368, 2020 WL 3619934 (6th Cir. Apr. 14, 2020), *appeal dismissed*, No. 20-3361, 2020 WL 3620205 (6th Cir. May 5, 2020); SWEPI, PL v. Mora Cnty., 81 F. Supp. 3d 1075, 1088 (D.N.M. 2015); Pa. Gen. Elec. Co. v. Grant Twp., 139 F. Supp. 3d 706, 721-22 (W.D. Pa. 2015); Spokane Entrepreneurial Ctr. v. Spokane Moves to Amend the Const., 369 P.3d 140, 145 (Wash. 2016) (en banc).

12. See cases cited *supra* note 11.

13. See, e.g., Houck, *supra* note 9, at 35-36; Hope M. Babcock, *A Brook with Legal Rights: The Rights of Nature in Court*, 43 *ECOLOGY L.Q.* 1, 19 (2016); David Takacs, *We Are the River*, 2021 *U. ILL. L. REV.* 545, 545-46, 550 (2021).

14. U.N. ENV'T PROGRAMME, EMISSIONS GAP REPORT 2022: THE CLOSING WINDOW xix (Oct. 27, 2022), <https://perma.cc/FG6L-M3VN> (calling for at least a 30% reduction in global greenhouse gas emissions by 2030 to stay on track toward the Paris Agreement's 2-degree Celsius goal); Yunne-Jai Shin et al., *Actions to Halt Biodiversity Loss Generally Benefit the Climate*, 28 *GLOB. CHANGE BIOLOGY* 2846, 2847-48 (2022) (discussing relationship between greenhouse gas emissions and biodiversity).

abroad, discussing implementation and court decisions in countries as diverse as Ecuador, India, and New Zealand.<sup>15</sup> With my focus on the United States, I make no claim in this Article about whether RoN could operate successfully in other legal systems. I also give minimal treatment to aspects of the RoN project that have been discussed at length elsewhere, such as nature's standing under Article III, how guardians for nature might be appointed, or the philosophical bases for conferring rights.<sup>16</sup> I am instead interested in whether the RoN movement offers a workable program for nature protection. It is that issue, more than any other, that determines whether resources should be poured into the RoN project.

My analysis proceeds as follows. In Part I, I provide an overview of the RoN movement in the United States, beginning with Christopher Stone's foundational 1972 article "Should Trees Have Standing?"<sup>17</sup> I then turn to the wave of local RoN ordinances in the United States and discuss why localities and activists are attracted to RoN concepts. Part I also discusses the principal goals and strategies of the RoN movement.

Part II explores why a rights-based approach is unlikely to be effective at protecting nature. I focus on the vagueness and incoherence of RoN concepts and their concomitant lack of guidance to humans. I argue that the litigation-based, judicialized strategy of RoN will underprotect nature while exposing humans to open-ended, arbitrary liability.

Finally, Part III considers whether RoN principles could be reformed (or made more palatable) to provide an effective response to the environmental crisis. One potential reform is to strike a balance between nature's rights and human rights. Some RoN proponents have suggested that such a balancing process (likely conducted by judges) would spur desirable accommodation with the natural world. A second potential reform is to legislate, in far more detail, the substantive content of nature's rights, including their limits and exceptions. In this way, the vague phrasing and vacuous content of nature's rights might be sharpened. I conclude that neither of these potential reforms would address the fundamental problems of the RoN movement. The unworkability of RoN is inherent. It is baked into the

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15. See, e.g., ANTHONY R. ZELLE ET AL., *EARTH LAW: EMERGING ECOCENTRIC LAW* 473–622 (2021); Huneus, *supra* note 1, at 133–34; KAUFFMAN & MARTIN, *supra* note 4; MIHNEA TANASESCU, *ENVIRONMENT, POLITICAL REPRESENTATION AND THE CHALLENGE OF RIGHTS: SPEAKING FOR NATURE* 2 (2016); Craig M. Kauffman & Pamela L. Martin, *Constructing Rights of Nature Norms in the U.S., Ecuador, and New Zealand*, 18 *GLOB. ENVTL. POL.* 43 (2018); Laura Schimoller, *Paving the Way for Rights of Nature in Germany: Lessons Learnt from Legal Reform in New Zealand and Ecuador*, 9 *TRANSNAT'L ENVTL. L.* 569 (2020); Lidia Cano Pecharrroman, *Rights of Nature: Rivers That Can Stand in Court*, 7 *RESOURCES* (2018).

16. See Babcock, *supra* note 13, at 26–33 (discussing Article III standing for natural objects); Burdon, *Wild Law: The Philosophy of Earth Jurisprudence*, 35 *ALT. L.J.* 62 (2010) [hereinafter Burdon, *Wild Law*] (discussing philosophical bases for conferring rights on nature).

17. Christopher D. Stone, *Should Trees Have Standing?—Towards Legal Rights for Natural Objects*, 45 *S. CAL. L. REV.* 450 (1972).

very idea of conferring enforceable legal rights on innumerable organisms and ecosystems to protect the natural world.

## I. THE RIGHTS OF NATURE MOVEMENT IN THE UNITED STATES

In the United States, scholars have been discussing a rights-based framework for environmental protection for more than fifty years,<sup>18</sup> and the intellectual roots of the movement can be traced to natural law traditions dating back to Thoreau and Jefferson, as well as to indigenous cultures.<sup>19</sup> It was not until 2006, however, that a U.S. municipality enacted RoN principles into law.<sup>20</sup> Since then, the U.S. movement has grown rapidly. Fueled by grassroots mobilization, dozens of municipalities have enacted RoN legislation (the RoN movement has gained no traction at the state or federal level).<sup>21</sup>

In this Part, I discuss the origins of the RoN movement and the reasons why localities in the United States are attracted to RoN principles. I also describe the main claims and goals of leading RoN proponents.

### A. THE ORIGINS OF THE U.S. RIGHTS OF NATURE MOVEMENT

Christopher Stone, a University of Southern California law professor, launched the RoN movement with his foundational 1972 article, “Should Trees Have Standing?”<sup>22</sup> That article, widely assigned today in American law schools, set forth “the root philosophical questions” about nature’s rights in a legal system.<sup>23</sup> Stone argued that natural entities such as trees and lakes should have legal personhood and standing to sue.<sup>24</sup> Humans could apply to be appointed as nature’s guardians, Stone suggested, and then seek redress on nature’s behalf.<sup>25</sup> In this way, nature could gain standing in cases where environmental organizations would not have access to the courts. Even if humans could obtain standing, Stone argued, a suit by a natural entity itself would better capture the full scope of nature’s harms.<sup>26</sup>

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18. See Stone, *supra* note 17; Laurence H. Tribe, *Ways Not to Think About Plastic Trees: New Foundations for Environmental Law*, 83 YALE L.J. 1315 (1974).

19. RODERICK FRAZIER NASH, *THE RIGHTS OF NATURE: A HISTORY OF ENVIRONMENTAL ETHICS* 15, 27, 29 (1989); Peter Burdon, *Earth Rights: The Theory*, IUCN ACAD. OF ENVTL. L. E-JOURNAL 3 (2011), <https://perma.cc/C5FP-HNGC> (2011); Huneeus, *supra* note 1, at 139-140.

20. Huneeus, *supra* note 1, at 144 & n.69.

21. *Id.*; Tănăsescu, *supra* note 2, at 430.

22. Stone, *supra* note 17.

23. Charles F. Wilkinson, *Justice Douglas and the Public Lands, in HE SHALL NOT PASS THIS WAY AGAIN: THE LEGACY OF JUSTICE WILLIAM O. DOUGLAS* (Stephen L. Wasby ed. 1990); BOYD, *supra* note 10, at 108 (“Professor Stone’s visionary article continues to be widely discussed in law schools nearly fifty years later.”).

24. Stone, *supra* note 17, at 464-65.

25. *Id.*

26. Stone, *supra* note 17, at 475 (arguing that nature could bring claims in court that could not be brought by environmental groups or other plaintiffs).

Stone's article is still celebrated today for offering a creative and generative vision for the future of environmental law. Bill Rogers called it one of the top six "aha! moments" in the history of environmental law.<sup>27</sup> In celebrations of this article, however, it is easy to ignore that Stone had little to say about the substantive content of nature's rights. Instead, Stone highlighted procedural mechanisms such as standing, representation, and environmental impact reviews.<sup>28</sup> Stone's inattention to nature's substantive legal rights has come to characterize the RoN movement. Proponents often focus on the paradigm-shifting implications of granting rights to nature. Yet they rarely explore, in detail, the substantive content of the rights themselves.<sup>29</sup>

Stone rushed to finish his article so that it might influence a then-pending Supreme Court case, *Sierra Club v. Morton*.<sup>30</sup> At issue in that case was whether the Sierra Club had Article III standing to challenge a proposed Disney development in the Mineral King Valley of California.<sup>31</sup> Justice Douglas dissented from the Court's denial of standing to the Sierra Club, citing Stone's article as support for his view that inanimate natural objects should have Article III standing.<sup>32</sup> Justice Douglas wrote that federal courts should have jurisdiction over litigation brought in the name of the real party in interest: "the inanimate object about to be despoiled, defaced, or invaded by roads and bulldozers."<sup>33</sup>

More than fifty years after *Sierra Club v. Morton*, American courts have widely rejected standing for non-human living beings.<sup>34</sup> The concept of legal personhood for nature has instead taken root in the academy, where there has been an

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27. William Rogers, *The Most Creative Moments in the History of Environmental Law: The Who's*, 39 WASHBURN L.J. 1, 13 (1999).

28. In discussing the substantive legal rights that nature might hold, Stone suggested vaguely that: 1) there should be financial recompense to nature for harm done, which would be used for restoration; and 2) nature has an inviolable right against irreparable injury. Stone, *supra* note 17, at 473-477, 485-86 (noting that such injuries should be "enjoined absolutely"). Stone also advocated for unspecified legal protection for certain "preferred objects"—natural entities of unique beauty or importance—where any threatened injury should be reviewed "with the highest scrutiny." *Id.* at 486.

29. See Babcock, *supra* note 13, at 26-33 (discussing theories for granting Article III standing and legal theories to support personhood for nature); Burdon, *Wild Law*, *supra* note 16, at 64-65 (discussing the philosophy behind granting nature legal rights); Marsha Jones Moutrie, *The Rights of Nature Movement in the United States: Community Organizing, Local Legislation, Court Challenges, Possible Lessons and Pathways*, 10 BARRY ENVTL. & EARTH L.J. 5, 5-6 (2020).

30. *Sierra Club v. Morton*, 405 U.S. 727 (1972); see Babcock, *supra* note 13, at 7 (describing links between Stone's article and the pending Supreme Court case); Takacs, *supra* note 13, at 554-56 (same).

31. *Sierra Club*, *supra* note 30.

32. *Id.* at 749-52 (Douglas, J., dissenting).

33. *Id.* at 741 (Douglas, J., dissenting).

34. See, e.g., *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1177-79 (9th Cir. 2004) (denying standing to whales, porpoises, and dolphins on statutory grounds); *Coho Salmon v. Pacific Lumber Co.*, 61 F. Supp. 2d 1001, 1008, 1015 (N.D. Cal. 1999) (finding subject matter jurisdiction based on the claims of human co-plaintiffs); *Loggerhead Turtle v. Cnty. Council of Volusia Cnty., Fla.*, 148 F.3d 1231, 1255-58 (11th Cir. 1998) (finding subject matter jurisdiction based on the claims of human co-plaintiffs); *Naruto v. Slater*, 888 F.3d 418, 422-26 (9th Cir. 2018) (explaining that crested macaque could have Article III standing but denying standing on statutory grounds).



explosion of interest in the last twenty years.<sup>35</sup> Thomas Berry, an American priest, professor, and self-described “geologist,” is one of the founders of the RoN movement.<sup>36</sup> In 2001, Berry crafted ten principles<sup>37</sup> that have become a “gospel” for the movement.<sup>38</sup>

Berry’s first principle was that “rights originate where existence originates.”<sup>39</sup> For Berry, as for later writers in the movement, the existence of a thing gives rise to legal rights, even if the thing has no self-conception, feeling, or sentience.<sup>40</sup> Therefore plants, fungi, insects, and bacteria can possess legal rights. Berry even advocated extending legal rights to *non-living* members of the “earth community,” such as water, nutrients, and minerals.<sup>41</sup> Building on Berry’s principles, many of the U.S. RoN ordinances confer rights on “aggregates” of living and non-living things, such as lakes, rivers, and ecosystems.<sup>42</sup> In this way, legal rights can be held by a non-sentient collective, not just by individual organisms.

With these animating principles, the RoN movement has become far more radical in its conception of law and legal personhood than the animal rights movement, which itself has seen only limited political and legislative success in the United States.<sup>43</sup> The animal rights movement seeks to expand rights to sentient, living beings.<sup>44</sup> Animal rights theorists going back to Jeremy Bentham have

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35. For early commentary on RoN after Stone, see Tribe, *supra* note 18; NASH, *supra* note 19; Berry, *The Origin*, *supra* note 8; CORMAC CULLINAN, *WILD LAW: A MANIFESTO FOR EARTH JUSTICE* (1st ed. 2003).

36. MAY EVELYN TUCKER ET AL., *THOMAS BERRY: A BIOGRAPHY* xvii, 30 (2019).

37. Berry, *The Origin*, *supra* note 8.

38. Takacs, *supra* note 13, at 556.

39. Berry, *The Origin*, *supra* note 8.

40. *Id.* (“The universe is composed of subjects to be communed with, not primarily of objects to be used. As a subject, each component of the universe is capable of having rights.”); Cormac Cullinan, *The Legal Case for A Universal Declaration of the Rights of Mother Earth* (2010), <https://perma.cc/BGD5-TMUD> (All beings “have inherent, inalienable rights which arise from their existence.”).

41. Berry, *The Origin*, *supra* note 8. See also CHRISTOPHER STONE, *SHOULD TREES HAVE STANDING?: LAW, MORALITY & THE ENVIRONMENT* 159-160 (3d ed. 2010) (listing examples where suits were filed in the name of nonhumans, including a river, a marsh, a brook, a beach, a national monument, a tree, and an endangered Hawaiian bird).

42. Mauricio Guim & Michael A. Livermore, *Where Nature’s Rights Go Wrong*, 107 VA. L. REV. 1347, 1368 (2021) (discussing aggregates); section I.B *infra* (text of selected ordinances).

43. The modern animal rights movement is widely believed to have been launched with the publication of Peter Singer’s *Animal Liberation* in 1975. See Lyle Munro, *The Animal Rights Movement in Theory and Practice: A Review of the Sociological Literature* 6 SOCIO. COMPASS 166, 171 (2012); Jane Kotzman & Nick Pendergast, *Animal Rights: Time to Start Unpacking What Rights for Whom*, 46 MITCHELL HAMLIN L. REV. 158, 162 (2019). See also SUE DONALDSON, *ZOOPOLIS: A POLITICAL THEORY OF ANIMAL RIGHTS* 4-5 (2011) (Animal rights theory is “politically marginalized” and has “virtually no resonance amongst the general public.”).

44. See Peter Singer, *All Animals are Equal*, in *ANIMAL RIGHTS AND HUMAN OBLIGATIONS* 79 (Tom Regan & Peter Singer eds., 2d ed. 1989) (“[T]he limit of sentience . . . is the only defensible boundary of concern for the interests of others.”); MARTHA C. NUSSBAUM, *FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP* 326, 351 (2006) (sentient, non-human animals are dignity-bearing subjects that should be incorporated into theories of justice); MARTHA C. NUSSBAUM, *JUSTICE FOR ANIMALS: OUR COLLECTIVE RESPONSIBILITY* xxv (2023).

pointed to avoidance of suffering as the ethical basis for legal rights for animals.<sup>45</sup> Within the RoN movement, in contrast, there is no agreed upon stopping point regarding which entities (living and non-living) should possess legal rights. The movement does not see the capacity to suffer as a limiting principle on the possession of legal rights.

#### B. RIGHTS OF NATURE LEGISLATION IN THE UNITED STATES

The first U.S. municipality to adopt RoN legislation was Tamaqua Borough, Pennsylvania, which enacted an ordinance in 2006 in response to threats to the town's drinking water supply.<sup>46</sup> Residents lobbied for the ordinance due to concerns about a proposal to dump sewage sludge into old mining pits.<sup>47</sup> The ordinance, which contained traditional water protection measures, also recognized "natural communities and ecosystems" as "persons" for enforcing the ordinance.<sup>48</sup>

The Community Environmental Legal Defense Fund (CELDF), a non-profit group that has since become a driving force behind the wave of RoN legislation in the United States, assisted Tamaqua Borough in drafting the ordinance.<sup>49</sup> CELDF was founded to promote local autonomy, foster democratic self-governance, and challenge corporate power on environmental issues.<sup>50</sup> It drafts ordinances and hosts trainings on the rights of nature, often serving small, rural communities as clients.<sup>51</sup> Since 2006, CELDF has assisted communities such as Grant Township, PA; Highland Township, PA; Mora County, NM; Lafayette, CO; and Toledo, OH in proposing and enacting RoN ordinances.<sup>52</sup>

Today, at least fifty-two communities and four tribal nations in the United States have enacted RoN ordinances.<sup>53</sup> The ordinances use similar language to define nature's substantive legal rights. They frequently confer rights to "exist" and "flourish."<sup>54</sup> For example:

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45. JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION cccviii-cccix n. a (1789); DOUGLAS KYSAR, REGULATING FROM NOWHERE: ENVIRONMENTAL LAW AND THE SEARCH FOR OBJECTIVITY 183-184 (2010) (discussing Bentham's views on animal rights and inclusion of non-humans in the moral community).

46. Kent Jackson, *1.8 Million Gallons of Sewage Leaks into River in Tamaqua*, REPUBLICAN HERALD (Apr. 27, 2012), <https://perma.cc/8VWS-5ADB>; Huneus, *supra* note 1, at 144; Kauffman & Martin, *supra* note 15, at 54.

47. Moutrie, *supra* note 29, at 7.

48. Tamaqua Borough, Pa. Mun. Code, §§ 260-66B (2006).

49. *Tamaqua Borough, Pennsylvania*, CELDF, <https://perma.cc/5YU5-NMSV> (last visited Sept. 6, 2022).

50. *About CELDF*, CELDF, <https://perma.cc/YX7V-YENP> (last visited Feb. 12, 2024).

51. Moutrie, *supra* note 29, at 10-11.

52. *Id.* at 10-24.

53. Huneus, *supra* note 1, at 134 n.10.

54. *See* Grant Twp., Pa., Community Bill of Rights Ordinance § 1(d) (2014), <http://s3.documentcloud.org/documents/1370022/grant-township-community-bill-of-rights-ordinance.pdf>. *See also* Mora Cnty., N.M., Cmty. Ordinance, No. 2013-01 § 4.3 (2013).

- A 2010 Pittsburgh, PA ordinance reads: “[n]atural communities and ecosystems, including, but not limited to, wetlands, streams, rivers, aquifers, and other water systems, possess inalienable and fundamental rights to exist and flourish within the City of Pittsburgh.”<sup>55</sup>
- A 2017 Lafayette, CO ordinance asserts that the ecosystems of Lafayette “possess a right to a healthy climate and life sustaining resources.”<sup>56</sup>
- A 2013 Mora County, NM ordinance states that natural communities and ecosystems have “inalienable and fundamental rights to exist and flourish” as well as a “right to a sustainable energy future,” which includes “use of energy from renewable fuel sources.”<sup>57</sup>
- A 2013 Santa Monica, CA ordinance declares that “[n]atural communities and ecosystems possess fundamental and inalienable rights to exist and flourish in the City of Santa Monica.”<sup>58</sup>
- A 2019 Nottingham, NH ordinance states that ecosystems have the right to “naturally exist, flourish, regenerate, evolve, and be restored.”<sup>59</sup>

Notably, ordinances in the United States do not seek to protect only particular named species or unique or irreplaceable sites. Rather, most of them confer legal rights on all of nature within the jurisdiction (and sometimes outside of it).<sup>60</sup> They reflect the universalistic conception of nature’s rights present in Berry’s writings.

The primary motivation for enacting these ordinances has been to protect the local environment from industrial activities allowed under state law.<sup>61</sup> According to CELDF, communities “want to just plain say no” to fracking, sewage disposal, hog waste lagoons, and other encroachments.<sup>62</sup> These local laws are often passed in direct response to state government authorization of an industrial or waste-producing activity.<sup>63</sup>

Given this motivation, the U.S. debate over nature’s legal rights is taking place against the backdrop of an intense political battle over local autonomy and state

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55. Pittsburgh, Pa., Ordinance No. 37-2010, § 1 (2010).

56. Lafayette, Colo., Ordinance No.02 Series 2017 (2017), <https://perma.cc/G8K8-MP6Z>.

57. Mora County, N.M., Ordinance 2013–01 (Apr. 29, 2013), *invalidated by SWEPI*, 81 F. Supp. 3d at 1088, 1092.

58. Santa Monica, Cal., Mun. Code Art. 12, Ch. 12.02.030 (2013).

59. Community Environmental Legal Defense Fund, *For All to See: Bias of New Hampshire Judiciary Exposed in Rights of Nature, Healthy Climate Proceedings*, <https://perma.cc/84FE-RUCD> (last visited Oct. 23, 2023).

60. See section II.B *infra*.

61. Moutrie, *supra* note 29, at 41 (“The community rights ordinances . . . proclaim local sovereignty as against corporate threats.”); *id.* at 63 (“Most community rights laws in the United States have been adopted in response to specific, local environmental threats . . . often related to fracking.”).

62. Thomas Linzey, Community Environmental Legal Defense Fund, Twenty-Fifth Annual Schumacher Lectures, *Of Corporations, Law, and Democracy* (Oct. 2005), <https://perma.cc/QF7G-UM5C>.

63. See Kathleen M. Mannard, *Lake Erie Bill of Rights Struck Down: Why the Rights of Nature Movement Is a Nonviable Strategy*, 28 BUFF. ENVTL. L.J. 39, 51 (2021).

preemption. Local activists, angry that the offending company's activities are allowed under state law, often organize around a particular environmental problem.<sup>64</sup> They work with local officials to enact an RoN ordinance to fight back and preserve local autonomy.

Alternatively, cities and towns could enact legislation to ban the activity outright within the jurisdiction, but such a move would risk challenge on preemption or Dillon's Rule grounds.<sup>65</sup> By enacting an RoN ordinance, proponents hope to raise an obstacle to industrial encroachment in a way that can survive court challenges.

In the United States, however, these local ordinances are not changing industry practices. Instead, firms have lawyered up and sued municipalities, and they have won every case.<sup>66</sup> Courts have overturned every U.S. municipal RoN ordinance that has been challenged. They have ruled that these ordinances are preempted by state law, frustrate state statutory programs,<sup>67</sup> are unconstitutionally vague,<sup>68</sup> deny due process by stripping away corporations' legal rights,<sup>69</sup> and are arbitrary and capricious.<sup>70</sup> States have also responded to local RoN ordinances by enacting state-wide bans on them or precluding their enforcement.<sup>71</sup>

No court in the United States has ever applied one of these municipal RoN ordinances to enjoin a defendant's activities or award damages. Nearly twenty years after the Tamaqua Borough ordinance, there is little evidence that local RoN ordinances are raising a real obstacle to environmentally harmful activity.<sup>72</sup>

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64. See Moutrie, *supra* note 29, at 60 ("U.S. laws recognizing Nature's rights have been primarily intended to reduce corporate destruction of the environment by diminishing corporate legal rights and enhancing local authority.").

65. Hugh Spitzer, "*Home Rule*" vs. "*Dillon's Rule*" for Washington Cities, 38 SEATTLE U. L. REV. 809, 811 (2015) (Dillon's Rule "limits local government powers to those expressly granted by statute or those necessarily implied."); Kenneth D. Dean, *The Dillon Rule—A Limit on Local Government Powers*, 41 MO. L. REV. 546, 546 (1976) (municipal corporations are "creatures of the state" and exist at the discretion of the state).

66. Moutrie, *supra* note 29, at 24.

67. *Id.* at 25-38.

68. Jeff D. Gorman, *Judge Shoots Down Lake Erie Bill of Rights*, Courthouse News Service (Feb. 28, 2020), <https://perma.cc/V7YY-2Y2P>.

69. Moutrie, *supra* note 29, at 33-38.

70. *Id.* at 25-31.

71. See, e.g., Florida's Clean Waterways Act, Fla. Stat. § 403.412(9)(a) (2020) ("A local government . . . may not recognize or grant any legal rights to a plant, an animal, a body of water, or any other part of the natural environment that is not a person or political subdivision."); Ohio Revised Code § 2305.011 (2019) (banning persons from bringing any action on behalf of or representing nature or an ecosystem).

72. One possible exception is Grant Township, Pennsylvania, where the town enacted an RoN ordinance to stop an injection well for fracking wastewater. Although a federal district court vacated the ordinance, the Commonwealth of Pennsylvania ultimately rescinded the well permit, bowing to public pressure. See Erin Ryan et al., *Environmental Rights for the 21<sup>st</sup> Century: A Comprehensive Analysis of the Public Trust Doctrine and Rights of Nature Movement*, 42 CARDOZO L. REV. 2446, 2561 (2021).

## C. LONG-TERM AMBITIONS OF THE RIGHTS OF NATURE MOVEMENT

The immediate goal of most U.S. RoN ordinances is protecting communities from unwanted industrial activity. But the long-term ambitions of the RoN movement are radical and far-reaching: to drive systemic change not just in environmental law, but in all of law and governance across the planet.<sup>73</sup> The RoN project in the United States should not be viewed as a collection of municipal ordinances. That narrow lens would overlook this movement's sweeping ambition to remake entire legal systems.

According to RoN proponents, the environmental crisis is rooted in law's centering of human needs and interests, and no solution for the crisis is possible without decentering humans in lawmaking.<sup>74</sup> The RoN movement is about rebalancing rights so that nature's rights can check humans' self-regarding egoism. According to proponents, law historically prioritizes human needs and enforces corporate rights that are devastating for nature.<sup>75</sup> Law treats nature as property, proponents say, fostering a culture of human dominance.<sup>76</sup> The U.S. Constitution, which "exalted the property-owning citizen," was the "legal structure that would authorise the assault on the natural world."<sup>77</sup>

Legal rights for nature are crucial to remedy the devastation, proponents argue. Recognizing legal rights would make nature a *subject* within the legal system—capable of suing humans and asserting rights—and not just an object.<sup>78</sup> Nature's legal rights would help preserve nature in specific lawsuits and, more importantly, they would promote a larger cultural transformation.

The transformation that RoN proponents seek is external, in law and governance, and internal, in the human psyche.<sup>79</sup> RoN scholars frequently emphasize law's symbolic value and signaling function.<sup>80</sup> Scholars contend, for example, that recognizing legal rights in nature could shift how humans view nature,<sup>81</sup>

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73. ZELLE ET AL., *supra* note 15, at 231-32.

74. CULLINAN, *supra* note 35, at 27 (criticizing "unquestioning adoption of myopically human-centered laws."); *see also id.* at 63 ("[T]he law reserves all the rights and privileges to use and enjoy Earth to humans and their agents.").

75. *Id.* at 66.

76. Susana Borrás, *New Transitions from Human Rights to a Healthy Environment to the Rights of Nature*, 5 TRANSNAT'L ENVTL. L. 113, 113-14 (2016).

77. Foreword by Thomas Berry in CULLINAN, *supra* note 35, at 19.

78. CARDUCCI ET AL., TOWARDS AN EU CHARTER OF THE FUNDAMENTAL RIGHTS OF NATURE, EUR. ECON. AND SOC. COMM. STUDY 61 (2019), <https://perma.cc/6TM2-62HN>.

79. CULLINAN, *supra* note 35; KAUFFMAN & MARTIN, *supra* note 4, at 7 ("[T]he ultimate goal of the RoN movement is a paradigm shift: to change the way people understand humans' relationship with nature [and] change their behaviors in a way that is more ecologically sustainable.").

80. CULLINAN, *supra* note 35, at 55 ("[W]hile the regulatory function of law is easy to see, we often overlook the fact that law plays an equally important role in constituting and forming society itself.").

81. *See, e.g.*, Guillaume Chapron, Yaffa Epstein & José Vicente López-Bao, *A Rights Revolution for Nature*, SCIENCE (Mar. 29, 2019), <https://perma.cc/QVF6-QV5Z>.

foster dignity for all beings by highlighting intrinsic value,<sup>82</sup> and spark a “fundamental reorientation of our societies.”<sup>83</sup> The movement draws heavily from indigenous traditions, animism, Deep Ecology, New Age spirituality, ecopsychology, and the Gaia concept of James Lovelock.<sup>84</sup>

To accomplish these dramatic societal changes, RoN proponents argue that humans must be dethroned at the apex of a hierarchy over nature.<sup>85</sup> Many proponents are explicit that they wish to demote human interests in lawmaking, and they argue that there is no reason to prefer human interests—including humans’ constitutional and statutory rights—over the rights they want recognized in nature.<sup>86</sup>

#### D. RIGHTS OF NATURE AS A SUBSTITUTE FOR EXISTING ENVIRONMENTAL LAW

Within this broader critique of law and legal institutions, RoN proponents often single out environmental law for disparagement. According to proponents, environmental law, though cloaked in a green façade, actually facilitates extraction, pollution, and industrial growth.<sup>87</sup> Through permits and approvals, environmental

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82. See David R. Boyd, *Recognizing the Rights of Nature: Lofty Rhetoric or Legal Revolution?*, 32 NAT. RESOURCES & ENV’T 13 (Spring 2018) (“[T]reating nature as a mere warehouse of resources for our use, and a repository for our pollution and garbage, is fundamentally wrong . . . Rights for nature impose responsibilities on humans to modify our behavior.”); Ori Sharon, *Finding Eden in a Cost Benefit State*, 27 GEORGE MASON L. REV. 571 (2020) (“Changing legal terminology to discuss natural objects (animate and inanimate) as deserving protection, care, and empathy . . . elevate[s] the objects’ moral status.”).

83. CULLINAN, *supra* note 35, at 47.

84. See Takacs, *supra* note 13, at 552–53; Robert MacFarlane, *Should this Tree Have the Same Rights as You?*, THE GUARDIAN, Nov. 2, 2019 (exploring the “new animism” in RoN legislation); Thomas Berry, *Ten Principles for the Revision of Jurisprudence*, Evening Thoughts, 149–150 (2006); ZELLE ET AL., *supra* note 15, at 76–78; BILL DEVALL & GEORGE SESSIONS, DEEP ECOLOGY: LIVING AS IF NATURE MATTERED (1985); JAMES LOVELOCK, GAIA: A NEW LOOK AT LIFE ON EARTH (1979); Jamie Murray, *Earth Jurisprudence, Wild Law, Emergent Law: The Emerging Field of Ecology and Law—Part I*, 35 LIVERPOOL L. REV. 215, 219–223 (2014) (exploring intellectual roots of Earth Jurisprudence).

85. CULLINAN, *supra* note 35, at 61 (advocating shifting the paradigm from a “homosphere” of human dominance to an “Earth-centered worldview”); Gellers, *Earth System Law and the Legal Status of Non-Humans in the Anthropocene*, 7 EARTH SYSTEM GOVERNANCE 4 (2021) (The RoN movement rejects “human-nature binaries” and “actively combats inter and intra-generational and inter-species injustices.”); CARDUCCI ET AL., *supra* note 78, at 69 (calling for a “nested hierarchy of rights” in which nature’s rights are superior to human rights).

86. See Linzey, *supra* note 62; Berry, *The Origin*, *supra* note 8 (“Human rights do not cancel out the rights of other modes of being to exist in their natural state.”); Press Release, Mumta Ito, Founder and President, Nature’s Rights, Nature’s Rights: The Missing Piece of the Puzzle (Mar. 29, 2017), <https://perma.cc/EFU4-8T3V>.

87. See JAN DARPÓ, CAN NATURE GET IT RIGHT? A STUDY ON RIGHTS OF NATURE IN THE EUROPEAN CONTEXT 14 (March 1, 2021), <https://perma.cc/72ZX-MAGZ> (written for the European Parliament’s Policy Department for Citizens’ Rights and Constitutional Affairs at the request of the JURI Committee, Brussels). See also *id.* at 48 (noting that some RoN scholars claim that environmental law is “a contributor to a system which cements the status quo in regarding nature as an object free for exploitation”); Julien Bétaille, *Rights of Nature: Why It Might Not Save the Entire World*, J. EUR. ENVTL. & PLAN. L. 35, 40 (2019); Linda Sheehan, *Implementing Nature’s Rights Through Regulatory*

law tolerates and legitimizes nature's degradation. As Mari Margil, Executive Director of the Center for Democratic and Environmental Rights, put it, environmental laws "*don't actually protect the environment*. At best, they merely slow the rate of its destruction."<sup>88</sup> Environmental law upholds, facilitates, and reifies the status quo.<sup>89</sup>

Some advocates argue that their preferred rights-based approach should replace existing environmental law. Conferring legal rights on nature, in this view, is not a complement to the U.S. Code and thousands of pages of regulation—it is a substitute for them.<sup>90</sup> These advocates seek to torpedo existing environmental law (and even property, land use, and corporate law) in favor of a new regime grounded in enforceable legal rights for nature.<sup>91</sup> Advocates and scholars who hold this position claim that environmental laws, and the agencies that enforce them, are hopelessly compromised and corporate-controlled—little better than useless.<sup>92</sup> Thomas Linzey, Senior Legal Counsel at the Center for Democratic and Environmental Rights, charged that “we’ve been wasting our time with regulatory agencies, with regulatory enforcement, and with drafting the regulations.”<sup>93</sup> Four RoN scholars from the United States and Israel concluded that environmental law, which is “based on errors in perception and thinking,” has “failed.”<sup>94</sup> Ten European RoN scholars argued that “law only manages the externalities and consequences of a dysfunctional system” and that “a new societal blueprint” is needed.<sup>95</sup>

RoN advocates never directly name the environmental statutes they want repealed. They never outwardly call for the repeal of the Clean Air Act, the Clean Water Act, the Marine Mammal Protection Act, or other bedrock U.S.

Standards, 20 VT. J. ENVTL. L. 227, 232 (2019) (“[O]ur environmental laws legalize and externalize the impacts of pollution, rather than more generally apply bans.”).

88. Mari Margil, *Stories from the Environmental Frontier*, in *EXPLORING WILD LAW: THE PHILOSOPHY OF EARTH JURISPRUDENCE* (Peter Burdon, ed. 2011).

89. Chapron et al., *supra* note 81; David Humphreys, *Rights of Pachamama: The Emergence of an Earth Jurisprudence in the Americas*, 20 J. INT’L RELATIONS & DEV. 459, 463 (2017); Cynthia Giagnocavo & Howard Goldstein, *Law Reform or World Re-form: The Problem of Environmental Rights*, 35 MCGILL L.J. 346, 350 (1990) (referring to environmental laws as “costly legitimization projects” and to environmental regulation as “nothing more than a licensing system for polluters”).

90. Ollie Houck envisions a continuing role for existing environmental statutes within an RoN framework. See Houck, *supra* note 9, at 41 (“[N]ature rights can be a significant partner to existing programs . . . Their next best friend.”).

91. See, e.g., ZELLE ET AL., *supra* note 15, at 4 (“Earth law necessitates reexamining entire areas of the law, such as property law.”). It is difficult to say how common these views are within the movement. Much of the RoN literature is silent regarding how RoN laws are supposed to coordinate with the vast body of environmental laws and regulations already in place. Incompatibility between the two regimes could occur if some activity, authorized by statute or permit, involves harm to living things and purportedly violates nature’s rights.

92. Elizabeth Macpherson, *The Human Rights of Nature*, 31 DUKE ENVTL. L. & POL’Y F. 327, 375 (2021) (explaining that the RoN movement seeks to replace “hegemonic legal frameworks” that proponents perceive to be “ineffective or captured by competing interests”).

93. See Linzey, *supra* note 62.

94. ZELLE ET AL., *supra* note 15, at 44, 48.

95. CARDUCCI, ET AL., *supra* note 78, at 5.

environmental statutes. But nearly every prominent RoN scholar and activist describes RoN legislation as an “alternative paradigm” or a “paradigm shift” when compared to existing environmental law.<sup>96</sup> For many proponents, RoN is not just one additional tool in the nature protection toolbox. Over time, they believe it will become a dominant legal regime that will sweep away the existing body of environmental law.<sup>97</sup>

## II. THE INEFFECTIVENESS OF RIGHTS OF NATURE FOR PROTECTING NATURE

The RoN movement is undoubtedly ambitious, but can it actually deliver on its promises? This is a movement that seeks an alternative legal regime for the United States, indeed for the whole Earth. Can this rights-based, paradigm-shifting framework deliver stronger environmental protection than current laws, and at acceptable cost?

In this Part, I argue that the RoN movement is a wrong turn because it is likely to be ineffective in achieving its main goal of protecting, conserving, and defending nature. There are other reasons to reject RoN concepts, including the doubtful constitutionality of RoN provisions, the dismal record of RoN ordinances when challenged in court, and the inevitable biases of any guardians who may be appointed.<sup>98</sup> Putting those concerns aside, this Part explores what I believe to be the heart of the issue: why conferring legal rights on nature is likely to be ineffective in protecting the environment.

I argue below that a rights-based regime is likely to be ineffective for four main reasons. First, the rights that the RoN movement seeks to grant to nature are vague, incoherent, and have a problematic ethical basis. They provide little guidance to humans about how to conform their behavior to law, which will make it harder, not easier, to protect the environment. Second, there is no limiting principle for the entities that will possess enforceable legal rights. The RoN project is unworkable given the universality of the rights it seeks to recognize and the difficulties of defining the boundaries of the rights-holders. Third, the judicialization of environmental protection that is at the heart of the RoN movement—its

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96. *Id.* at 69 (recognizing RoN would signal a “paradigm shift from the current neo-classical economic model to a holistic model”).

97. One comprehensive review of the literature summed up three main assumptions of the RoN movement: first, that current environmental law is anthropocentric and therefore cannot recognize nature’s intrinsic value; second, that introducing legal personhood to natural objects would be a paradigm shift in law; and third, that this concept is better suited than existing environmental law to solving the challenges of today, such as climate change and large scale biodiversity losses. DARPÓ, *supra* note 87, at 14. See also BOYD, *supra* note 10, at xxxiv (“Today’s dominant culture and the legal system that supports it are self-destructive. We need a new approach rooted in ecology and ethics.”).

98. See section II.A *infra* (discussing Ohio case that vacated RoN ordinance as overly vague under the 14th Amendment); Laura Spitz & Eduardo M. Penalver, *Nature’s Personhood and Property’s Virtues*, 45 HARV. ENVTL. L. REV. 67, 86 (2021) (noting that the guardianship process “is very likely to recapitulate the kinds of inquiries raised in the standing context and [result in] relatively narrow perspectives . . . before the court”).



reliance on courts and ad hoc litigation—is ill-suited for effective environmental protection. Complex environmental problems cannot be shoehorned into this bilateral dispute model. Finally, the wide conferral of legal rights on nature will lead to arbitrary and oppressive results for humans with little offsetting benefit. These threats to human well-being are not only morally objectionable in their own right, but also call into question whether RoN could sustain long-term political support.

#### A. INEFFECTIVENESS DUE TO THE VAGUENESS OF NATURE’S RIGHTS

Any effective system of environmental law must alert humans about which activities are permitted or proscribed as they interact with nature.<sup>99</sup> That statement should be axiomatic. Yet the RoN ordinances enacted in the United States and the broader RoN philosophy do not meet this test. A central problem with the RoN project is that the rights asserted are too vague to provide appropriate guidance to humans as to how to conform their behavior to law.

This vagueness in RoN legislation raises due process concerns, as I will discuss below. Even more fundamentally, vague nature rights, which provide little guidance to humans, are unlikely to protect the health and diversity of the natural world. They cannot support the heavy lift asked of them: that they serve as a basis for money damages and injunctions against humans, replace a vast body of environmental statutes and regulations, and govern the interactions between humans and nature for decades to come.

The RoN movement is now five decades old, and thousands of scholarly articles have discussed the rights of nature.<sup>100</sup> Yet RoN proponents have not settled on a definition of nature’s rights that is specific enough to provide guidance to humans. The problem of vague rights is inherent in the project of recognizing rights in nature. It cannot be remedied with better legislative drafting.<sup>101</sup>

### 1. Vague Nature Rights Legislation in the United States and its Consequences

The vagueness of nature’s rights can be seen in the RoN ordinances enacted in the United States so far. As discussed in Part I, these ordinances frequently state that nature has a right to “exist” or a right to “flourish.”<sup>102</sup> Even when RoN ordinances seek to protect components of nature, such as aquatic features, they are no

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99. See Theodore J. Boutros & Blaine H. Evanson, *The Enduring and Universal Principle of Fair Notice*, 86 S. CAL. L. REV. 193, 194 (2013); Kiel Brennan-Marquez, *Extremely Broad Laws*, 61 ARIZ. L. REV. 641, 642-43, 655-56 (2019).

100. See, e.g., Houck, *supra* note 9; Burdon, *The Rights of Nature*, *supra* note 9; Giagnocavo & Goldstein, *supra* note 89; BOYD, *supra* note 10. A search on Google Scholar returned 2850 hits for articles published since the beginning of 2021 with “rights of nature” in the title.

101. See section III.B *infra*.

102. Borrás, *supra* note 76, at 129 (“[A]ll forms of life have the right to exist, persist, maintain and regenerate their vital cycles.”); ORANGE COUNTY, FLA., CODE pt. 1, art. VII, § 704.1(A)(1) (2023); Santa Monica, Cal., Mun. Code art. 12, ch. 12.02.030 (2013).

more lucid.<sup>103</sup> An RoN ordinance in Orange County, Florida stated, for example, that waterways in the county have the right to “exist, flow, and be protected against pollution.”<sup>104</sup> Spokane, Washington drafted an initiative, later struck down in court, that would have granted the Spokane River a right to “exist and flourish” and have “sustainable recharge.”<sup>105</sup>

These formulations of legal rights are maddeningly vague. Full of “intellectual traps,”<sup>106</sup> they contain no judicially manageable standards to guide their implementation.<sup>107</sup> Peter Burdon, an RoN scholar and advocate, has written that “the municipal ordinances passed in the United States are specific and targeted,”<sup>108</sup> but that is hardly the case.

By stating the legal rights of nature broadly and vacuously, RoN ordinances fail to provide guidance to policymakers, industry, and communities. Humans must speculate as to their meaning, and some basic questions remain:

- Do nature’s rights to “exist” and “flourish” encompass a legally enforceable right for ecosystems to be left alone?
- If not, how can humans lawfully use and modify rights-holding ecosystems?
- What do these rights mean for nature on privately-held land?
- Do these rights mean that humans cannot fish in water bodies, harvest crops, or divert rivers for irrigation?
- Do these rights encompass a right for nature to be free of all pollution? Or only a right to be free of pollution that exceeds some threshold that would harm nature’s ability to “flourish?”<sup>109</sup>

The ordinances enacted in the United States provide no answers, and scholars’ descriptions of the substance of nature’s rights are similarly vague. The most influential description of nature’s rights is that of Thomas Berry, who identified

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103. Huneus, *supra* note 1, at 150 (noting a shift in U.S. ordinances from granting rights to ecosystems to the more “tangible” approach of granting rights to particular natural entities such as lakes or rivers).

104. Kristin Urban, *The Right to Clean Water Charter Amendment*, IDEAS FOR US (Sept. 23, 2020), <https://perma.cc/D8UL-KU9E>.

105. *Spokane Entrepreneurial Ctr.*, 369 P.3d at 145–46 (quoting language of ballot initiative).

106. Dieter Birnbacher, *Legal Rights for Natural Objects*, in *APPLIED ETHICS IN A TROUBLED WORLD* 29, 36 (Edgar Morscher et al., eds. 1998).

107. Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274, 1325 (2006) (noting that “rights may go wholly or partly unenforced due to an absence of judicially manageable standards”).

108. Burdon, *The Rights of Nature*, *supra* note 9, at 81.

109. See Guim & Livermore, *supra* note 42, at 1405. Mauricio Guim and Michael Livermore explain that this issue of thresholds is a flaw in the RoN project because if some degradation of nature is considered allowable, and the rights of nature kick in only once degradation is about to exceed some threshold of harm, then human impacts early in the process get a kind of free pass. Those early impacts that degrade nature “may be occupied by activities that have little social value or benefit only a select few.” *Id.* at 1405-06.

three rights held by every component of the Earth community, “both living and nonliving.”<sup>110</sup> These rights are “the right [for each component] to be, the right to habitat or a place to be, and the right to fulfill its role in the ever-renewing processes of the Earth community.”<sup>111</sup>

American law professor Ollie Houck similarly summarized the rights of nature as threefold: “the right to exist, the right to continue to exist, and the right, if degraded, to be restored.”<sup>112</sup>

Australian law professor Peter Burdon has suggested that we can more precisely define nature’s rights by looking to nature’s subcomponents. Burdon asserted that “rivers have river rights; trees have tree rights; birds have bird rights and humans have human rights. The difference is qualitative, not quantitative, and the rights of one part of nature would be of no value to another part.”<sup>113</sup>

These descriptions of nature’s rights from Berry, Houck, and Burdon are quicksand. They do not provide any sure legal footing for humans. “Bird rights” have no more substantive legal content than “nature rights.” A legal right for all living and non-living things “to be” is hardly a coherent way to channel or curtail human behavior. The vagueness in the rights of nature is seductive—and likely to be a permanent feature of the movement—because it allows proponents to read into these rights their own worldviews, cosmologies, and political agendas.

A recent case illustrates how U.S. courts are likely to react to these vague nature rights. The case involved a challenge to Toledo’s Lake Erie Bill of Rights (LEBOR), enacted in 2019. In LEBOR, the City of Toledo attempted to give the 10,000 square mile lake and its even larger watershed rights to “exist, flourish, and naturally evolve.”<sup>114</sup> It imposed criminal penalties on anyone who interfered with those rights.<sup>115</sup>

Ohio farmers sued the City of Toledo in federal court, seeking a declaratory judgment to invalidate LEBOR.<sup>116</sup> The farmers were concerned that they would face liability under LEBOR for applying fertilizer to their fields because the fertilizer entered Lake Erie through runoff.<sup>117</sup>

Holding for the farmers, Judge Jack Zouhary of the Northern District of Ohio called LEBOR a “textbook example of what municipal government cannot do.”<sup>118</sup> The court invalidated LEBOR under the 14<sup>th</sup> Amendment’s vagueness doctrine,<sup>119</sup> which provides that a law violates due process if “persons of common

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110. Berry, *The Origin*, *supra* note 8.

111. *Id.*

112. Houck, *supra* note 9, at 31.

113. Burdon, *The Rights of Nature*, *supra* note 9, at 79 (discussing the work of Berry).

114. CITY OF TOLEDO, OHIO, MUN. CODE, ch. 17, § 254(a) (2023).

115. *Id.* § 255.

116. *Drewes Farms*, 441 F. Supp. 3d at 554.

117. *Turning the Tides: Judge Finds Lake Erie Bill of Rights Unconstitutional*, NATIONAL AGRICULTURAL LAW CENTER (Mar. 4, 2020), <https://perma.cc/TM9T-WGTB>.

118. *Drewes Farms*, 441 F. Supp. 3d at 557.

119. *Id.* at 556.

intelligence must necessarily guess at its meaning.”<sup>120</sup> Vague laws are unconstitutional both because they “may trap the innocent by not providing a fair warning,” and because they “invite arbitrary enforcement.”<sup>121</sup>

Applying the vagueness doctrine, the court explained:

What conduct infringes the right of Lake Erie and its watershed to “exist, flourish, and naturally evolve”? How would a prosecutor, judge, or jury decide? LEBOR offers no guidance. Countless . . . activities might run afoul of LEBOR’s amorphous environmental rights: catching fish, dredging a riverbed, removing invasive species, driving a gas-fueled vehicle, pulling up weeds, planting corn, irrigating a field—and the list goes on.

The court concluded that “LEBOR’s authors failed to make hard choices regarding the appropriate balance between environmental protection and economic activity. Instead, they employed language that sounds powerful but has no practical meaning. Under even the most forgiving standard, the environmental rights identified in LEBOR are void for vagueness.”<sup>122</sup>

Notably, the court suggested that if the City of Toledo had enacted traditional water pollution legislation, focusing on the problem of the growth of algae blooms, such legislation would probably be upheld.<sup>123</sup> LEBOR failed not because cities are foreclosed from addressing local water quality issues, but because Toledo attempted to do so by ascribing vague rights to Lake Erie, thereby failing to alert humans as to what conduct was prohibited. The court’s decision on LEBOR should be a glaring warning for other municipalities considering RoN ordinances.

## 2. Potential Responses to the Vagueness Critique

Proponents may have three possible responses to this critique of the vagueness of nature’s rights.

First, they may contend that the rights conferred on nature in RoN ordinances are appropriately vague because they are not meant to decide actual cases. Instead, these rights are symbolic—rhetorical devices meant to “instill reverence toward the natural world.”<sup>124</sup> In this view, governments are adding nature’s rights to legislation to “challenge[] some fundamental assumptions,”<sup>125</sup> kick off a “deliberative process,” or “get ideas on the table.”<sup>126</sup> No doubt, recognizing rights

120. *Roberts v. United States Jaycees*, 468 U.S. 609, 629 (1984).

121. *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972).

122. *Drewes Farms*, 441 F. Supp. 3d at 556.

123. *Id.* at 557. The court cited favorably an ordinance from Madison, Wisconsin that focused on the algae bloom problem and that survived judicial review. *Id.* (citing *CropLife Am., Inc. v. City of Madison*, 432 F.3d 732, 733 (7th Cir. 2005)).

124. Sharon, *supra* note 82, at 579.

125. ZELLE ET AL., *supra* note 15, at 69.

126. MIHNEA TĂNĂȘESCU, UNDERSTANDING THE RIGHTS OF NATURE: A CRITICAL INTRODUCTION 93 (2022); Huneeus, *supra* note 1, at 137 n.21; Guim & Livermore, *supra* note 42, at 1352 n.13 (“[A]t this

for nature has been a powerful rallying cry for activists, and proponents may assert that this mobilizing effect of vague nature rights is good enough for now because the RoN movement is still building momentum.<sup>127</sup>

These arguments about the symbolic or deliberative value of nature's rights may have been persuasive five decades ago. After all, getting ideas on the table was one of the main goals of *Should Trees Have Standing?* in 1972.<sup>128</sup>

But now that governments are codifying nature's rights in binding legislation, it is disingenuous to claim that these laws do not really mean what they say, or that the laws are merely symbolic expressions of a locality's desire to nurture nature. As noted above, LEBOR contained criminal penalties for violating the legal rights of Lake Erie; this threat of jail time hardly seems symbolic or innocuous. Across the United States, municipalities are enacting RoN legislation to block particular projects and industrial activities. The ordinances are more than rhetorical or aspirational; they are intended to have a legal effect.

Second, proponents may respond that the rights they seek to confer on nature, such as rights to exist or flourish, are no more vague than existing rights that humans enjoy, such as freedom of speech or equal protection.<sup>129</sup> In this view, vagueness in the content of nature's rights is tolerable because judicial decisions and further legislation will clarify the meaning of nature's rights over time.

The U.S.'s vague constitutional rights, however, should hardly be used as a model for a new paradigm for environmental protection. Defining the scope, contours, and limits of those eighteenth century constitutional rights required centuries of judicial interpretation and a civil war. That long process can and should be avoided in drafting environmental protection statutes, where specificity is paramount.

Given the urgency of the environmental crisis, we do not have the luxury of waiting for decades of judicial decisions to give substantive legal content to nature's rights, especially given that leading RoN theorists have struggled to define the rights themselves. Arguing that nature's rights are appropriately vague delegates stunningly broad powers of interpretation, implementation, and enforcement to judges. Vagueness in nature's rights means that judges will decide fundamental issues of economic development, land use, health, resource allocation, and nature protection.<sup>130</sup>

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stage in their development, nature's rights provisions are not intended to have determinate substantive content. Rather, they initiate a deliberative process.”).

127. Huneus, *supra* note 1, at 152 (explaining that CELDF and other RoN advocacy groups are using “law to push for changes in *thinking* about the relationship of local communities to their environment”).

128. See Stone, *supra* note 17, at 457 (suggesting that we should “begin to explore the implications” of nature's rights).

129. U.S. CONST. amends. I, V, XIV § 1.

130. Hope Babcock, a supporter of the RoN project, has expressed concern that it “transfer[s] potentially political disputes from the political branches of government to the nonpolitical one.” Babcock, *supra* note 13, at 4.

Finally, RoN proponents often defend their project by arguing that the law already recognizes enforceable rights in other non-human entities—particularly corporations—so there is nothing incoherent or unworkable about extending legal rights to nature.

RoN literature is crowded with comparisons between rights of nature and rights of corporations,<sup>131</sup> and it is a telling comparison. On the one hand, the argument for nature's rights may seem stronger than rights for corporations because living things have form and substance. They have DNA, an existence that predates humans, and life-giving properties. Corporations, in contrast, are inanimate entities without substance or form. They are purely creations of law, and relatively recent ones at that.<sup>132</sup>

But the rights we grant to corporations are discernable and far from absolute: the rights (and duties) of a corporation are spelled out, in detail, through statutory law, constitutional law, corporate charters, and the vast array of contracts that bind corporations. Law details the substantive content of corporate rights and their limits and exceptions, granting certain legal rights to corporations and denying others.<sup>133</sup> In contrast, RoN legislation advances a vague, nebulous set of rights—such as rights of natural entities to “exist,” “have habitat,” or “flourish”<sup>134</sup>—leaving humans to guess at the substantive content of the law. When a human enters into a transaction with a corporation, the rights and duties of the parties are largely knowable and discernable, but vagueness limits nature's rights as a basis for a workable legal system.

The comparison to corporate rights highlights an important point: the reason that a rights-based regime for nature is unworkable is not because it seeks to grant legal rights to something other than natural persons. Over many centuries, legal systems have granted rights to corporations, limited liability companies, trusts, religious societies, etc.<sup>135</sup> The problem, rather, is that the RoN movement seeks a

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131. Tribe, *supra* note 18, at 1343 (arguing that we should view the “independent legal status of environmental objects” as essentially the same as the corporate form because both are “a useful but quite transparent legal fiction”); Houck, *supra* note 9, at 44 (arguing that there is no “problem of practicability” with RoN lawsuits because “lawyers represent nonhuman interests every day, including corporations that we have simply *declared* to be persons”).

132. See Gwendolyn J. Gordon, *Environmental Personhood*, 43 COLUM. J. ENVTL. L. 49, 63-64 (2018) (tracing development of corporate personhood since the middle ages); Erin Fitz-Henry, *Challenging Corporate “Personhood”: Energy Companies and the “Rights” of Non-Humans*, 41 POL. & LEGAL ANTHROPOLOGY REV. 85, 90 (2018) (“[E]cological systems are composed of considerably more ‘vibrant’ or ‘agentive matter’ than the companies currently protected by constitutional rights.”).

133. See Brandon L. Garrett, *The Constitutional Standing of Corporations*, 163 U. PA. L. REV. 95, 97, 100 (2014) (detailing constitutional rights granted to corporations and noting rights that are denied to corporations, such as Fifth Amendment self-incrimination rights, Article IV Privileges and Immunities Clause rights, and Due Process liberty rights).

134. See ordinances discussed *supra* Part I.

135. Garrett, *supra* note 133, at 105; 1 U.S.C. § 1 (“[T]he words ‘person’ and ‘whoever’ include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.”).

rights revolution on behalf of trillions of organisms and innumerable ecosystems that cannot themselves express their interests but would nonetheless be positioned to assert far-reaching rights that have no precise legal meaning.

#### B. INEFFECTIVENESS DUE TO LACK OF LIMITING PRINCIPLES

A second reason why RoN legislation is likely to be ineffective in protecting nature is that the RoN project lacks limiting principles. As noted in Part I, many RoN proponents take the position that the mere existence of a thing gives rise to enforceable legal rights. Given that stance, there is no logical stopping point in the number of entities (living and non-living) that could come to possess legal rights.

My objection to this expansiveness in nature's rights is not a philosophical one, grounded in debates about what level of sentience or consciousness is needed to be a rights-holder. I do not take the position that plants or animals are ontologically incapable of holding legal rights, nor do I contend that an entity can possess legal rights only if it can carry out legal duties.<sup>136</sup> Instead, my objection is a practical one, grounded in skepticism that an effective, alternative regime for environmental protection can be established by creating trillions of new rights-holders with mutually conflicting interests. This is a recipe for conflict and stasis, not environmental progress.

##### 1. The Universalism of Nature's Rights

In most RoN legislation, the grant of legal rights to nature is sweeping and universal. By conferring rights on "nature," "natural communities," or "ecosystems," RoN ordinances in the United States confer the same legal rights on the bacteria and the bison, the weed and the willow.<sup>137</sup> They reflect what the Norwegian philosopher Arne Naess called "biospherical egalitarianism."<sup>138</sup>

This universalism is problematic for several reasons. First, it makes it difficult to obtain buy-in from the public, legislators, and the courts for a rights-based approach to environmental protection. Once people understand that proposed

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136. An entity need not be an active agent in the world, carrying out legal obligations, to be the holder of legal rights. See Visa A.J. Kurki, *Can Nature Hold Rights? It's Not as Easy as You Think*, 11 *TRANSNAT'L ENVTL. L.* 522, 542 (2022). A human infant is the best example of a being that holds legal rights without corresponding duties to respect others' legal rights. Cf. *id.* (discussing a human infant as an example of a "passive" entity, rather than an active agent, that has legal rights). See also Burdon, *The Rights of Nature*, *supra* note 9, at 78 ("It is plainly nonsense to speak of nature holding duties.").

137. Some writers have suggested that nature's rights can be differentiated, with different species possessing different sets of rights. See Stone, *supra* note 17, at 457-58; Burdon, *The Rights of Nature*, *supra* note 9, at 79-80. These scholars have provided no further detail, however, on how legal rights would be differentiated among species, or among organisms within species.

138. David Kelleet, *Gleaning Lessons from Deep Ecology*, 2 *ETHICS & ENV'T* 139 (1997). See also DEVAL & SESSIONS, *supra* note 84, at 67-69 ("[A]ll things in the biosphere have an equal right to live and blossom and to reach their own individual forms of unfolding and self-realization within the larger Self-realization.").

RoN laws are granting legal rights to every living thing, including abundant *non-endangered* organisms, opposition to the RoN project will become intense. Expansion of rights beyond humans, without any limiting principles for which species or organisms will become rights-holders, is not a viable political program for nature protection.

A second drawback of this rights-universalism is that expansions of rights impose liberty costs on society. Rights trigger corresponding duties on both private parties and the government to restrict behavior to respect the rights.<sup>139</sup> They also trigger an investment of judicial resources to uphold the rights.<sup>140</sup> To assert that every living thing has enforceable rights is to impose intolerable costs on society; society could barely function if RoN legislation were interpreted literally.<sup>141</sup> The RoN movement is waging high profile campaigns on behalf of elephants,<sup>142</sup> orcas,<sup>143</sup> and monkeys,<sup>144</sup> but these cases can easily distract from the much broader agenda of the RoN movement, which involves granting enforceable legal rights to every living organism and to innumerable ecosystems.

To see the implications of the sweeping universalism of the U.S. ordinances, consider that there are almost 30,000 species of beetles in the United States.<sup>145</sup> In fact, one out of every four animal species on the planet is a beetle.<sup>146</sup> If RoN ordinances were interpreted literally, individual beetles within each of the 30,000 species would become rights-bearing entities, positioned to assert claims against humans in U.S. courts. Would policymakers and the public support RoN legislation if they knew the number of new rights-holders it would create? Who would ascertain the interests of each of these potential plaintiffs? And how would courts resolve the inevitable rights conflicts among beetles, as well as rights conflicts between beetles, other species, and humans?

Recognizing such universal rights for every living organism quickly becomes incoherent as a basis for operating a legal system. It opens the legal system to an astonishing set of rights claims. For example, if individual beetles obtain new rights to “exist” or “flourish,” it is not clear that these rights would mean solely a claim to be free of intentional destruction by humans—they could also be interpreted as requiring humans to intervene affirmatively to effectuate a beetle’s rights. Would humans have a duty, for example, to protect a beetle from its own

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139. See *infra* section III.B.

140. See STEPHEN HOLMES & CASS R. SUNSTEIN, *THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES* 45-46 (1999) (explaining that the exercise of a right involves a claim on public authorities).

141. See *infra* section II.D.

142. See Nonhuman Rts. Project, Inc. *ex rel.* Happy v. Breheny, 197 N.E.3d 921, 923–24 (N.Y. 2022).

143. See Michelle Bender, Rachel Bustamante & Kriss Kevorkian, *Rights for the Southern Resident Orcas Gains Momentum*, EARTH LAW CENTER (Feb. 22, 2023), <https://perma.cc/Q58V-2A8V>.

144. *Naruto v. Slater*, 888 F.3d 418 (9th Cir. 2018).

145. *Beetles (Coleoptera)*, WISCONSIN HORTICULTURE: DIVISION OF EXTENSION, <https://perma.cc/8PDB-D68Y>.

146. *Id.*



predators? Surely that cannot be the case, yet the wording of RoN legislation leaves that possibility open.

The global decline in beetles and other insects is alarming.<sup>147</sup> To address this problem, however, there is no need to enact a new, nebulous set of legal rights for beetles. If the ultimate goals are preserving habitats for insect species and reducing the pollution that is harming insects, we should focus on those goals rather than establishing new legal rights for trillions of insect organisms. We can simultaneously hold a principled belief that humans are deeply dependent upon, and embedded within, natural ecosystems while rejecting the argument that the only way to protect nature is to grant legal rights to every living organism.

A theoretical right becomes workable only if human political and legal systems are willing to sacrifice resources in the name of protecting it. There is simply no prospect that humans will create legal mechanisms to ensure that trillions of common, non-endangered organisms can assert rights on this scale. A project of environmental protection is headed for failure if it depends on convincing elected officials (and voters) that every living organism can assert rights in U.S. courts.<sup>148</sup>

RoN legislation could instead address a far narrower range of rights. A more feasible approach would be to confer specific legal rights on specific organisms to solve a social or environmental problem. Take, for example, the problem of hens confined in tiny “battery cages” in the egg industry.<sup>149</sup> One could imagine a city or state enacting an ordinance that conferred a legal right on hens to roam or to have a certain minimum square footage per hen.

But RoN proponents have shown little interest in targeted legislation of this sort. They have worked instead to enact RoN ordinances that confer broad legal rights on all of nature or “natural communities” within a jurisdiction, transforming trillions of organisms into potential plaintiffs.<sup>150</sup>

RoN proponents contend that RoN legislation should be drafted broadly because rights flow from interests, and every living thing has an interest in existing.<sup>151</sup> As Ollie Houck put it, “all living things on earth struggle against dying and to reproduce their own, which if nothing else demonstrates a primordial urge

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147. Jennifer E. Harris et al., *Decline in Beetle Abundance and Diversity in an Intact Temperate Forest Linked to Climate Warming*, 240 BIOLOGICAL CONSERVATION (2019); International Union for the Conservation of Nature, *Why Beetle Populations Are Plummeting in the Mediterranean* (2019), <https://perma.cc/N584-TF36>; David L. Wagner et al., *Insect Decline in the Anthropocene: Death by a Thousand Cuts*, 119 PROC. NAT’L ACADEMIES SCIS. (2021).

148. See HOLMES & SUNSTEIN, *supra* note 140, at 45-46 (“[The] wronged party exercises his right to use the publicly financed system of litigation, which must be kept readily available for this purpose . . . To claim a right successfully . . . is to set in motion the coercive and corrective machinery of public authority. This machinery is expensive to operate, and the taxpayer must defray the costs.”).

149. See *Farm Animal Confinement Laws By State*, ASPCA, <https://perma.cc/ZMC7-LEUX> (giving examples of states that have banned the use of battery cages for laying hens).

150. See ordinances cited *supra* Part I.

151. See Chapron et al., *supra* note 81.

to exist and continue existing.”<sup>152</sup> But an interest-based grounding for the rights of nature has many problems that make this approach unworkable. Living things cannot directly convey their interests to us. It is hubristic to believe that we can nonetheless identify the interests of individual organisms at such a granular level that their interests can be captured in legal ordinances enforceable in court. Most of the species on Earth have not even been named and cataloged.<sup>153</sup>

Additionally, by resting legal rights on the purported interests of each organism, we risk swapping in our own interests and identifying them with the interests of nature. Consider the species *Triticum aestivum*, commonly known as wheat. If we follow the logic and assume that *Triticum aestivum* (and every organism within it) has an interest in existing, should that interest get converted into a legal right to exist? If so, would such a legal right preclude human harvesting of wheat? More likely, humans would redefine the interests of wheat by concluding that its role in the Earth community is to serve as a food source for us. How could it be otherwise? Having food positively *demand*s that humans override the allegedly universal right to exist.

Another problem with an interest-based grounding for nature rights is that courts would arrive at widely varying decisions depending on what level or portion of nature they examine. An individual beetle surely has an interest in existing, but a forest ecosystem might have an “interest” in the beetle becoming prey for some larger species or in having its decomposing body nurture the soil. Basing the legal rights of nature on the purported “interests” of nature leads to indeterminate results and depends entirely on how we aggregate nature for the purpose of the analysis.<sup>154</sup>

The lack of a limiting principle within the RoN project becomes most apparent when the movement seeks to grant legal rights to entities that are not organisms. As noted in Part I, RoN legislation frequently confers legal rights on things that are not themselves living organisms but are aggregates of living and non-living things, such as lakes or rivers.

But why, exactly, does an aggregate of trillions of living and non-living things—a collective of life and non-life—become a singular rights-bearer? For legislation to proclaim that a river has a legal “right” to flow is not based on any underlying consciousness or interest of the river. We might as well argue that the wind has a legal right to blow.

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152. Houck, *supra* note 9, at 33 (emphasis omitted). P.W. TAYLOR, RESPECT FOR NATURE: A THEORY OF ENVIRONMENTAL ETHICS 222 (2011) (“All organisms, whether conscious or not, are teleological centers of life in the sense that each is a unified . . . system of goal-oriented activities that has a constant tendency to protect and maintain the organism’s existence.”).

153. Mora et al., *supra* note 8, at 5.

154. See Guim & Livermore, *supra* note 42, at 1386. See also Spitz & Penalver, *supra* note 98, at 98 (discussing problems of aggregating nature in litigation regarding the Colorado River); Ryan et al., *supra* note 72, at 2573 (exploring whether people would represent nature “at the level of individual animals or plants” or at the level of “the natural system as a whole”).

A river has a “right” to flow only in the sense that humans ascribe that interest to the river. Given that there are trillions of other non-sentient objects on Earth, there is no limiting principle when it comes to non-living things: it is not clear why legal rights should attach to “the river” rather than to other objects, such as pebbles on a beach or copper in a mine. The only plausible reason for conferring enforceable legal rights on “the river” is that rivers have far more subjective value to humans. This is not to say that rivers deserve no protection under law, but rather to highlight the ways in which rights-talk for rivers and other aggregates requires philosophical and logical leaps that are not present when we protect those same resources through traditional prescriptive regulation.

## 2. Problems in Defining Nature’s Boundaries

Compounding the lack of limiting principles for the entities that will hold rights, RoN legislation also creates clouds of uncertainty about the geographic boundaries of nature-as-rights-holder. Everything in nature is interconnected. There is no clear demarcation between one ecosystem and another. For a rights-based regime to become workable, it would have to define the physical boundaries of the rights-holding entity, such as a river, a lake, or a species. Only through clearly defined boundaries can humans know, *ex ante*, whether they are obligated to limit their activities around a protected natural entity.

Delineating the geographic boundaries of nature-as-rights-holder is a conceptual muddle, however. Some RoN legislation takes a “top-down” approach in which “nature” refers to the entire biosphere.<sup>155</sup> This view is attractive to the RoN movement because it appears to offer the most comprehensive protection to nature. But this maximalist view of nature has several problems. For one thing, it necessarily includes humans, which makes human destruction of living things, to some extent, “natural.” This view of the scope of nature’s rights fails to do much work, legally, if at the end of the day it seems to tolerate even profligate destruction of nature by humans.<sup>156</sup> This approach to writing RoN legislation is also problematic because it is not possible to determine a single meta-interest of the biosphere as a whole.<sup>157</sup> Species within the biosphere compete against each other in life and death struggle. Given this Darwinian backdrop, what does it mean for “nature” as a whole to have legal rights?

As an alternative, some legislation relies on a “bottom-up” definition of nature that seeks to protect specific ecosystems.<sup>158</sup> Many of the U.S. RoN ordinances rely on this approach. The problem, however, is that the boundaries between

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155. Guim & Livermore, *supra* note 42, at 1395-98.

156. Guim & Livermore explain that if humans are part of nature, then “nutrient pollution from industrial agriculture, the construction of dams, and the hunting to extinction of large mammals are natural processes.” *Id.* at 1400. They then note an internal contradiction in the RoN movement because “if nature’s rights are to mean anything, then these are the kinds of activities that would be curtailed.” *Id.*

157. *Id.* at 1397-1400 (discussing objections to a top-down approach to defining nature).

158. *Id.* at 1367-69.

ecosystems are indeterminate, and there is no scientifically accepted way to determine where one ecosystem begins and another ends. Once we move beyond individual organisms as rights-holders, we begin to lose precision in identifying the thing to which we are ascribing enforceable legal rights.

Anyone who has followed the fifty-year effort of U.S. courts and agencies to define the boundaries of the “waters of the United States” under the Clean Water Act<sup>159</sup> would quickly grasp the difficulty of delineating an ecosystem as a rights-holder.<sup>160</sup> Does a rights-bearing aquatic ecosystem include all associated tributaries? What about adjacent wetlands? Non-adjacent wetlands? What about groundwater that feeds the water body?

These definitional issues matter for the effectiveness of RoN legislation because protecting nature requires that humans understand the boundary lines of the protected entity. However, defining the boundaries of nature-as-rights-holder is simply a “terminological quagmire.”<sup>161</sup> It is an intractable problem that undermines RoN as a practical program of environmental protection.<sup>162</sup>

One point where there should be agreement is that the protected boundaries of nature can be no greater than the geographic boundaries of the rights-granting jurisdiction. A city, if it wishes, could confer rights on natural entities within the city (assuming consistency with the state and federal constitutions), but not on natural entities outside the city.

But even on this point, U.S. municipalities have gone rogue. Many governments have attempted to confer rights on natural entities far outside political boundaries. The City of Spokane, Washington, for example, attempted to place an initiative on the ballot that would grant “inalienable rights to exist and

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159. 33 U.S.C. § 1362(7) (“The term ‘navigable waters’ means the waters of the United States, including the territorial seas.”).

160. See generally *Sackett v. EPA*, 598 U.S. 651 (2023) (Alito, J.) (holding that waters of the U.S. include only those wetlands with a continuous surface connection to waters such as streams, oceans, rivers, and lakes); *Rapanos v. U.S.*, 547 U.S. 715 (2006) (plurality) (Scalia, J.) (same); *Solid Waste Agency Northern Cook Cty. v. U.S. Army Corps of Eng’rs*, 531 U.S. 159 (2001); *U.S. v. Riverside Bayview Homes Inc.*, 474 U.S. 121 (1985).

161. See Michael Carolan, *Society, Biology, and Ecology: Bringing Nature Back into Sociology’s Disciplinary Narrative Through Critical Realism*, 18 *ORG. & ENV’T* 393, 399 (2005). See also KATE SOPER, *WHAT IS NATURE?* 15-21 (1995) (describing multiple definitions of the term “nature”); Guim & Livermore, *supra* note 42, at 1386 (“So far, there is no convincing account of how to define the relevant aggregates for purposes of understanding the implications of nature’s rights in individual cases.”); Stone, *supra* note 17, at 456 n. 26 (“[T]here are large problems involved in defining the boundaries of the ‘natural object.’”).

162. Notably, there is no analogous problem in defining the boundaries of humans as rights-holders. Rights may attach to particular *statuses* of humans (children, prisoners, tenants, medical patients etc.) and those statuses may require definition, but there is not the morass of issues regarding where the physical boundaries of human rights-holders begin and end *vis a vis* other humans.

flourish” to the Spokane River and to an aquifer that extends into Idaho.<sup>163</sup> The Supreme Court of Washington struck down that ordinance, holding that this attempt to extend legal rights into Idaho exceeded Spokane’s jurisdiction.<sup>164</sup>

The City of Toledo’s LEBOR, discussed above, purported to establish rights for the 10,000 square mile Lake Erie and its much broader watershed.<sup>165</sup> Upping the ante, a bill introduced in the New York State Assembly purported to confer rights to “exist, persist, [and] flourish” on all seven of the Great Lakes and each of their watersheds, stretching from New York to Minnesota.<sup>166</sup>

As these examples show, there is often a fundamental mismatch between a government’s geographic jurisdiction and the ambitious, universalistic goals of the RoN movement. Without limiting principles, the movement seeks to ascribe a set of legal rights to the whole natural world, but in the United States, it “unfolds at the humble level of small-town and city ordinances and so often ends in swift legal or political defeat.”<sup>167</sup>

### C. INEFFECTIVENESS DUE TO JUDICIALIZATION

I have so far focused on the vague content of nature’s rights and the problems of defining and limiting nature’s rights. I now shift to another reason why a rights-based regime for nature protection is likely to be ineffective: the institutional limitations of the actors that will enforce nature’s rights.

In the vision of RoN proponents, courts would become the lead actors in interpreting, implementing, and enforcing nature’s new rights.<sup>168</sup> The RoN movement seeks to judicialize nature protection, reducing the relevance of administrative agencies, enforcement officials, and regulators. Yet there has been little discussion in RoN literature of how RoN cases would fare in U.S. courts, or whether this judicialization is desirable.

Below, I argue that courts are fundamentally unsuited to taking on this lead role in nature protection, especially if RoN litigation came to replace the traditional agency roles of standard-setting and enforcement. Judicialization has two distinct drawbacks: 1) localized problems with vindicating nature’s rights in

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163. Spokane Entrepreneurial Ctr, 369 P.3d at 146.

164. *Id.*

165. CITY OF TOLEDO, OHIO, MUN. CODE, ch. 17, § 253.

166. Assemb. B. 3604, 2021-2022 Leg., Reg. Sess. (N.Y. 2021).

167. Huneus, *supra* note 1, at 136.

168. Arguments for judicializing environmental protection were clear in early RoN writings. See Stone, *supra* note 17, at 458 (For a thing to have legal rights means “first, that the thing can institute legal actions at its behest; second, that in determining the granting of legal relief, the court must take injury to it into account; and, third, that relief must run to the benefit of it.”) (emphases removed). As the RoN movement has developed, it has continued to view courts as the principal vindicators of nature’s rights. See Babcock, *supra* note 13, at 18 (“It is important to give nature the independent legal right to go to court to protect itself from harm because the current system will not allow others to intervene on nature’s behalf.”); Takacs, *supra* note 13, at 604 (advocating for a guardianship approach for nature).

individual cases; and 2) systemic problems with relying on the judiciary to prevent and punish environmental damage.

### 1. Problems with Vindicating Nature's Rights in Individual Cases

The RoN movement rests on the assumption that judges can protect nature by issuing decrees in tort-like suits brought by an injured natural entity against one or more human or corporate wrongdoers. That assumption is flawed. The limitations of protecting the environment through private litigation of this type are well-known, even under current circumstances where humans are the plaintiffs.<sup>169</sup> In an RoN framework where a natural entity, not a human, would be the plaintiff, there would be unique hurdles to winning a case.

As an initial matter, before filing an RoN case, someone (it is not clear who) would have to monitor potential harms to innumerable organisms and ecosystems (insects, amphibians, lakes, rivers, forests, etc.) and assess whether any of those harms are caused by humans (an attribution issue). Assuming every standing hurdle could be overcome for nature-as-plaintiff, a person or organizational guardian would have to decide that nature's rights are in fact violated, that the harm is severe enough to warrant the expense of a lawsuit, and that a judicial remedy could help.<sup>170</sup> There would likely be endless satellite litigation over the identity of the guardian. Nature obviously needs the assistance of a person to file a lawsuit, but any rights-based system would have to grapple with the question of who is a *legitimate* guardian for the particular need and interest asserted. That question alone is politically fraught, particularly where the proposed guardian differs from the owner of the land on which nature-as-plaintiff exists.

Once a nature-rights suit is filed, the guardian would then face motions to dismiss and other pre-trial motions to limit the scope of the case. If a trial were ever held, the guardian would face enormous hurdles of proof and causation. For many types of environmental damage (e.g., toxic pollution, habitat loss, climate

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169. RoN literature rarely mentions the existing scholarship on the inadequacies of private litigation for addressing environmental problems. *See, e.g.*, Noah M. Sachs, *Toxic Floodwaters: Strengthening the Chemical Safety Regime in the Era of Climate Change*, 46 COLUMBIA J. ENVTL. L. 98-102 (2020) (discussing weaknesses of private lawsuits for obtaining damages after natural disasters); Christopher H. Schroeder, *Lost in the Translation: What Environmental Regulation Does That Tort Cannot Duplicate*, 41 WASHBURN L.J. 583, 598-602 (2002); Stephen Shavell, *Liability for Harm versus Regulation of Safety*, 13 J. LEG. STUD. 357, 364-67 (1984) (discussing factors that make regulation preferable to liability law for addressing some types of risks).

170. The identity of the guardian could be dispositive in RoN litigation because the guardian would bring their own biases to their representation. *See* Ryan et al., *supra* note 72, at 2572 (The appointment of a guardian is a "puzzling problem" because "different people might come to very different conclusions about how to prioritize the interests of other members of the biotic community"). In a remarkable passage from his dissent in *Sierra Club v. Morton*, Justice Douglas wrote that a variety of guardians could be appointed to speak for a body of water, including "a fisherman, a canoeist, a zoologist, or a logger." *Sierra Club*, 405 U.S. at 743. Justice Douglas failed to acknowledge, however, that these various guardians have fundamentally clashing interests, and such a case would likely turn on which guardian is appointed.

change), there could be countless human parties who bear some responsibility. A guardian would bear the burden to prove that a natural entity's damages are caused by a particular defendant before the court, and this critical issue of causation would have to be litigated in an adversarial context with dueling experts. Absent some sort of strict liability regime, the guardian would also have to prove that the defendant harmed nature intentionally or carelessly.

Even if all these hurdles were surmounted, and a judge or jury concluded that nature's rights were in fact violated, nature-as-plaintiff could still lose. As discussed below in section III.A, many RoN proponents envision that nature's rights would be balanced against human rights, needs, and interests. As a result of this balancing process, a natural organism whose rights are adjudicated to be violated may still not prevail in a case.

RoN proponents must be prepared for nature to *lose* in court. Nature could be silenced in binding precedential decisions. Yet this possibility is rarely discussed in RoN literature, which adopts the optimistic view that conferring rights on nature will activate human empathy and care.<sup>171</sup> RoN scholars focus on the symbolic and rhetorical benefits of the grant of rights to nature while ignoring how difficult it would be to transform rights on paper into a final judgment that actually protects nature.

Some critical questions remain unanswered about how RoN cases would fare in U.S. courts. Will judges be willing to enjoin economic development projects, hospital construction, energy infrastructure, or agriculture in the name of nature's rights? Can a judiciary run by humans really become the vehicle for vindicating an ecocentric assortment of rights of nature? About half the U.S. states elect judges.<sup>172</sup> In these states, judges raise campaign dollars from powerful interests, and campaigns costing well over a million dollars are common.<sup>173</sup> At least at the state level, judges are hardly insulated from the corporate forces that RoN advocates decry.<sup>174</sup>

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171. CARDUCCI, ET AL., *supra* note 78, at 66 (arguing that the EU's adoption of RoN principles would heal humans' "societal disconnect from the rest of nature and each other"). *But see* Spitz & Penalver, *supra* note 98, at 89 (noting that RoN could antagonize humans and mark the "preservation of natural resources as adverse to human interests").

172. *Judicial Selection: Significant Figures*, BRENNAN CENTER FOR JUSTICE (May 9, 2015), <https://perma.cc/B6JG-FHAB>.

173. *See, e.g.*, Barnhizer, *On the Make: Campaign Funding and the Corrupting of the American Judiciary*, 50 CATH. U. L. REV. 361 (2001); James L. Gibson, et al., *The Effects of Judicial Campaign Activity on the Legitimacy of Courts: A Survey-Based Experiment*, 64 POL. RSCH. Q. 545–58 (2011). In the 2022 election cycle, "billionaire contributors" and right-wing PACs contributed millions to influence elections to state supreme courts. Michael Wines, *As Stakes Rise, State Supreme Courts Become Crucial Election Battlegrounds*, N.Y. TIMES (Nov. 2, 2022), <https://perma.cc/G8TZ-PTQ3>.

174. Additionally, in the United States, defendants would have a 7th Amendment right to a jury trial in civil suits for money damages. Assuming that some natural entity or organism could surmount every hurdle and make it to trial, what will jurors think of nature's new rights? Would jurors vote to implement vague rights of nature instead of, for example, ruling in favor of a company that is a major employer in the area?

## 2. Systemic Problems from Judicializing Nature Protection

Judicializing environmental protection is a mistake not only from the standpoint of individual cases, but also because of systemic problems with relying on the judiciary as the lead institution to prevent and punish environmental harm. Courts are not well-suited for this role.

Environmental harms often are diffuse, affect multiple species and ecosystems, span jurisdictional boundaries, and have multiple causes.<sup>175</sup> Courts are not well-positioned to provide remedies for these kinds of harms.

Moreover, courts can act only on cases brought by litigants. They have no general authority to investigate, prevent, or ameliorate environmental harm. Consequently, under an RoN framework, there is no realistic probability that courts would prioritize the most serious environmental problems. There is nothing holistic or preventative about protecting nature by judicial decree.

Even if an RoN case could be prosecuted successfully, a court's judgment compelling money damages (or restoration) would bind only the defendant in the case. Meanwhile, similar environmental degradation, caused by other firms or governments, could continue unabated.<sup>176</sup>

The most significant drawback of judicializing nature protection is that litigation offers a poor mechanism for addressing complex issues of risk assessment and risk management. The RoN movement rests on a bilateral dispute model in which environmental damage to some protected entity would get resolved by suing an identifiable wrongdoer. But few environmental problems can be addressed this way. Consider just a few examples of complex problems that likely have no judicial solution:

- siting of renewable energy projects that involve land disturbance
- adapting to a warmer climate
- regulation of toxic chemicals that serve some useful purpose
- declines of endangered species with unknown causes
- reviewing new pesticides for health and environmental risks
- regulating mining's environmental and safety risks

In these examples, who would sue whom? How would judges manage risk and allocate resources? These problems are simply not amenable to resolution through a litigation-driven strategy.

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175. See Shavell, *supra* note 169, at 370.

176. It is an open question whether a final judgment in one RoN case would deter other actors from engaging in similar activities. Many tort scholars have concluded that deterrence signals are muted because of a variety of factors: an optimism bias of managers at other companies, difficulties of distinguishing the effects of harmful human behavior from background effects, and low chances that damage from future similar behavior would be detected. See Schroeder, *supra* note 169, at 592 (summarizing the research).



If RoN legislation ever came to replace existing environmental statutes, reliance on the judiciary could actually result in less effective management of environmental risk. We would be trading expert regulators and enforcement officials for generalist judges who lack the power to craft ecosystem-wide remedies. Under existing environmental statutes, regulatory agencies routinely engage in scientific research, risk assessment, and risk management to address the kinds of problems listed above. This work requires thousands of trained staff and long-term funding to conduct monitoring, research, impact assessment, habitat protection, or waste site control.<sup>177</sup> Long-term follow-up is critical for agencies to determine if the legal response is helping. Judges, in contrast, lack the technical training that regulators have in fields such as toxicology, wetlands biology, hydrology, conservation biology, and ocean science.

It is not my goal in this Article to engage in a comprehensive comparison of RoN legislation and existing environmental laws. But consider one illustration that shows how these two different regimes would fare in addressing a complex environmental problem.

Take the example of a factory emitting toxic air pollutants. In the existing model of environmental protection—based on prescriptive regulation and agency enforcement—the Clean Air Act details regulatory standards for such pollution, naming 187 toxic pollutants in the statute and prohibiting emissions beyond EPA-set emissions limits.<sup>178</sup> These emissions limits reflect the maximum achievable control technology for each pollutant, and they are updated regularly.<sup>179</sup> The control regime is backed by inspections, enforcement, and the threat of significant penalties.<sup>180</sup>

A nature-rights approach could never match the effectiveness of this regime. The fundamental problem is that under the RoN approach, no one knows whether that factory's emissions are lawful or unlawful. Someone would have to bring suit to prove that the emissions from the factory are not only toxic but are causing provable damage to some natural entity. The question of the lawfulness of these emissions would then be resolved only after a trial court's final judgment on whether the factory is violating nature's rights. Appeals would follow.

The RoN approach is underprotective because irreversible environmental damage can occur in the years before a court adjudicates some challenged human activity. Prior to judgment, the challenged factory and all similar ones would take advantage of the uncertainty created by vague nature rights-language. A rights-based framework would result, at best, in scattershot litigation and a patchwork

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177. See DARPÖ, *supra* note 87, at 56 (arguing that “funding, well-developed administrative infrastructure [and] transparency are necessary conditions” for environmental protection).

178. Clean Air Act § 112, 42 U.S.C. § 7412.

179. *Id.* § 7412(d)(6).

180. *Id.* § 7413(a)-(h) This regime does not ban emissions of toxic pollutants, but rather reduces emissions to the maximum extent achievable. *Id.* § 7412(d)(2).

of judicial decisions binding particular defendants, not a nationally-uniform program for controlling toxic air emissions, as under the Clean Air Act.

This example also demonstrates that traditional prescriptive regulation can be more protective of nature because it gives notice to humans, *ex ante*, of exactly what activities are prohibited. The Clean Air Act and associated regulations, for example, alert a factory to the emissions limits that will apply for toxic pollutants long before the factory begins operation.<sup>181</sup> In contrast, under a rights-based approach, companies could make billion dollar investments in equipment and buildings and emit thousands of tons of pollutants before a court tells them, years later, that their air emissions violated the rights of nature.

Given these drawbacks of judicializing environmental protection, the RoN movement's trust in the judiciary is fantastically misplaced. Improbably, the RoN movement sees courtroom liability—nature protection by judicial decree—as the solution to nearly all environmental problems.

None of what I have said here should be construed as minimizing the important role that the judiciary has played in U.S. environmental protection. That role has been a secondary one, however, with judges interpreting and enforcing detailed statutes and regulations to ensure that environmental laws are implemented.<sup>182</sup> Courts hear enforcement suits against private parties as well as suits against government agencies. Courts hold agencies to legislatively-imposed deadlines and overturn agency decisions that are arbitrary and capricious or unsupported by substantial evidence.<sup>183</sup> The RoN movement has an entirely different vision, where the judiciary would play the primary institutional role in protecting the environment. But nature conservation cannot be shoehorned into RoN's bilateral dispute model.

#### D. OVER-DETERRENCE OF BENEFICIAL HUMAN ACTIVITIES

The fourth problem with the RoN project is its chilling effect on beneficial human activities. Vague rights, conferred on new classes of rights-holders, will undoubtedly be used by humans against other humans in malevolent ways that have little to do with protecting nature. Nature's new rights will supercharge

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181. *Id.* § 7412(d) (establishing emissions standards for hazardous air pollutants that reflect the maximum achievable control technology); *id.* § 7412(f)(4) (prohibiting emissions not in accordance with the standards).

182. *See, e.g.*, Katherine A. Rouse, Note, *Holding the EPA Accountable: Judicial Construction of Citizen Suit Provisions*, 93 N.Y.U. L. REV. 1271 (2018); David S. Tatel, *The Administrative Process and the Rule of Law*, 34 HARV. ENVTL. L. REV. 1 (2010); Patricia M. Wald, *The Role of the Judiciary in Environmental Protection*, 19 B.C. ENVTL. AFF. L. REV. 519 (1992).

183. 5 U.S.C. § 706.

NIMBY opposition to transit, infrastructure, and renewable energy projects.<sup>184</sup> Nature's rights could easily be weaponized to harass enemies and bankrupt competitors. They could be deployed against marginalized groups and environmental justice communities to halt economic development and new affordable housing.<sup>185</sup> Through casting a wide liability net, nature's rights will deter valuable activities that should be allowed in a tolerant, democratic, thriving society.

Many RoN scholars have suggested that clipping the wings of human aspirations is necessary to protect nature. In their view, limits on humans are the price we must pay for rebalancing our legal system to make space for nature's rights. European RoN scholars, for example, wrote that "phasing out" certain unspecified industries under an RoN regime will result in our "moral and social compass [being] reset at a higher level."<sup>186</sup> Other RoN scholars have argued that negative consequences for humans are a just result of stripping humans of their privileged position on Earth.<sup>187</sup>

I alluded to the morally objectionable impacts on humans in earlier parts of this Article, and here I expand on the reasons why RoN poses unjustified threats to human well-being. I also build on my earlier points by showing why these negative impacts on humans are, ultimately, a problem for nature. Onerous liability for humans could undermine the broad public support for environmental protection that currently exists in the United States.<sup>188</sup> These political feedback dynamics—a problem of backlash—have been overlooked by RoN proponents.

## 1. Nature's Rights and Human Harms

Consider how human activity would be diminished if RoN legislation became more widespread. If individual organisms and natural communities possessed legally enforceable rights to "exist" or "flourish," would home building be permitted? Road or school construction? Timber harvesting?

All of these activities could trigger an RoN lawsuit, and it is unclear how courts would resolve such suits. Any construction of buildings or infrastructure, any taking of plants or animals for food, or any timber harvesting seems to run afoul of nature's rights and could potentially be enjoined in court. The broad-brush

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184. Dan Wu & Sheila R. Foster, *From Smart Cities to Co-Cities: Emergency Legal and Policy Responses to Urban Vacancy*, 47 *FORDHAM URB. L.J.* 909 (2020); Ori Sharon, *Fields of Dreams: An Economic Democracy Framework for Addressing NIMBYism*, 49 *ENVTL. L. REP. NEWS & ANALYSIS* 10264 (2019); Iva Ziza, *Siting of Renewable Energy Facilities and Adversary Legalism: Lessons from Cape Cod*, 42 *NEW ENG. L. REV.* 591 (2008).

185. See A. Mechele Dickerson, *Systemic Racism and Housing*, 70 *EMORY L.J.* 1535, 1552 (2021).

186. CARDUCCI ET AL., *supra* note 78, at 62.

187. See Alberto Acosta, *The Rights of Nature, New Forms of Citizenship, and the Good Life*, in *CONTOURS OF CLIMATE JUSTICE: IDEAS FOR SHAPING NEW CLIMATE AND ENERGY POLITICS* 108, 110 (Ulrich Brand et al., eds., 2009).

188. See, e.g., Pew Research Center, *As Economic Concerns Fade, Environmental Protection Rises on the Public's Policy Agenda* (Feb. 13, 2020).

assertion of nature's rights would even seem to prohibit hunting and trapping by indigenous groups that have inspired RoN legislation.<sup>189</sup>

This blocking function of RoN needs to be called out as one the movement's biggest drawbacks. There is no assurance that RoN lawsuits would be used only to enjoin egregiously harmful human practices. Just as likely, RoN lawsuits would be used to block beneficial human initiatives that modify or alter nature in some way.

The blocking function would be especially pernicious in climate change law, where new rights for nature could be used to block urgently needed investments in low-carbon infrastructure. The Intergovernmental Panel on Climate Change has estimated, for example, that \$3.0 to \$3.5 trillion in energy sector investments are needed *per year* to mitigate climate change.<sup>190</sup> Because construction of renewable energy projects, transmission lines, electric vehicle chargers, and mass transit will undoubtedly harm living things, to some extent, claims that nature has inviolable rights could be used to halt these environmentally essential investments. At a time when governments should be promoting a rapid energy transition, RoN provides the legal ammunition to enjoin it.

Nature's rights could be weaponized not only to threaten large-scale projects such as wind turbines, sea walls, and mass transit infrastructure but also to threaten smaller-scale activities on private property. Indeed, limiting humans' freedom over their own property is one of the primary goals of the RoN movement.<sup>191</sup>

When engaging in activities on their own property, humans may inadvertently or knowingly infringe on some legal right that has been granted to nature. Even disturbing insect communities and microorganisms by grading land could potentially trigger liability.<sup>192</sup> Widespread adoption of RoN legislation could result in a tsunami of lawsuits by individuals or governments attempting to enjoin otherwise lawful activity on private property. Farmers would be especially at risk of abusive RoN lawsuits given that their core business operation involves harvesting (killing) living organisms.

Ollie Houck has suggested that humans would learn to live with these new restrictions on private property, comparing them to "zoning regulation, pollution

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189. See Lieselotte Viaene, *Can Rights of Nature Save Us from the Anthropocene Catastrophe? Some Critical Reflections from the Field*, 9 ASIAN J. L. & SOC. 187, 197 (2022) (noting the "snowballing effect" of RoN and explaining that RoN "could compete or even jeopardize indigenous claims to their territory and natural resources").

190. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, GLOBAL WARMING OF 1.5 C 321 (2018), <https://perma.cc/J5DG-SE3B>.

191. CULLINAN, *supra* note 35, at 108 (The "virtually unfettered rights of a property owner to do as he or she likes with land or living creatures represents a dangerously unbalanced force."); ZELLE ET AL., *supra* note 15, at 84 (noting that RoN challenges "traditional conceptions of property law" in a way that is "more profound" than simply enacting "limits to existing rights of owners of property").

192. Locey & Lennon, *supra* note 7, at 5973 (estimating more than one trillion unique species of microorganisms).

controls, and other measures that we accept routinely for the common weal.”<sup>193</sup> But Houck is missing the sweeping reach of RoN ordinances. If implemented literally, they could prohibit *all* modification to private land that harms living things, and therefore all development. Zoning law serves as a scalpel to preclude certain development practices that harm the common good, but RoN legislation is a bludgeon.

Many of the existing RoN ordinances in the United States magnify the negative consequences for humans through provisions that strip humans and corporations of constitutional rights.<sup>194</sup> In 2013, for example, Mora County, NM enacted an RoN ordinance that gave “natural communities” and “ecosystems” a “right to a sustainable energy future.”<sup>195</sup> The ordinance, which contained criminal penalties, also stated that corporations engaging in prohibited activities in the area, like oil and gas extraction, would lose their First and Fifth Amendment rights and would be stripped of their rights to be considered “persons” under the U.S. and New Mexico constitutions.<sup>196</sup> The ordinance also proclaimed that individuals or corporations that ran afoul of the ordinance “shall not possess the authority or power to enforce State or federal preemptive law against the people of Mora County.”<sup>197</sup>

Six years later, the City of Toledo’s LEBOR took an even more aggressive approach to rights-stripping. It dispossessed corporations of “any . . . legal rights, powers, privileges, immunities or duties that would interfere with the rights or prohibitions” enumerated by LEBOR.<sup>198</sup> In a remarkable assertion, LEBOR also provided that the laws of Ohio “shall be the law of the City of Toledo only to the extent that they do not violate the rights or prohibitions of this law.”<sup>199</sup>

These rights-stripping provisions oppressively terminate state and federal constitutional guarantees by local fiat. They are blatantly unconstitutional and were found so by federal district courts in New Mexico and Ohio.<sup>200</sup> Though overturned in court, such provisions demonstrate the desire of some municipalities to enforce RoN legislation without any interference from higher levels of government or from state and federal constitutions.

## 2. Human Harms and Backlash against Environmental Protection

If RoN suits ever became common in the United States, the oppressive consequences of RoN for humans would pose a political problem for nature protection. It is implausible that voters would support enacting nature rights into law and

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193. Houck, *supra* note 9, at 34.

194. *See* Community Water Rights and Local Self-Government Ordinance, Ordinance 2013-01, Mora County, New Mexico (2013).

195. SWEPI, 81 F. Supp. 3d at 1092 (quoting Ordinance 2013-01).

196. *Id.* at 1093-95 (quoting Ordinance 2013-01).

197. *Id.* at 1094 (quoting Ordinance 2013-01).

198. CITY OF TOLEDO, OHIO, MUN. CODE, ch. 17, § 257.

199. *Id.*

200. SWEPI, 81 F. Supp. 3d at 1167, 1187-88; Drewes Farms, 441 F. Supp. 3d at 558.

then abide willingly for decades with the explosive liability implications of those rights. Voters would quickly lobby legislators to repeal RoN legislation. In other words, there could be a feedback mechanism where nature's rights, deployed to halt human activities, could result in erosion of support for the legislation that grants nature rights. The impact of this dynamic could even extend beyond RoN legislation: voters could come to see environmental protection in general as unfair and oppressive. If nature's rights are used to block human enterprises and activities, environmental protection could run aground on the sharp rocks of backlash politics.<sup>201</sup>

Currently, Americans' concern about the environment is near a two-decade high.<sup>202</sup> Against this backdrop, Congress in 2022 passed the largest package of climate and energy legislation in U.S. history, containing more than \$1 trillion in new climate mitigation, adaptation, and environmental justice measures.<sup>203</sup>

Rather than building on that momentum and fostering an empathic relationship with nature, the RoN movement turns nature into a rights-bearing other, a literal *opponent* to humans in litigation. If RoN lawsuits ever became common, American media would highlight this antagonistic dynamic, spotlighting sympathetic defendants who face financial ruin from RoN litigation. The possibility that an antagonistic relationship would develop between humans and nature, in the wake of RoN legislation and lawsuits, is rarely discussed in the scholarly literature.

Of course, any new assertion of rights can trigger backlash.<sup>204</sup> The mere existence of backlash is no reason to abandon social change movements. But coupled with the implausibility of RoN serving as an effective framework for environmental protection, there is a legitimate question about whether it is worth pursuing RoN legislation and wading into hostile environmental politics.

In the United States, the political backlash against RoN legislation will likely be fierce. To provide a comparison, the political backlash against the 1973

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201. Legislators in Ohio and Florida have already enacted state-wide legislation aimed at stopping the RoN movement. Clean Waterways Act, ch. 150, § 24 (2020) (codified as amended at Fla. Stat. § 403.412(9)(a) (2020)) (banning local RoN ordinances); Ohio Revised Code 2305.011 (banning persons from bringing any action on behalf of or representing nature or an ecosystem in the any court of common pleas).

202. Lydia Saad, *A Seven Year Stretch of Elevated Environmental Concern*, GALLUP NEWS (Apr. 5, 2022), <https://perma.cc/WQ6K-NRZZ>.

203. Inflation Reduction Act of 2022, Pub. L. No. 117-169, 136 Stat. 1818. Recent estimates conclude that the cost of the tax subsidies under the Act will exceed \$1 trillion over ten years. GOLDMAN SACHS, *The U.S. is Poised for an Energy Revolution* (Apr. 17, 2023), <https://perma.cc/R3N9-3VMN>; *Update: Budgetary Cost of Climate and energy provisions in the Inflation Reduction Act*, PENN WHARTON BUDGET MODEL (Apr. 27, 2023), <https://perma.cc/63HC-TX98>.

204. Michael J. Klarman, *How Brown Changed Race Relations: The Backlash Thesis*, 81 J. AM. HIST. 81 (1994); Michael Waterstone, *Backlash, Courts, and Disability Rights*, 95 B. U. L. Rev. 833 (2015); GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 9-20 (2d ed. 2008) (exploring political dynamics of backlash).

Endangered Species Act *has* been fierce,<sup>205</sup> mainly because of its restrictions on use of private property.<sup>206</sup> But that legislation applies only to 2,400 species on the federal endangered species list, and those species are on the brink of extinction from the Earth.<sup>207</sup> Could the RoN movement sustain political support as it blocks human enterprises to protect common, abundant organisms that are not endangered?

RoN scholars have never addressed the paradox of how RoN can maintain political support from voters while subjecting humans to open-ended, enormous liability. Politically, it is not clear how a program aimed at demoting human rights, needs, and interests could be propelled forward by elected legislators, accountable to voters, in democratic societies.

To be sure, many municipalities in the United States have enacted RoN legislation in the past decade, so some elected officials support the movement. But those municipal ordinances are not evidence of long-term support for RoN in the American electorate. The ordinances do not yet have legal bite. They have never been successfully enforced in court to enjoin human activities. Companies that have felt targeted by these ordinances have succeeded in suits to vacate them.<sup>208</sup> The existing municipal ordinances, in other words, reveal little about whether the RoN movement could sustain political support over the long-term.

### III. IS THE RIGHTS OF NATURE PROJECT FIXABLE?

With the multiple drawbacks to the RoN project that I detailed in Part II, there is a lingering question about whether these problems could be fixed. Must the consequences of RoN legislation for humans be so stark, or is there a way that these consequences could be softened? Is vagueness inherent in RoN legislation, or could nature's rights be clarified to make the project more workable as practical law?

In this Part, I examine whether the RoN project could be reformed to make it both workable and effective. I examine two potential reforms: A) a balancing process in which nature's rights would be balanced with human rights and interests to arrive at satisfactory accommodation; and B) specific drafting of RoN legislation to provide greater content to nature's rights and more guidance to humans. Ultimately, I conclude that neither approach can remedy the fundamental problems with conferring legal rights on nature.

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205. 16 U.S.C. §§ 1531-44.

206. See generally Judith A. Layzer, *Environmental Policy from 1980 to 2008: The Politics of Prevention*, in CONSERVATISM AND AMERICAN POLITICAL DEVELOPEMENT (Brian J. Glenn & Steven M. Teles eds., 2009); JUDITH A. LAYZER, OPEN FOR BUSINESS: CONSERVATIVES' OPPOSITION TO ENVIRONMENTAL REGULATION (2012); Jeffrey S. Kopf, *Slamming Shut the Ark Doors: Congress's Attack on the Listing Process of the Endangered Species Act*, 3 Animal L. 103 (1997).

207. U.S. FISH & WILDLIFE SERV., ENVIRONMENTAL CONSERVATION ONLINE SYSTEM (Aug. 13, 2023), <https://perma.cc/JEU9-EUAU>.

208. See, e.g., Houck, *supra* note 9, at 35-36; Babcock, *supra* note 13; Takacs *supra* note 13.

## A. BALANCING NATURE'S RIGHTS WITH HUMAN RIGHTS AND INTERESTS

Some RoN scholars have attempted to put a softer face on the RoN project by arguing that it does not threaten human well-being in the ways I described in Part II. They reason that nature's rights can and should be balanced against the rights and interests of humans to arrive at compromises that can serve the long-term interests of both nature and humans.<sup>209</sup>

Your garden won't sue you for pulling weeds. Mites won't sue you for plowing fields. Instead, in the view of these scholars, rights of nature would have a more limited role. Nature's rights would be invoked only when a natural entity is deemed irreplaceable or when destruction of nature cannot be justified by any countervailing human interest.<sup>210</sup> Many scholars acknowledge, as they must, that humans are part of nature, so human interests should be taken into account under an RoN regime. According to Ollie Houck, reasonable accommodations can be found once nature has a "seat at the table" to balance "the cacophony of competing human interests."<sup>211</sup>

Courts would play a key role in this process of accommodation. Courts would decide how nature's rights would be balanced with humans' interests and rights, just as courts currently balance competing rights claims among humans.<sup>212</sup>

This balancing process sounds reasonable. It seems to merge a nature-rights framework with values of recognition, reciprocity, and co-equal consideration of competing needs. But there are several reasons why balancing is not a viable reform pathway for the RoN project.

First, existing U.S. RoN ordinances say nothing about balancing and instead recognize nature's rights without exception. There is nothing in the existing ordinances that states that nature's rights should be invoked only to stop human activities deemed wasteful or unjustifiable. The ordinances have a much broader sweep. In fact, some ordinances expressly state that the legal rights of humans and corporations must yield to the rights of nature, as in the ordinances from Mora County, NM and Toledo, OH discussed above.<sup>213</sup>

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209. Houck, *supra* note 9, at 35; KAUFFMAN & MARTIN, *supra* note 4, at 230 (explaining that under an RoN framework, humans could still "inflict limited harm" on natural systems, but they could not prevent nature from "functioning and regenerating").

210. See Babcock, *supra* note 13, at 45-46.

211. Houck, *supra* note 9, at 35.

212. See Susan Emmenegger & Axel Tschentscher, *Taking Nature's Rights Seriously: The Long Way to Biocentrism in Environmental Law*, 6 GEO. INT'L ENVTL. L. REV. 545, 583-85 (1994); Houck, *supra* note 9, at 33; Joel I. Colon-Rios, *On the Theory and Practice of the Rights of Nature*, in THE SEARCH FOR ENVIRONMENTAL JUSTICE 132 (Paul Martin et al., eds. 2015); Stone, *supra* note 17, at 473 (discussing balancing of human interests in environmental disputes).

213. See *supra* section II.D. See also Assemb. B. 3604, *supra* note 166 (The rights granted to the Great Lakes watershed shall be "unencumbered by legal privileges vested in property, including corporate property."); SHAPLEIGH, ME., CODE §§ 99-11 (2009) ("No corporation doing business within the town of Shapleigh shall be recognized as a 'person' under the United States or Maine Constitutions,



RoN ordinances have been enacted in the United States for almost two decades, but the idea of balancing nature's rights with human needs is still a theoretical concept, not a working mechanism in legislation. Some prominent RoN proponents explain that nature's rights have exceptions and limits that make them more palatable,<sup>214</sup> but if so, they are not written in the relevant legislation.

A second reason why balancing is unlikely to provide a workable path forward is that a vocal part of the RoN movement vehemently opposes it.<sup>215</sup> For these scholars and activists, whom I call absolutists, the point of granting legal rights to nature is to dethrone human needs and considerations in lawmaking. Balancing nature's rights with the interests of humans would uphold the status quo and would inevitably prioritize humans.<sup>216</sup> In this view, the radical reach of the movement—its potential to transform society—depends on nature's rights *not* being balanced against human needs.<sup>217</sup>

The absolutist view is expansive, unyielding, and utopian. Two scholars have argued, for example, that “*any* planned disturbance of . . . natural harmony is prohibited.”<sup>218</sup> Christopher Stone contended that any irreparable damage to nature should be “enjoined absolutely.”<sup>219</sup> Danielle Celermajer and her colleagues argued in a recent article that “[a] right has a non-negotiable character. It cannot

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or laws of the United States or Maine, nor shall the corporation be afforded the protections of the Contracts Clause or Commerce Clause of the United States Constitution . . .”).

214. Cormac Cullinan, *Wild Law and the Challenge of Climate Change*, 37 *SOUNDINGS* 124 (2007) (advocating that the rights of “members of the community of beings that constitute Earth (e.g., trees, rivers, animals, and mountains)” must be balanced against the rights of humans); Burdon, *The Rights of Nature*, *supra* note 9, at 84–85 (advocating a “relational” approach in which courts would balance human needs for water against the rights of rivers and lakes). *See also id.* at 79 (Nature’s rights should be implemented in a “limited and relative fashion.”).

215. Stone, *supra* note 17, at 461 (explaining that the application of balancing tests would disfavor the mitigation of environmental degradation); Babcock, *supra* note 13, at 21–22, 21 n.18 (describing Stone’s concerns about balancing).

216. Simon Davis-Cohen, *Hundreds of Communities Are Building Legal Blockades to Fight Big Carbon*, *THIS CHANGES EVERYTHING* (Oct. 10, 2014), <https://perma.cc/2KS7-CNZW> (“To be fully enjoyed, local rights must trump the legal privileges that allow unfettered [fossil fuel] extraction.”); Tribe, *supra* note 18, at 1341 (“[W]e must begin to extricate our nature-regarding impulses from the conceptually oppressive sphere of human want satisfaction” and avoid “insistent reference to human interests.”). *See also* Giagnocavo & Goldstein, *supra* note 89, at 366 (noting that balancing of rights “is done to maintain the existing order”).

217. *See* Ben Price, *Challenges to Implementing Rights of Nature in the U.S.*, *COMMUNITY ENVIRONMENTAL LEGAL DEFENSE FUND* (Nov. 20, 2021), <https://perma.cc/AA6W-236G> (“Subordinating RoN law to administrative law runs the real risk of nullifying its transformative potential.”).

218. Emmenegger & Tschentscher, *supra* note 212, at 586 (emphasis added).

219. Stone, *supra* note 17, at 486.

be traded off as one interest among others.”<sup>220</sup> At the extreme edge of the RoN movement, absolutists contend that nature’s rights are not only inalienable and inviolable, but will ultimately come to sit at the apex of all of the world’s legal systems, superior to human rights, property rights, and the traditional rights of states over natural resources.<sup>221</sup>

For a balancing process to take hold within a rights-based approach to nature protection, this vocal component of the RoN movement would have to be challenged, perhaps sidelined. The absolutists would have to be brought around to the idea of compromising nature’s rights to serve important human needs—an unlikely prospect.<sup>222</sup>

Finally, even if there were political support for an RoN project that includes balancing, it is difficult to see how this would work in practice. Any balancing process would confer extraordinary power on judges with little guidance on how the balancing should be conducted. Judges would decide fundamental land use, health, pollution, and resource allocation issues. How much alteration or destruction of nature will be considered tolerable or permissible? Which human activities will be considered important enough to allow alteration of nature?

In a democratic society, courts should not be handed the authority to make such decisions. As Mauricio Guim and Michael Livermore have explained, when policymakers confront tradeoffs among human needs, there are available metrics for making the calculation, including cost-benefit analysis to monetize the expected value of alternative courses of action.<sup>223</sup> Because there is no comparable

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220. Danielle Celermajer et al., *Multispecies Justice: Theories, Challenges, and a Research Agenda for Environmental Politics*, 30 ENVTL. POL. 119, 130 (2021).

221. Cormac Cullinan, *A History of Wild Law*, in *EXPLORING WILD LAW: THE PHILOSOPHY OF EARTH JURISPRUDENCE* (Peter Burdon ed., 2011) (arguing that a new earth jurisprudence requires the “realignment of human governance systems with the fundamental principles of how the universe functions”); DÄRPO, *supra* note 87, at 14 (discussing view in the RoN movement that “the only laws that humans should create and observe are . . . those derived from the natural laws that govern life on Earth”); *Rights of Nature FAQs*, COMMUNITY ENVIRONMENTAL LEGAL DEFENSE FUND (Mar. 21, 2016), <https://perma.cc/HD4Q-J7LX> (“Given that ecosystems and Nature provide a life support system for humans, their interests must, at times, override other rights and interests.”).

222. Some RoN scholars contend that balancing is appropriate within a rights of nature framework. In their view, humans are free to use nature and natural resources for their own ends, just not “too much,” or in a way that would invade nature’s rights. See KAUFFMAN & MARTIN, *supra* note 4, at 229. According to Kauffman and Martin, people and nature are engaged in “reciprocal transaction[s]” in which people “have to restore any damage done to the ecosystem . . . And people cannot exploit the ecosystem to the point that it is permanently damaged or altered.” *Id.* This vision is one of sustainable use of natural resources, promoting natural regeneration. See also *Rights of Nature FAQs*, *supra* note 221 (“[A] court weighs the harms to [nature’s] interests, and then decides how to balance them . . . [H]umans are part of Nature as well, which means that human needs must also be considered when the rights and interests of ecosystems come into conflict with ours.”); CULLINAN, *supra* note 35, at 107 (“As we all know from our own relationships, a bit of give and take is fine, and even taking without giving can be tolerated for a period. However, in the long run, balance is essential. When one of the parties takes so much that it begins to affect the essential character of the other, the relationship becomes dysfunctional and abusive.”).

223. Guim & Livermore, *supra* note 42, at 1377-79.

metric for weighing the interests of humans and the natural world, judges will inevitably struggle with this balancing task.

Assume, for example, that a state legislature appropriates funds for a harbor project and that the project and associated boat traffic would harm the habitat of crabs. How would judges weigh the human interest in building the harbor (and the will of elected representatives) against crabs' asserted legal rights to have undisturbed habitat in that same location?

The balancing approach provides no guidance on how this weighing of interests should be carried out.<sup>224</sup> Is it a pure utilitarian calculation, or something else? How would the "utility" of crabs be assessed? Would a crab's right to exist prevail over any countervailing human needs? Or, on the other hand, does the legislative approval for the project signal to judges that human needs should take priority? Should judges consider the degree of damage to organisms against the backdrop of the existence of millions of the same organisms, or should harm to any single living organism be enjoined?

These questions would need to be sorted out to engage in a balancing process, and in the end, it is not worth proceeding down this path. A balancing approach asks the public, legislators, and courts to jump through multiple unnecessary hoops. Such a legal regime would ask legislators to undertake the difficult task of granting rights to nature—a project that challenges powerful lobbying interests as well as core philosophical concepts of western legal traditions. Then, once nature's rights are ensconced in legislation, judges could balance away nature's rights (that is, negate them) if the countervailing human interest is strong enough. This is a circuitous and feeble basis for environmental protection.

#### B. FLESHING OUT THE CONTENT OF NATURE'S RIGHTS

There is another potential reform to the RoN project in which governments could craft RoN laws with far more detail regarding the content of nature's rights. To remedy the existing vagueness of nature's rights, legislation could describe the scope of nature's rights, the boundaries of the protected ecosystems, the species or organisms that will become rights-holders, and how (if at all) nature's rights should be balanced against other priorities. Provisions conferring rights on nature, which are often a few sentences in current U.S. ordinances, could conceivably be expanded to pages of text.

Although more detailed text would be an improvement on existing RoN legislation, I doubt that this reform could overcome the fundamental problems with resting environmental protection on new rights for nature.

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224. Advocacy of balancing can lead to comical conclusions. Two scholars argued, for example, that the legal rights of viruses should be balanced against the legal rights of their human hosts. They argued that a virus "has an intrinsic value as part of nature" and its "extinction has to be justified." Emmenegger & Tschentscher, *supra* note 212, at 583.

Currently, the vagueness of nature's legal rights is viewed positively by RoN proponents. It allows the RoN movement to rally supporters around a broad menu of talismanic rights whose practical consequences are yet to be determined.<sup>225</sup> Moreover, vague rights, universally applied to all organisms, allow proponents to frame the movement as giving voice to indigenous traditions such as reciprocity and harmonious coexistence.<sup>226</sup> The U.S. RoN movement is increasingly attaching itself to indigenous activism and indigenous traditions, and a key part of that project is investing all living and nonliving things with mystical, quasi-religious significance. That goal would be undermined by writing exceptions, limits, and variation into RoN legislation. Given the string of recent defeats in U.S. courts, the movement has little to gain from spelling out nature's rights in more detail. Instead, the U.S. movement is "being pushed into an ever-more symbolic realm, where the ordinances are written to be more inspiring than technical."<sup>227</sup>

Fleshing out the content of nature's rights would also mean that RoN legislation would begin to look like current environmental laws, which impose duties, requirements, and obligations on humans.

Under a Hohfeldian lens, the grant of a legal right to a party triggers a "jural correlative," a duty on other parties to honor that right.<sup>228</sup> A right to free speech, for example, is correlated with a duty on the part of the government to avoid infringement of free speech. Applying that lens to RoN, detailed nature rights legislation would trigger correlative duties on humans. These might include property restrictions, harvesting limits, cessation of industrial or urban development, technological controls on pollution, restrictions on agriculture and the meat industry, and prohibitions on hunting and fishing.

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225. See Dieter Birnbacher, *What Does it Mean to Have a Right?* 4 INTERGENERATIONAL JUSTICE REV. 128, 128-132 (2009).

226. See Erin Fitz-Henry, *Multi-Species Justice: A View from the Rights of Nature Movement*, 31 ENVTL. POL. 338, 342-43 (2022) (noting that RoN scholars recognize in indigenous traditions certain attributes that offer "radical alterity," such as "holism, multi-species respect and responsibility, reciprocity, [and] commitments to exchange and circulation."); BOYD, *supra* note 10, at xxx ("A key element of the legal systems of many Indigenous cultures is a set of reciprocal rights and responsibilities between humans and other species . . . and non-living elements of the environment."). See also John Nobel, *Nature Scores a Big Win Against Fracking in a Small Pennsylvania Town*, ROLLING STONE (Apr. 1, 2020), <https://perma.cc/J65E-C454> (quoting Jon Greendeer of the Ho-Chunk Nation of Wisconsin: "What the rights of nature does is translate our beliefs from an indigenous perspective into modern legislation.").

227. Huneus, *supra* note 1, at 152. According to Alexandra Huneus, the RoN movement has generated the illusion of momentum, despite the defeat of municipal ordinances in U.S. courts, by connecting to "legislation, constitutional law, and court victories unfolding in distant countries, many in the Global South," and by drawing on the "activism of Indigenous communities." *Id.* at 136.

228. See Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 18 (1913). Hohfeld would likely categorize rights of nature as a claim-right upon humans that triggers a correlative duty. *Id.* at 32. In the RoN context, the correlative duties must fall on humans, as it would be absurd to argue that natural entities must respect the legal rights granted to other natural entities.

When viewed through this lens of correlative duties, detailed RoN legislation would highlight the explosive liability implications of conferring rights on nature in a way that is currently hidden from view. Because the duties on humans would become more explicit, adding more detail to RoN legislation could derail the RoN project.

The Hohfeldian lens of correlative duties also raises questions about what work nature's rights is really doing. If the practical impacts of conferring rights on nature occur through triggering new duties and requirements for humans, then why not enact legislation that lays out these duties and requirements? Such legislation would be far more defensible as a program of environmental protection, it would confer less discretion on judges, and it would be more likely to be upheld by courts. As the Canadian law professor Geoffrey Garver suggested, "[r]ather than leaving it to the courts to sort out what human responsibilities derive from nature's rights, why not spell out those responsibilities explicitly?"<sup>229</sup>

With increasing deforestation, rising greenhouse gas emissions, and startling rates of species loss, there is an urgent need for an ecological transition. We need detailed laws that address greenhouse gas emissions, destructive land use, and wasteful energy consumption. But adding more verbiage to nature's rights is not the answer. The philosophical morass of the RoN movement—seeking to change the fundamental orientations of human thinking since the Enlightenment—can be avoided. Governments should instead deploy existing frameworks of environmental law to address these urgent environmental problems, and they should be transparent about the duties they are imposing on humans.<sup>230</sup>

Granting legal rights to nature is an attractive political organizing tool but a misguided program of practical legal reform. The language of rights is magnetic and visionary. The language of duties suggests burdens and restrictions. But rights and duties are two sides of the same coin.<sup>231</sup> An effective, long-term program of environmental protection cannot emphasize the former while obscuring the latter.

#### CONCLUSION

In arguing that the RoN movement is a wrong turn for environmental law and policy, I am not suggesting that humans should dance blindly into oblivion, degrading nature's life-support systems with no check on our actions. We have

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229. Geoffrey Garver, *Are Rights of Nature Radical Enough for Ecological Law?*, in *FROM ENVIRONMENTAL TO ECOLOGICAL LAW* 90, 94 (Kirsten Anker et al. eds., 2021).

230. Current environmental law also recognizes the inherent value of nature, limits human activities to protect that value, and promotes co-existence and interdependence with nature. See Betaille, *supra* note 89.

231. As Dieter Birnbacher put it, although every assertion of a right implies a corresponding duty on someone else, "the language of rights brings the recipient of these obligations sharply in view and remains silent on those who are expected to accept these obligations." Birnbacher, *supra* note 225, at 128.

already exceeded planetary boundaries and are transforming the planet to the detriment of our species and others.<sup>232</sup> Limits on human destruction of nature are essential.

The limits should be imposed through existing frameworks of law, not through novel approaches that grant enforceable legal rights to living organisms and non-living things. Within a set of legal institutions established and run by humans, the guardrails on humans must ultimately be self-defined and self-imposed—by humans.

Will we humans limit ourselves to address the environmental crisis? In the past, we have successfully used law to limit destruction of nature. Law has limited property rights, regulated extractive industries, and controlled human freedom of action over nature, and law can do so in the future. The United States has enacted controls to protect wetlands, waterways, airsheds, endangered species, and wilderness areas. It is hardly necessary to document the dozens of federal laws and hundreds of state laws that have placed limits on private property and imposed significant costs on industry to achieve environmental protection.<sup>233</sup> This record belies the notion that “only rights can provide the full protection which natural entities need to guard their intrinsic value.”<sup>234</sup>

Far more work is still needed, particularly in the energy, building, and transportation sectors. Limiting human impacts on nature, and especially controlling greenhouse gas emissions, is the defining project of this century. The roadblocks to stronger environmental protection in the coming decades are political and economic, not conceptual,<sup>235</sup> so a fundamental re-orientation of law is not necessary to address the environmental crisis.

Legislators already have the authority to draft laws to reduce fossil fuel consumption, limit toxic chemical production, transform transportation, increase environmental enforcement, impose pollution limits and taxes, adjust burdens of proof, and protect species and habitat. In contrast to the novel, rights-based approach of the RoN movement, all of these measures fit comfortably within U.S. constitutional traditions. An open, transparent system of law, with elected officials determining the limits of human impacts on nature, is the best path forward.

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232. Gustav Engstrom et al., *Carbon Pricing and Planetary Boundaries*, 11 NATURE C'NS 1 (2020).

233. See, e.g., Wilderness Act, 16 U.S.C. §§ 1131-36; Endangered Species Act, 16 U.S.C. §§ 1531-44; Clean Air Act, 42 U.S.C. § 7401 *et seq.*; Clean Water Act, 33 U.S.C. § 1251 *et seq.*

234. Emmenegger & Tschentscher, *supra* note 212, at 575.

235. Sheehan, *supra* note 87, at 231 (“Lack of funding, political backtracking, understaffing, weak enforcement, and other challenges certainly have created obstacles for success.”).