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Address at the Lincoln Charter of the Forest Conference, Bishop Grosseteste University: The Charter of the Forest: Evolving Human Rights in Nature

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LINCOLN RECORD SOCIETY
Bishop Grosseteste University, Woodland Trust, American Bar Association

THE LINCOLN CHARTER OF THE FOREST CONFERENCE

22-24 September 2017

THE CHARTER OF THE FOREST: EVOLVING HUMAN RIGHTS IN NATURE

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This conference is a singular event, long over due. It has been 258 years since William Blackstone celebrated “these two sacred charters,”¹ *Carta de Foresta* and *Magna Carta*, with his celebrated publication of their authentic texts. In 2015, the Great Charter of Liberties enjoyed scholarly, political and popular focus. The companion Forest Charter was and is too much neglected.² I salute the American Bar Association, and Dan Magraw, for the ABA’s educational focus of the Forest Charter, as well as Magna Carta. Today we restore some balance with this conference’s searching and insightful examination of the Forest Charter’s significance. I congratulate The Lincoln Record Society and thank the conference organizers.

I am honored to be addressing you, although I must confess to being akin to Mark Twain’s Connecticut Yankee in King Arthur’s Court.³ As an American, I cannot claim the “liberties of the forest” that were ceded to the English. Nor am I a medievalist, but only a student of medieval historians, such as G.J. Turner, whose Select Pleas of the Forest⁴ inspired my own comparative law studies of Forest Law and the Charter of 1217, and also Professors J.C. Holt, David Carpenter, Nicholas Vincent, David Crook and the other distinguished speakers

¹ William Blackstone, The Great Charter and the Charter of the Forest. With Other Authentic Instruments. To Which Is Prefixed an Introductory Discourse Containing the History of the Charter (Oxford by The Clarendon Press, 1759).

² The U.K. government told Parliament that it had no plans to observe the 800th anniversary of the Forest Charter. Charter of the Forest: Written Questions – HL272, U.K. Parliament (June 4, 2015), at 763 Par. Deb HL, (5th Ser.) (2015). See <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Lords/2015-06-04/HL273/>; Discussed in Paul Babie, “Magna Carta and the Forest Charter: Two Stories of Property, What Will You Be Doing in 2017, 94 N. Carolina Law Rev. 1431, at 1432-1433 (2016).

³ Mark Twain (Samuel Clemens) *A Connecticut Yankee in King Arthur’s Court* (1889).

⁴ G.J. Turner, Select Pleas of the Forest (Selden Society, 1901).

here assembled. As a conservationist,⁵ it is also a joy to lecture under the auspices of the Woodland Trust, whose accomplishments and goals I admire.

My lecture will address four themes: (1) The importance of norms, such those expressed in the Forest Charter, about human behavior respecting nature, embodied in laws; (2) Nature as a shared space, and Elinor Ostrom's common pool theory as applied to Royal Forests; (3) An evaluation of the Charter of the Forests in terms both of its form, as an environmental statute, and of its human rights content; and (4) A distillation of insights from the Forest Charter useful in coping with contemporary environmental challenges.

I. Evolved Norms: Humans and Nature

My métier is law. Together with British colleagues, such as Richard Macrory, Colin Read, Andrew Waite or Malcolm Forster, we are among the first generation of lawyers in the 1970s who fashioned and then specialized in a new field of law: environmental law. For five decades, including my years chairing the Commission on Environmental Law of the International Union for the Conservation of Nature & Natural Resources (IUCN) and serving as IUCN's Legal Advisor, I have collaborated with governments, universities and non-governmental organizations to develop and refine environmental law. These endeavors and my academic studies have led me to conclude that the Forest Charter exhibits all the hallmarks of an environmental law statute, and should be regarded as the first.

Moreover, the Forest Charter articulates human environmental rights. It is a landmark in the quest for justice. The Charter demarcates an inter-generational struggle to evolve and apply norms for just relations with nature. We call this today the right to the environment.

The Charter advances ordered liberty through clarifying everyone's rights in royal forests, including the King's. As Roger of Wendover reported, it restored a set of stable expectations. In 1223, when the baron William Brewer urged rejection of the Charter's proclamation of liberties, arguing that they had been extorted from Henry III rather than granted by his free will, Archbishop Langton replied, "William, if you love the King you should not impede the peace of the kingdom."⁶ The Forest Charter was then still essential for re-unifying English barons behind King Henry III after the civil war with King John. At this time, the Charter's guarantees are akin to a social contract, confirming just relations among the many users of royal forests. The Charter embodies clearly

⁵ Honorary Vice President, Sierra Club; Honorary Member, International Union for the Conservation of Nature (IUCN); former Vice President of the Association for the Protection of the Adirondacks.

⁶ David Carpenter, The Minority of Henry III at pp. 296-7 (1990).

stated, fair norms that sustained a just social order. The norms had the effect of sustaining ecosystems as well.

Let us together examine why an expression of norms from 1217 has relevance in 2017.

Mark Twain's fanciful tale, A Connecticut Yankee, imagines time travel in which a 19th century tourist visiting Warwick Castle finds himself, across the mists of time, in 6th century Camelot. In a short preface, Twain explains his literary license of presenting humans of the past as if they lived with us today. He observes:

“The ungentle laws and customs touched upon in this tale are historical, and the episodes which are used to illustrate them are also historical. It is not pretended that these laws and customs existed in England in the sixth century; no, it is only pretended that inasmuch as they existed in the English and other civilizations of far later times, it is safe to consider that it is no libel in the sixth century to suppose them to have been in practice in that day also.”

Aside from teasing his readers to accept Arthurian myth as confirmed history, what Mark Twain posits by intuition about laws does have a scientific foundation. Evolutionary psychologists and biologists today study how the human brain functions to shape behavior.⁷ Human nature has not changed much over time. When we read David Carpenter's The Minority of Henry III, do we not find kinship in the emotions and concerns of those who crafted the Charter of the Forest? Do we not recognize injustice when a forest officer enforces the King's Forest Law by expelling a farmer from his lands because they were afforested, and then fines him and forces him to pay rents to continue his customary livelihood?

Humans behave today in ways similar to those of us in the past. By studying a long record of behavior associated with royal forests, we can discern how norms are formed and applied. It therefore matters for us today that, in the 13th century, humans muddled through a great crisis and consciously collaborated to provide rules that once loosely governed as much as one-third of the English countryside.⁸ Understanding the rights accorded in the Forest

⁷ See, e.g. Jerome Barkow, Leda Cosmides and John Tooby, The Adapted Mind: Evolutionary Psychology and The Generation of Culture (1992); Steven Pinker, Angels of Our Better Nature: Why Violence Has Declined (2011). I explore law as a cultural human construct and how environmental laws can be characterized as “evolved norms,” in Nicholas A. Robinson, “Evolved Norms: A Canon for the Anthropocene,” in Christina Voigt, Rule of Law For Nature – New Dimensions and Ideas in Environmental Law (Cambridge University Press, 2013).

⁸ As Robert Axelrod observes, “Even among the strategic approaches to norms, relatively little attention has been devoted to understanding the dynamics of norms: how they can get started,

Charter, and how “forest liberties” evolved over the 25 succeeding generations, affords insights into how humans shape norms that govern shared natural resources. These insights will be useful to us as we try to cope with the impacts of climate change and environmental degradation.

The neurosciences study about how the brain shapes our human nature. It seems that our species is remarkably consistent over generations. On the other hand, ecology and other environmental sciences inform us that our natural environment is much changed since 1217. With the impacts flowing from “climate change,” nature is rapidly losing the integrity that we once knew, whether in the 13th century or the 20th. As the Woodland Trust reports, in the United Kingdom only 2% of ancient medieval forest is extant.⁹ Can we learn from eight centuries of managing royal forests, how to cope in the future?

Royal Forests were more than woods, encompassing moors, wetlands, fields and associated flora and fauna, along with roads, farms and other uses. This swath of countryside was distinct from other places because it was governed by the King’s Forest Law,¹⁰ which as administered by a pervasive regime of forest officers. England’s treatment of its once royal forests offers a uniquely long period of time to study humans interacting with nature. Today, nature is robust in some former forests, but is in others no longer.¹¹ What factors account for why one forest today is preserved and another not? Studies about how shared resources are managed can guide us to some answers.

II. Evaluating Royal Forests As A “Commons”

Royal Forests existed within wider ecosystems and landscapes, which were shared by many. Laws reflect the norms that different people bring to their own relationships with nature. Nature’s web of life, of course, is wider than any narrow legal right or activity. It is a complex system shared in common by many. In 2009 Dr. Elinor Ostrom was awarded the Nobel Prize for Economic Sciences, for her studies of economic governance of such systems. She demonstrated that “common-pool,” or shared and finite resources, are managed in complex social systems, rather than by rational-choice theory.¹² She

how a partial norms can be sustained and become well established, and how one norm can displace another. An evolutionary approach is helpful in studying these dynamics...” R. Axelrod, “An Evolutionary Approach to Norms,” 80 *The American Political Science Review* 1095 at 1110 (Dec, 1986).

⁹ <https://www.woodlandtrust.org.uk/about-us/ancient-woodland-restoration/>

¹⁰ Elements of Forest Law exist before 1066 (e.g. Canute’s Law of the Royal Forest 1016). After King William I established royal forests, and with their Justiciars he, William II, Henry I and II elaborated the Norman Forest Laws and associated administrative regimes.

¹¹ See Raymond Grant, *The Royal Forests of England* (1991) appendix of disafforestments and alienations, at p. 221.

¹² Elinor Ostrom, *Understanding Institutional Diversity* (Princeton University Press, 2005).

effectively disproved the “tragedy of the commons” theory,¹³ demonstrating how cooperation within communities respects shared uses of common pool situations.

In her final works, Dr. Ostrom invited further empirical research to better understand how multiple centers of decision-making interact to sustain ecological systems. “We need to ask how diverse polycentric institutions help or hinder the innovativeness, learning, adapting, trustworthiness, levels of cooperation of participants, and the achievement of more effective, equitable, and sustainable outcomes at multiple scales.”¹⁴ This lecture extends Dr. Ostrom’s analysis by drawing on the richly documented history of England’s royal forests and by applying legal theory to her political economic findings.

Royal Forests can be evaluated as common pool resources, with each forest being a different center of activity for managing special interests. On the one hand, royal forests supported the King. While his court extracted timber, game and other natural resources, royal forests were extremely important sources of his revenue. The Exchequer received funds from fines or amercements for offenses against Forest Law, from grants of licenses and privileges, from sales of timber or sales of land in royal forest. The many officers of the Forests aggressively applied Forest Law to maximize revenues. The Eyres and forest courts were more like “tax collectors” than tribunals of justice. Arbitrary afforestations expanded the borders of royal forests and effectively seized property and disrupted customary natural resources uses, without recourse. Indeed, there was only one remedy: whenever the King convened a council to request an exceptional levy of funds, the barons and earls would demand disafforestation and the return to earlier forest boundaries, and restoration of the “ancient liberties” recognized by Kings William or Henry I and II. Perambulations were ordered to redraw boundary lines. Forest Law was an arbitrary and abusive regime.

But at the same time, on the other hand, there was significantly more in England’s “Forests” than the King’s chance to extract revenues. The King’s Royal Forest was expected to supply the needs of many others. Much is made of the king’s exclusive claim for deer (*venison*), but medieval society lived on and amidst the wider ecological fruits of a shared countryside. Even in royal demesne, customary rights to collect bracken (*fugerium*), herbs (*herbage*) and small plants (*vert*), to dig farm fertilizers (*marl*), to allow pigs feed on acorns and beech mast (*pannage*), to graze cattle (*pasturage*), taking wood (*estover*), gathering firewood and collect wood from pollards, cutting peat (*tubary*), and

¹³ Garrett Hardin, “The Tragedy of the Commons,” “The Tragedy of the Commons.” *Science* 162:3859 (13 December 1968): 1243-1248.

¹⁴ Elinor Ostrom, Nobel Prize Lecture, December 8, 2009, “Beyond Markets and States: Polycentric Governance of Complex Economic Systems, p. 436, on line at http://www.nobelprize.org/nobel_prizes/economic-sciences/laureates/2009/ostrom_lecture.pdf.

fishing (*piscaria*) and collecting honey from wild bee trees. Lives and livelihoods depended on exercise of these customary usufructs. Those who exercised these rights knew how to do sustainably manage their harvest each year.

Rights to such customary uses were diffuse, but were well enough understood for the Forest Charter to guarantee many of them. In subsequent years, rules would evolve further to guide the exercise of commoners' rights.¹⁵ Gradually, management systems for exercising the commoners' rights emerged. For example, in 1540, by the statute "Drift of the Forest,"¹⁶ a drive of all commonable animals at each forest was mandated. John Manwood restated the rights of "the Common and Commoners within the Forest," in his 1598 Treatise and Discourse on the Laws of the Forreest.¹⁷ Manwood described the forest as a "circuit of ground, containing a libertie within itselfe wherein diverse men have land within it, and yet the same territorie itself doth lie open and not inclosed, although perhaps there may be diverse inclosures within it."¹⁸ By 1720, a later legal treatise described these commoner's rights generically: "a right or privilege which one or more persons claim to take or use some part or portion of which another Man's lands, waters, woods etc., do naturally produce."¹⁹ In the late 1800s and again in last decades of the 1900s, Parliament would provide orderly systems for classifying and recording commoners' rights, while extending everyone's public rights through enacting a regime for national parks.

The Charter of the Forest, of course, did not cause all this to happen.²⁰ Nonetheless, given the clarity of its guarantees of selected shared rights, the Forest Charter can be evaluated through the methodologies used for Dr. Ostrom's common pool resource analysis. Moreover, because it was law that

¹⁵ The Commons Registration Act 1965 provides which for registration of common land and of town and village greens. The registers were to be maintained by county councils. Registration began on 2 January 1967. The Commons Registration (Time Limits) Order 1966 provided that registration should take place by 31 March 1970 (extended by an Amendment Order to 31 July 1970). The Countryside and Rights of Way Act 2000, (CRoW), at <http://www.legislation.gov.uk/ukpga/2000/37/contents>, requires the Countryside Agency and the Countryside Council for Wales respectively to prepare for England and Wales maps showing all registered common land and all open country.

¹⁶ An Act Concerning the Breed of Horses of Higher Stature, 1540, 32 Hen. 8.

¹⁷ Chapter XIII, John Manwood, A Treatise and Discourse of the Lawes of the Forreest: Wherein is declared not only those Lawes, as they are now in force, but also the original and beginning of the Forrestes...etc. (London, Thomas Wight and Bonhams Norton, 1598).

¹⁸ *Id.*, Chap. 1, Section 3, p. 2.

¹⁹ The Law of Commons and Commoners, or a Treatise Shewing the Original and Nature of Common, and Several Kinds Thereof. [London]; printed by Eliz. Nutt and B. Gosling. (1720).

²⁰ The Forest Charter over time was often cited to justify new customary usage claims, but this was like the appeal to "ancient" rights, a claim to derive legitimacy from the Charter.

provides the crucible for evolving these shared natural resource management systems, legal analysis can elaborate and refine Dr. Ostrom's economic focus.

III. The Forest Charter as a Human Rights Statute

First, let us focus on the legal stature of the Charter. It is at once an early exemplar of a government legal text setting forth human rights, and the first statute for environmental rights. It established a constitutional basis to struggles over governing shared "forests."

1. As A Statute

The Forest Charter is a statute, albeit one that was debated, drafted and acknowledged by all as a written law *before* Parliament existed. Consider how this came to be. When King John conceded and sealed the Charter of Liberties at Runnymede, abuses of forest liberties were the well understood.²¹ What was lacking was a means to remediate abuses. In 1215, in Chapter 48 of the Charter of Liberties King John had ordered election 12 knights in each county to investigate abusive behavior by the King's officials.²² After King John's death, the Regent for Henry III, William Marshal, evidently enabled the knights' commissioned reports of abuses to be compiled. Throughout 1216, in order to win support for Henry III's reign, Marshal and the Papal Legate were consulting widely with earls and barons, and ecclesiastics to restore the King's authority after the civil war. Over many months, clerks had ample time to draft the new Forest Charter. As Professor Holt surmised, "The work of the commissions of 1215 must have been even more valuable in compiling the Charter of the Forest." Except for Chapter 2, "the rest were new and they created the regulation of forest law beyond anything considered or even suggested in any of the earlier documents."²³

When William Marshal and the Papal Legate Gualo on 12 November 1216 sealed Henry III's reissue of the Charter of Liberties, this Charter of Liberties deferred any decisions about the customs of counties and evil deeds of forest officials, and on riverbanks. It recites that the prelates and magnates "have agreed to these being deferred until we have fuller counsel, when we shall ...do what is for the common good, and the peace and estate or ourselves and our kingdom." Nonetheless, as a hint of reforms to come, even while

²¹ Before 1215, texts of the "Unknown Charter" and the "Articles of the Barons" had circulated demanding reforms in how Forest Law was being administered. Charles R. Young, The Royal Forests of Medieval England, at pp. 64-64 (1979). In Magna Carta Chapter 47 ordered that all King John's afforestation and riverbank enclosures were immediately reversed. Since there was no administrative means to ensure the King acted, this decree was stillborn.

²² King John's Writ (20 June in the 17th year of his reign (1215), in Hereford Cathedral Archives, No. 2256.

²³ J.C. Holt, Magna Carta, at 384-5 (2d Ed., 1992).

consulting further about abuses of Forest Law the 1216 Charter of Liberties did concede several related rights: not to arbitrarily fine freemen, earls and barons, and clerks;²⁴ not to draft villeins to work on bridges and river banks; not to allow sheriffs and bailiffs to appropriate chattels²⁵ or the uses of horses and carts,²⁶ or timber,²⁷ without making payments. King John's afforestations were to be reversed fully, but again the 1216 Charter of Liberties did not provide administrative means to ensure this could happen.²⁸

By November 6, 1217, agreement was had on the terms of a separate Charter on abuses of Forest Law. As David Carpenter observes, the great council of October-November 1217 must have resolved the matters deferred from 1216 when the great council debated the "abolition of bad customs."²⁹ The precision of each of the seventeen chapters of the Forest Charter reflects a clear consensus about reforms needed to stabilize social conditions in and around Royal Forests across England. In his majority, Henry III reconfirmed the Forest Charter. The text evolved somewhat, but as it existed in 1225 it would repeatedly be proclaimed, disseminated and ordered read in towns and churches. By the time Edward I reconfirmed the Forest Charter and Magna Carta in 1297, it was an acknowledged statute of the realm.³⁰ This re-iterative process for the acceptance of agreed norms is a proto-parliamentary process.

2. As Recognizing Environmental Human Rights

The Forest Charter established fundamental rights and prescribed rules for their observance. In 1217, it guaranteed rights that previous, aggressive afforestations had disrupted. Its role as an early guarantor of human rights is evident in three aspects.

First, in the context of the 13th century, the Charter prescribed rules aimed to establish just conditions between the King and his forest offices, and others in and around royal forests. Royal Forest boundaries are to be restored to those of Henry II, and perambulations ordered to set borders.³¹ Inspections of forest borders are to be held only every three years and under the rules of Henry II.³² Holdings by ecclesiastics, nobles and free holders are restored as of the coronation of Henry III, and any fines, rents and fees excused.³³ Offenses

²⁴ Chapters 15-17.

²⁵ Chapter 21, 1216 Magna Carta.

²⁶ Chapter 22, 1216 Magna Carta.

²⁷ Chapter 23, 1216 Magna Carta.

²⁸ Chapter 38, 1216 Magna Carta, as in Chapter 47 of the 1215 Magna Carta.

²⁹ David A. Carpenter, *The Minority of Henry III* at p. 60. His study surmises that the great council of October-November 1217 was the "more likely forum" for agreeing on the content of a Forest Charter" than earlier councils.

³⁰ 9 Hen. 3

³¹ Forest Charter chap. 1 and chap. 3.

³² Forest Charter chap. 5.

³³ Forest Charter chap. 4.

committed from the reign of Henry II to the coronation of Henry III are pardoned.³⁴ Specific rules for hunting dogs are prescribed.³⁵ Swanimote courts are to supervise the introduction of animals into the forests. Penalties for taking deer are prescribed, and “no one shall lose life or suffer loss of limbs as punishment for taking a deer.” It regulates the rights of those who must pass through royal forests, and exempts persons carrying brush or bark or charcoal from payment of any fees.³⁶

Second, the Forest Charter guaranteed broad public rights, both substantive and procedural. The very first chapter preserves everyone’s right to gather herbs and berries.³⁷ Its second chapter excuses everyone from compulsory attendance at the forests courts, unless summoned expressly.³⁸ This ended the imposition of fines for non-attendance and restores hours of lost labor. The Charter guarantees the land rights of freemen.³⁹ Every free man (*liber homo*) is guaranteed unfettered uses of his own holdings in a royal forest: access to water to operate a mill or fish pond, to keep eyries and claim honey from wild bee trees, and to reclaim arable land, subject only to the common law rule that he not create a nuisance.

The Charter guarantees everyone’s procedural rights also. It requires that rules be set to provide due process of law for handling offenses of Forest Law.⁴⁰ Extreme penalties are prohibited.⁴¹ Foresters are duty-bound to present anyone arrested at once to Verderers, who are to make a record and present those arrested before the Forest Court.⁴² Like contemporary human rights laws, the Charter specified both right and the means to enforce the rights.

Third, the final declaration of the Forest Charter’s last chapter reads not unlike a universal declaration of rights. The final text, taken from William Blackstone’s publication of *Carta de Foresta* in 1759,⁴³ reads as follows:

“Has autem libertates de forestis concessimus omnibus Salvis archiepiscopis episcopis abbatibus prioribus comitibus baronibus militibus et aliis tam personis ecclesiasticis quam secularibus templariis et hospitalariis libertatibus et liberis consuetudinibus in forestis et extra in warennis et aliis quas peius habuereunt Omnes autem istas consuetudines predictas et

³⁴ Forest Charter chap 15.

³⁵ Forest Charter chap. 6.

³⁶ Forest Charter chap. 14.

³⁷ Forest Charter chap 1.

³⁸ Forest Charter chap. 2.

³⁹ Forest Charter chap. 9, chap. 2 and chap. 13.

⁴⁰ Forest Charter chap. 7.

⁴¹ Forest Charter chap. 10.

⁴² Forest Charter chap. 16.

⁴³ William Blackstone, *The Great Charter and Charter of the Forest, with other instruments: to which is prefixed an Introductory Discourse Containing the History of the Charters* (Oxford at the Clarendon Press, M.DCC.LIX) at p. 65. Italics in original. *Supra* note 1.

libertates quas concessimus in regno nostro tenendas quantum ad nos pertinent erga nostros omnes de regno nostro *observent* quantum ad se pertinet erga suos Pro hac igitur concessione et donatione libertatum istarum et aliarum libertatum contentarum in majori carta nostra de aliis libertatibus archiepiscopi episcopi abates priores comites barones milites libere tenentes et omnes de regno nostro dederunt nobis quintamdecimam partem omnium mobilium suorum Concessimus etiam eisdem pro nobis et heredibus nostris quod nec nos nec heredes nostri aliquid perquiremus per quod libertates in hac carta contente infringantur vel infirmentur et si ab aliquo aliquid contra hoc perquisitum fuerit nichil valeat et pro nullo habeatur”

A 19th century translation in English reads thus:⁴⁴ “And these forest liberties we have granted to all men; saving to the Archbishops, Bishops, Abbots, Priors, Earls, Barons, Knights, and others, as well ecclesiastical persons as secular; Templars and Hospitallers, their liberties and free customs in Forests and without in Warrens, and other places which had them. Also all those customs and liberties aforesaid, which we have granted to be holden in our kingdom, for as much as belongs to us; all our whole kingdom shall observe, as well as the Clergy as of the Laity, for as much as belong to them.”

This provision addresses the mutual obligations of a government and its people. The text echoes the language of the 1217 Magna Carta chapters 45 and 46. Sir Edward Coke would later observe: “This is the chiefe felicity of a kingdome, when good laws are reciprocally, of prince and people (as here undertaken) duly observed.”⁴⁵ Coke viewed this chapter as a “savings” clause, familiar to statutes today, which simply ensured that while new enumerated rights were being declared, all other rights remain unchanged. In his time, and reaffirming the Petition of Right of 1628, this claim made sense. However, before in the 13th century, and today, a wider reading is more plausible.

The language “all the liberties and free customs which they formally had” is very broad. The words appeal to and encompass all the past liberties, which “evil customs” had suppressed. In doing so, this appeal invokes the claim to justice, as a rights, which the King is duty bound to provide. The social contract is evident: guarantee and preserve our rights and we shall be loyal subjects. The invocation of “liberties” is deliberately expansive, which is characteristic of human rights. The door is left open each generation to invoke its own reading what rights the government must ensure and observe.

⁴⁴ The translation from Richard Thompson, *A Historical Essay on the Magna Carta of King John: To which are added the ...the original charter of the forests ... etc.* (1829), at p. 335.

⁴⁵ Edward Coke, Second part of the Institutes of the Lawes of England (1642), “Magna Carta,” in *The Selected Writings of Sir Edward Coke*, (Steve Sheppard, editor) Liberty Fund, Indiana, 20030 VOL., II AT P., 912.

In this light, I would streamline the rendering of this last chapter, reading it not with medieval sensibilities or even those of the 18th and 19th century. Doing so, several themes emerge in relief. One can read the grant to “all in our whole kingdom” (*omnes*) as also encompassing the persons referenced in the prior chapters of the Forest Charter.⁴⁶ These expressly address freeholders. *Omnes* in the Charter’s final chapter can be read to include all for whom right are conveyed. Certainly freemen had customary rights and depended on forest liberties, as much as did the clergy or nobility.

Chapter 17, then, can read to convey the following meanings:

“These liberties of the forest and free customs traditionally had, both within and without the royal forests, are granted to ecclesiastics, nobles, freeholders, and all in our realm, in short to everyone. Everyone is also obliged to observe the liberties and customs granted in the Forest Charter.”⁴⁷

In extending the liberties of the forest to everyone, and obliging everyone to respect also the King’s property and legitimate interests in royal forests, the Charter acknowledges that humans have rights in nature, which the Crown is obliged to respect and sustain. In the future, the content of “liberties” would evolve, reflecting the human dependencies on nature at the time in which they were being demanded.

Generically, these elements of forest “liberties” are similar to other declarations recognizing all fundamental rights. Human rights are aspirational, not always observed. They set fundamental norms by which behavior is judged. Over time, as society expects the norms to be honored, adherence to the norms becomes pervasive and assumed.

In the following centuries, the Crown would disregard or try to abolish commoners’ customary rights when selling Forest to raise revenues, or later for timber for building ships or supplying military requisites. Unjust conditions ensued. For example, in the 17th and 18th centuries the Commissioners of Woods and Forests sold allotments of royal forests resulting in the exclusion of commoners. Raymond Grant reports that “the loss of their common rights of course caused great hardship among the poor of the forest districts. So in 1831 commoners rioted in the forest of Dean, threw down their enclosures and drove their cattle and sheep into the coppices and had to be suppressed by soldiers.”⁴⁸ On the other hand, where norms respecting customary rights were strong, they inspired protection. The Royal Forest of Essex had been much reduced in size by disafforestations. In 1874, the Corporation of the City of London secured an

⁴⁶ See for example, the inclusiveness of Chapters 1,2,9,10 and 12.

⁴⁷ Forest Charter chap. 17, from the rendering in Appendix H of D.B. Magraw, et al., Magna Carta and the Rule of Law (American Bar Association 2014) at p. 423.

⁴⁸ Raymond Grant, The Royal Forests of England, at p., 211 (1991).

order of the Chancery Court to vindicate commoners' rights,⁴⁹ removed enclosures, purchased outright 3,000 acres from forest manors, and campaigned to save Epping Forest. Parliament's Epping Forest Act⁵⁰ disafforested Epping, made London its conservator, provided for four Verderers, and secured commoners' rights while providing for public access for recreation.

Environmental human rights are at stake when different uses of nature compete. Norms are required to prefer a sustainable and just uses. Liberties of the forest have broadened to include preserving habitat and ecosystems services. Some nations declare today that nature has its own rights, existing apart from either human rights or the right to the environment.⁵¹ In 1217, the Forest Charter provides such basic norms. It provides us today with an established point of reference from which to assess how the right to the environment has evolved. Worldwide it is rare to have such a well-documented record of struggles over eight centuries of decision-making about public rights in a shared natural resource such as the royal forests.

At a national level, the way England has saved its royal forest sites may be compared to the Forest Preserve in New York,⁵² or protected areas in other countries. This legal dimension refining Dr. Ostrom's common pool management theories can also be applied to individual former royal forests. Each evidences a different evolution of how environmental norms have been applied. The rights of the Crown, of commoners or of the general public have been gradually refined. Since the 20th century and into the present, these norms are being informed by ecology and other environmental sciences. Within England, one may inquire what factors allow public or commoners' rights to be respected by Conservators in Ashurst Forest, or by Verderers New Forest or the Forest of Dean, and lost in other former "Forests"?

IV. Conclusions: For Theory & Practice

⁴⁹ *Commissioners of the Sewers of the City of London v. Glasse* (1874) 19 L.R. Eq. 134.

⁵⁰ 41 & 42 Vict. C. ccxiii.

⁵¹ See the Constitutions of Bolivia and Ecuador. In the Russian Federation, since 1917 *zapovedniki* are strict nature preserve in which humans are not to enter, except for limited scientific study. Russia boasts the largest wilderness preserves in the world. Douglas R. Weiner, *A Little Corner of Freedom – Russian Nature Protection from Stalin to Gorbachev* (Univ. of California Press 1999).

⁵² Since 1894, the Forest Preserve has been mandated to be "kept as forever wild forest land" by Article XIV of the NYS Constitution. It is situated within the Adirondack Park, an area in New York larger than the entire State of Massachusetts, with towns and hamlets amidst the wilderness. See Nicholas A. Robinson, "Forever Wild": New York's Constitutional Mandates to Enhance the Forest Preserve (Arthur M. Crocker Lecture, Feb. 15, 2007), at <http://digitalcommons.pace.edu/lawfaculty/284/>. The laws and management systems of the Adirondack Park have many similarities to those of New Forest or the Forest of Dean, or other protected former royal forests in England.

The history of the Royal Forests reconfirms Elinor Ostrom's common pool resources findings, while also introducing the role of law that provides a further refinement of her management analysis. The presence of a clear right to the environment strengthens stewardship norms. Environmental laws prescribing uses and procedures for oversee those laws are essential for long-term management of shared natural resources. Where common pool management systems lack a legal normative support system, they erode. The resource degrades.

1. A Legal Dimension For Common Pool Management Studies

Dr. Ostrom found that effective stewardship of a protected area requires careful delineation of its boundaries, and that rules governing use of common goods need to reflect local needs and conditions. As we have seen, the Forest Charter addresses both. Her studies showed that those affected by the rules must have the process for users to participate in modifying the rules and that there needs to be a system by which the community monitors how everyone observes the rules. It has taken several centuries for English law to adopt provisions that align with each of Dr. Ostrom's stewardship indicators.

Dr. Ostrom's research did not examine how a system of fundamental rights could operate to prevent regression or derogation of stewardship norms.⁵³ This may be partially because the common pool resource management systems that she studied had emerged before and apart from any applications of a human environmental right. When she wrote, knowledge of the Forest Charter of 1217 was restricted to historians, beyond the silos of the social sciences. But then her analysis generally chose not to examine the role of customary law, the common law, and legislation as the means to establish agreed norms for each of her management indicators.

Her common pool analysis is enhanced by study of environmental law, and *vice versa*. For example, it is local environmental law, applying regional or national legal norms, and in turn nested in international environmental treaties, that provides much of contemporary legal and social responsibility for governing common resources. Today, England's former royal forests exist in such nested tiers from the lowest level up to the entire interconnected system.⁵⁴ Public interests are advanced by nature conservation societies and other non-governmental organizations; they affirm and enforce norms and sustain the missions of responsible governmental agencies. Beyond local and national laws,

⁵³ This is now set forth as the "Non-Regression Principle" in environmental law. See Michel Prieur, *The Non-Regression Principle in Environmental Law*, at 5 SAPIENS (IUCN) at <https://sapiens.revues.org/1405>.

⁵⁴ See the discussion of the layers of laws applied in the territory of the New Forest, in N.A. Robinson, "The Charter of the Forest: Evolving Human Rights in Nature," Chapter 12 in D.B. Magraw, et al., eds., *Magna Carta and the Rule of Law* (American Bar Association, 2014), at pp. 367-352.

European Directives have provided key parts of this nested regime, such as the Wild Bird's Directive.⁵⁵ With the United Kingdom leaving the European Union, there will be opportunities to strengthen or weaken this system of nested protection. Knowledge of the Forest Charter can inspire design of new laws to enhancing environmental protection.

II. The Upshot: Lessons for the Anthropocene

What might a Forest Charter for our times look like? Earth's environment has always been changing. We humans have induced an abrupt acceleration of change. In this new geological era, the Anthropocene, humans are adding 2 billion more people to the planet. There is a manifest need for a norm to manage Earth's hydrological and carbon cycles and other shared natural systems.

Given the rapid pace of global development, it can be doubted whether human society can afford the leisure of taking eight centuries to figure out how to govern shared resources. If the analysis of the Forest Charter has lessons, are there ways to apply them quickly? The struggle to adopt and implement the Paris Agreement on Climate Change illustrates our dilemma.

The United Nations acknowledges that urgent action is required. In the summer of 2014, the Open Working Group of the United Nations General Assembly sent its text of proposed UN Sustainable Development Goals⁵⁶ to the General Assembly for adoption. It reported that:

“Global health threats, more frequent and intense natural disasters ... and related humanitarian crises and forced displacement of people threaten to reverse much of the development process made in recent decades. Natural resource depletion and adverse impacts of environmental degradation, including desertification, drought, land degradation, freshwater scarcity and loss of biodiversity, add to and exacerbate the list of challenges which humanity faces. Climate change is one of the greatest challenges of our time and its adverse impacts undermine the ability of all countries to achieve sustainable

⁵⁵ Concerned with the deep decline in avian species across Europe, EU Member States unanimously adopted the Directive 79/409/EEC in April 1979. It is the oldest piece of EU legislation on the environment and one of its cornerstones. The Directive was amended in 2009, and became [Directive 2009/147/EC](#). See http://ec.europa.eu/environment/nature/legislation/birdsdirective/index_en.htm.

⁵⁶ For background on the United Nations Sustainable Development Goals, see the UN Department of Social and Economic Affairs website: <https://sustainabledevelopment.un.org/>

development. Increases in sea level rise, ocean acidification, and other climate change impacts are serious affecting coastal areas and low-lying coastal countries, including many least developed countries and small island developing States. The survival of many societies, and of the biological support systems of the planet, is at risk.”⁵⁷

This stark assessment did not come from academics, scientists, NGOs, or the media, but from seasoned career diplomats. Scarcely two months later, at the High Level meetings on September 28, 2015, the UN General Assembly adopted the Sustainable Development Goals (SDGs), as a blueprint for all socio-economic development in the coming 15 years.⁵⁸

We are witnessing the establishment of norms for the management of the shared global environment. In the United Nations, IUCN is today working with all nations to create a treaty on protecting biodiversity of the high seas, beyond areas of national jurisdiction. Many Marine Protected Areas have been established. On land, there is also progress. The Woodland Trust is creating thousands of acres of woodland in Britain.⁵⁹ IUCN reports that national laws have protected nearly 15% of the Earth. As protected areas, England’s former royal forests are important components. More is needed. Dr. Edward O. Wilson of Harvard University posits that we need to protect 50% of the planet if we are to keep all of our biosphere’s natural systems working well.⁶⁰

We are face to face with deteriorating conditions of the natural world in which we live.⁶¹ Appreciation of beauty in nature is a human instinct. It can and does inspire agreement on norms to prevent desecration of shared natural areas. Motivated by a consensus to protect nature, governments in all regions are adopting environmental statutes. Just as the Forest Charter was proclaimed amidst the troubles of 1217, so in our troubled times most countries formally recognize a right to the environment. 174 nations provide this right in their written constitutions.⁶² Through IUCN, I work with some fifty nations that have

⁵⁷ Paragraph 14, “Transforming Our World: The 2030 Agenda for Sustainable Development.” Contained in A/68/970, “Report of the Open Working Group of the General Assembly on Sustainable Development Goals,” (see also A. 68/970 Add. 1), adopted in UNGA Res. A/Res/70/1 (25 September 2015), distributed 21 October 2015, for Agenda Items 15 and 116, 70th Session, UN GA.

⁵⁸ UNGA Resolution A/RES/70.1 (October 21, 2015).

⁵⁹ <https://www.woodlandtrust.org.uk/about-us/woodland-creation/>

⁶⁰ E.O. Wilson, *Half Earth – Our Planet’s Fight for Life* (2016).

⁶¹ For an eloquent account of the “thinning” of biodiversity in England, see Michael McCarthy, *The Moth Snowstorm – Nature and Joy* (NY Review Book 2015).

⁶² David Boyd, *The Environmental Rights Revolution* (University of British Columbia Press 2011).

established more than 1,000 environmental courts to administer these rights.⁶³ The United Nations recognizes many environmental rights as implicit in Human Rights, for example in 2010 the “right to water.”⁶⁴ In 2018 on the initiative of France, the United Nations will propose adopting a “Global Pact for the Environment” recognizing an explicit right to the environment.⁶⁵ This Pact may well be a Forest Charter *redux*, one for our times.

What do or should human rights in nature mean? Answers are found in the Forest Charter.

Everyone knew in 1217 that their rights in nature were not mere abstractions. As we learn to endure the impacts of climate change, we shall need to learn how to manage Earth as our ultimate common pool resource. In 2015 the United Nations adopted 17 Sustainable Development Goals, to harmonize and guide norms for sustainable development globally. In Goal 15 nations agree to “protect, restore and promote sustainable use of terrestrial ecosystems, sustainably manage forests...and halt biodiversity loss.”⁶⁶

What does legal theory and the precedent of the Forest Charter offer for realizing the human norms embodied in the SDGs?

First, the right to the environment is the foundation for all law, not only ecological law. Rules about the environment are not merely instrumental or social preferences. They are the basis for our socio-economic world.

Second, as the ecologist Dr. Barry Commoner observed, laws that set boundaries and “bright lines” are the most effective. Environmental laws must be clear, not fuzzy. Being flexible or “reasonable” abets confusion and resistance to changing “business as usual.” The Forest Charter drew such bright lines. Humans understand the fairness of recognizing basic rights and observing them.

⁶³ See Symposium on “Environmental Courts and Tribunals: Improving Access to Justice and Protection of the Environment Around the World,” *Pace Environmental Law Review*, Volume 29, Issue 2 (Winter 2012), at <http://digitalcommons.pace.edu/pelr/vol29/iss2/>; See also, George and Catherin Pring, *Environmental Courts and Tribunals* (UN Environment Programme 216), at <http://wedocs.unep.org/bitstream/handle/20.500.11822/10001/environmental-courts-tribunals.pdf?sequence=1&isAllowed=y> .

⁶⁴ On 28 July 2010, through UN General Assembly Resolution 64/292, at <http://www.un.org/es/comun/docs/?symbol=A/RES/64/292&lang=E> , the United Nations General Assembly recognized the human right to water and sanitation and acknowledged that clean drinking water and sanitation are essential to the realization of all human rights.

⁶⁵ France announced it would submit the draft Global Pact for the Environment to the UN General Assembly for approval and adherence by States as a treaty. Article 1 states “Every person has the right to live in an ecologically sound environment adequate for their health, well-being, dignity culture and fulfillment.” See <https://www.iucn.org/news/world-commission-environmental-law/201707/global-pact-environment-introduced-world-0>

⁶⁶ UN Sustainable Development Goal 15, at <https://sustainabledevelopment.un.org/sdg15> .

Third, law must provide strong procedures by which rules are administered. A right without a remedy proves to be elusive.

Fourth, everyone needs to explain the rules and confer often together repeatedly about how to enhance and observe them. The repeated public readings and struggles over the Forest Charter were key to evolving acceptance of the rule of law, not the other way around.

No one can make the claim that the Forest Charter created or was solely responsible for nature protection outside or within England. One can demonstrate that, like Magna Carta, the Forest Charter was instrumental in establishing “rule of law” as a constitutional foundation for democracy.⁶⁷ The Universal Declaration of Human Rights extended that tradition. Civil and political rights, and social and economic rights, were codified and matured.⁶⁸

In our age of the Anthropocene, societies will need to sustain due process of law, and recognize the right to the environment. Our environmental home is at risk. Humans must discover anew how to sustain today’s “liberties” of the Forest. If these liberties are remembered only as an ancient backdrop to stories of Robin Hood,⁶⁹ we shall not make it. From the Forest Charter of 1217 comes the hope that agreed-upon environmental rights can indeed guide us through the coming decades of change across our Earth.

⁶⁷ At least for the first two centuries after 1217, demands that the Crown repeatedly proclaim both Charters were stimulated by society’s dependence on the wealth derived from the “forest.” As England’s economy matured and diversified, political rights posited in Magna Carta took on continuing importance, while fewer were the commoners who depended on the “liberties of the forest.” As models of democracy spread, especially in countries bound by the Common Law tradition, appeals of “right” were to Magna Carta. The Forest Charter became an historical footnote. The rights of Magna Carta, embellished and elaborated by Sir Edward Coke in the Bill of Right of 1681, were claimed as ancient liberties. They found expression as a Bill of Rights to the US Constitution.

⁶⁸ See the United Nations Human Rights Conventions. International Covenant on Civil and Political Rights (ICCPR, 16 December, 1966) International Covenant on Economic, Social, and Cultural Rights (ICESCR, 16 December, 1966), at <http://www.ohchr.org/Documents/Publications/CoreTreatiesen.pdf>.

⁶⁹ J.C. Holt, *Robin Hood* (3rd edition). For the literature on these themes, see Sarah Harland-Haughey, “Forest Law Through the Looking Glass: Distortions of the Forest Charter in the Outlaw Fiction of Late Medieval England,” *25 Wm & Mary Bill of Rights J.* 549 (2016).