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The Most Fundamental Right

The Magna Carta and successors recognize a right to the environment as central to human existence. Along with associated rule of law and due process, 193 national charters recognize such a right — but not the U.S. Constitution. This right does lie latent in America's state constitutions, however, and can also be read into the federal document as well. Meanwhile, recognition of environmental rights is expanding globally

By Nicholas A. Robinson

Failing to recognize basic rights feeds injustice. The abolitionists fought to end slavery. Suffragettes won their right to vote. Child labor yielded to the rights of the child. The civil rights movement championed redress for persons of color. Each generation renews the efforts to attain basic rights for all.

Now come environmental rights. As pollution grows, people know — by instinct or logic — that humans have an innate right to live in a clean environment. This struggle is as old as human society. Preservation of Europe's largest primeval woodlands, Bialowieza Forest, began in the 14th century. Well before then, local communities in India were defending some 14,000 sacred groves. Since the 12th century, Shinto shrines have conserved ancient forests in Japan. In 1217, England's Forest Charter recognized environmental liberties for all people, forever. Yet, nature in all these places remains at risk. People in each age fight on to sustain protections that prior generations attained.

What is new is the vigor and global scope with which environmental rights are being asserted. Vast pollution in China obliged the Communist Party in 2015 to design norms for "ecological civilization" within state socialism, and authorized citizen suits to combat polluters. In England's New Forest and Forest of Dean, a Verderers' court still convenes to safeguard public rights and liberties in government forests.

Remedies in many nations invoke rights to the environment. We in America forget that, from its inception with Magna Carta, due process of law includes the right to a clean environment. Today's challenges to degradation are largely based on accepted administrative law doctrines appropriate for judicial review. Few as yet invoke fundamental rights. But judicial victories may be ephemeral. Laws can be repealed and higher courts can reverse. Remedies available since the 1970s via citizen suits are being diminished. Establishing a basic right would more surely secure peoples' health and happiness.

When Congress enacted the National Environmental Policy Act of 1969, the statute was hailed as a "Magna Carta for our times." While NEPA's environmental impact statement procedures in Section 102 did become a mandate worldwide, rights framed in NEPA were stillborn. In committee, Congress replaced "shall" with "should" in Section 101(c): "The Congress recognizes that each person should enjoy a healthful environment."

The rule of law has an environmental dimension, acknowledged in more than 170 nations that today



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recognize the right to the environment. As the Supreme Court of the Philippines explained in *Oposa v. Factoran*: “The right to a balanced and healthful ecology is [no] less important than any of the civil and political rights. . . . Such a right belongs to a different category of rights altogether for it concerns nothing less than self-preservation and self-perpetuation. . . . As a matter of fact, these basic rights need not even be written in the Constitution for they are assumed to exist from the inception of humankind.”

In the United States, one need not amend NEPA nor even the Constitution (or state constitutions) to clarify everyone’s environmental rights. The right to a healthy environment already exists, awaiting invocation. Anglo-American legal traditions are grounded on due process of law. Arbitrary government actions that permit or cause environmental harm violate due process. Individuals injured have the right to seek remedies in equity. Due process is a foundation for state constitutions and states placed it in the federal Constitution’s 5th and 14th amendments. Since the 13th century, due process has encompassed an autonomous right to the environment. Magna Carta provides, “No freeman shall be taken, imprisoned, disseised, outlawed, banished, or in any way destroyed, nor will we proceed against or prosecute him, except by the lawful judgment of his peers and by the law of the land.”

Fully one quarter of Magna Carta secures environmental rights. Natural resources were then the major source of sustenance, livelihoods, and wealth. In 1215 rivers and royal forests were not exclusively the king’s. He had certain hunting, timbering, and fishing rights, but everyone understood the importance of resources shared in common. Commoners long had rights to use the rivers, lands, and forests, but had few effective ways to enforce their traditional entitlements. The monarch’s intrusive forest officers enforced royal prerogatives, assessing fines and collecting rents, often in arbitrary and unjust ways. Civil unrest resulted. Extortions of property and taxes, imprisonment, and threats of death characterized King John’s rule.

When John needed significant additional revenues, he announced an enlargement of the royal forest borders. Adjacent farms, baronial lands, or monasteries were now inside the royal bounds. He would fine them for being trespassers, charge them rent to remain, and assess fees and taxes. This extortion was widely detested. When seeking funds for military exigencies, John called on England’s barons to make extraordinary payments. In acceding, the barons insisted in return that the king restore the royal forests to their original borders. Knights

would be commissioned to conduct “perambulations” to reset the former borders.

Magna Carta put an end to such arbitrary abuses of royal power. It ordered disafforestations. It also commissioned knights to investigate King John’s environmental “evil” deeds throughout England. This inquiry produced a second charter in 1217, devoted entirely to environmental rights, Carta de Foresta or the Forest Charter. It was equally as important as Magna Carta. William Blackstone celebrated “these two sacred charters” in his *Commentaries* in 1759. In time, both charters, with the Petition of Right, established due process norms that we follow today as the rule of law.

The Forest Charter secured customary environmental rights. It barred the loss of life or limb as penalties for killing the king’s deer, and banned cutting off the paws of dogs to prevent them from chasing deer. It guaranteed pasture rights for cows and sheep, and the rights of freemen to farm, operate mills, have eyries for hawks, and collect honey from wild bees.

Most fundamentally, the Forest Charter imposed the rule of law, restricting the discretion of the monarch’s forest officers. Those arrested by forest officers were to be presented at once to verderers, who would record the arrest and promptly present them to a forest justice. Arbitrary application of the monarch’s stringent Forest Law was to end. The right to due process of law is the greatest legacy of Magna Carta and Carta de Foresta — the antidote to unjust behavior by any government. The Forest Charter proclaims for all in the realm, the “liberties of the forest and free customs traditionally had, both within and without the royal forests.” It obliged everyone “to observe the liberties and customs granted in the Forest Charter.”

These environmental liberties are reserved to all people, forever. These rights exist apart from those enumerated rights in what became America’s Bill of Rights. The federal Constitution’s 10th amendment conservatively preserved all non-enumerated rights to the people and the states. As Justice Antonin Scalia recognized in his dissent in 1991 in *Pacific Mutual Life Insurance v. Haslip*, “The American colonists . . . widely adopted Magna Carta’s ‘Law of the land’ guarantee.”

If American jurisprudence has been slow to invoke the environmental rights in due process of law, it is largely because the bounty of nature sustained the exercise of environmental liberties for many generations. While American courts have often invoked political and civil aspects of due process, they have had little occasion to address the environmental guarantees. The one exception is the

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Magna Carta's provisions for access rights to rivers. The king's arbitrary interference with public access to waterways led Magna Carta to provide that "no river bank shall henceforth be made a preserve," with some exceptions based on prior royal use.

State courts across the United States still enforce the public trust doctrine, as law received from England. They require government to guarantee public access to rivers and foreshores. States also conferred on Congress, under the Constitution's commerce clause, the power to regulate navigable waterways.

Awakening respect for environmental due process of law is necessary to protect life, liberty, and property from arbitrary governmental abuse. Victims are entitled to invoke their rights. Environmental due process was abused in 2014 when governments caused lead-laced drinking water to injure children in Flint, Michigan. Environmental statutes proved insufficient. Neither NEPA nor Michigan's celebrated Environmental Protection Act could protect the 100,000 residents.

More fundamentally, Earth's life-support systems are on the line. Governmental action, and inaction, are disrupting natural systems, ushering in unprecedented disruptions. Extremes of temperatures afflict urban heat islands and fuel exurban wild fires. Droughts alternate with floods. Biodiversity losses mount while invasive species disrupt habitats and spread diseases. Most people live on land that the seas soon will reclaim.

It is hardly surprising that demands for environmental rights grow. The United Nations acknowledges a human right to water. Last March, John Knox, the UN special rapporteur on human rights and the environment, advised the Human Rights Council in his final report of the "strong evidence of the converging trends toward greater uniformity and certainty in the understanding of human rights obligations relating to the environment." Knox's successor, David R. Boyd, is author of *The Environmental Rights Revolution* (2011). In the book, he identifies 193 national constitutions that recognize the right to the environment.

Regionally, the Inter-American Court of Human Rights last year published a ruling that the right to a healthy environment exists as "an autonomous right," different from the environmental aspects of other human rights, such as the right to life or the right to personal integrity. The court recognized the irrefutable relationship between protecting the environment and human rights, because environmental degradation affects the effective enjoyment of other human rights. The court also held that individuals could enforce the right through proceedings presented to it.

The expanding recognition of environmental rights offers contemporary corroboration for the environmental rights inherent in due process of law. Revisiting the roots of environmental due process is not merely an academic inquiry. The Forest Charter articulates the right to the environment, and prescribes reciprocal rights and duties. The crown's guarantee of everyone's natural rights is a social contract. In Sir Edward Coke's estimation, the "chief felicity" is realized when good laws, like Magna Carta and the Forest Charter, "are reciprocally, of prince and people, duly observed." Due process ensures that the government and the people honor their two-way relationships.

Today, Forest Charter due process rights reverberate afresh. The 21 youngsters in *Juliana v. United States* are defending these liberties in federal district court in Oregon. Just as Magna Carta, over time, has guaranteed the people's access to forests, rivers, and coasts, so now the air. Earth's atmosphere is shared by 7.5 billion humans. Governments and people have reciprocal duties to protect this ultimate commons.

International negotiations are underway to reaffirm and clarify this right. Last May, the UN General Assembly launched consultations into 2019 about a "Global Pact for the Environment." The right to the environment arguably is already a norm binding on all nations, as *ius cogens*, or a peremptory norm. All nations have the duty to maintain Earth's biosphere as a healthy home for humans and nature. The General Assembly has already recognized environmental rights and duties in the 1982 World Charter for Nature. Restating the right in a new treaty would clarify for all nations that the right is fundamental and must be observed.

The Global Pact's draft Article 1 reads like the Forest Charter: "Every person has the right to an ecologically sound environment adequate for their health, well-being, dignity, culture and fulfillment." The correlative duty is found in Article 2: "Every state or international institution, every person, natural or legal, public or private, has the duty to take care of the environment. To this end, everyone contributes at their own levels to the conservation, protection and restoration of the integrity of the Earth's ecosystem."

We cannot know whether or not recognizing the right to the environment has the capacity to halt the juggernaut of ecological disruption around the world. What we can know is that, like other human rights, the environmental right could well be a lifeline. **TEF**

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