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The Public Trust Doctrine in the 21st Century

Nicholas A. Robinson*

I. Introduction

If anyone doubts that the legal decisions of the 12th century in England have relevance today, let them reflect upon Magna Carta. This great charter of liberties launched our concepts of limited and accountable government and the rule of law. Chapter 39 declares that “[n]o free man is to be arrested, or imprisoned, or disseised, or outlawed, or exiled, or in any other way ruined, nor will we go against him or send against him, except by the lawful judgment of his peers or by the law of the land.”¹ Our norms of due process of law emerge from this right. Chapter 40 declares “[w]e will not sell, or deny, or delay right or justice to anyone.”² As prosecutors in New York attack the “pay to play” corruption or bar associations criticize abusive bail practices, it is evident that rights granted by Magna Carta in 1215 are central to the quest for justice today. Magna Carta greatly advanced the rights of women, which the Suffragettes extended.³

Are we not still “seeking justice”⁴ after 800 years? The struggles to define a more just society in the 12th and 13th centuries in England put us on the path we still struggle to define today. Magna Carta sought to redress wrongs across a range of complex relationships. Some are bound up in the feudal relationships and are lost on us today. Others are timeless, speaking to the human condition in any era.

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1. MAGNA CARTA cl. 39 (1215), *reprinted and translated in* MAGNA CARTA AND THE RULE OF LAW app. C, at 394 (Daniel Barstow Magraw et al. eds., 2014) [hereinafter Magraw].
2. MAGNA CARTA ch. 40 (1215), *in* Magraw app. C, at 394.
3. *See*, e.g., Pace Law Sch., Exhibit, Magna Carta: Enduring Legacy 1215-2015 (Oct. 13-26, 2015). The pursuit of justice was a theme of the exhibitions and special programs (curated by Prof. Nicholas Robinson) at Pace University School of Law and the New York State Judicial Institute, and sponsored by the American Bar Association and Law Library of Congress. The exhibition honored the 800th anniversary of Magna Carta. For more information, please visit <https://law.pace.edu/magna-carta>.

It behooves us today to explore the environmental rights that Magna Carta identified, confirmed, and protected. Most of these were “place based,” involving the natural resources of England. Although William Blackstone’s writing made all of Magna Carta known to the early bar in the Americas, our Founding Fathers had no occasion to dwell on the Charter’s environmental rights. America was a realm of vast natural resources, carpets of forest, and easily accessible coastlines. Nonetheless, having embraced Magna Carta’s fundamental norms of justice, America’s legal systems are open to the rediscovery of how simple justice would mandate recognizing environmental rights today, as occurred in 2015.⁵

William Blackstone made his career by researching what he called the “two sacred charters,” using these works to publish an extraordinary book that included his own commentaries.⁶ The first Charter was Magna Carta of 1215, and the second was Carta de Foresta of 1217 (Forest Charter). The American Bar Association published my detailed history of the Forest Charter in 2014.⁷ Blackstone’s scholarship on *The Great Charter and Charter of the Forest* (1759) and his *Commentaries* built upon the jurisprudence established by Sir Edward Coke. Coke had declared that these charters were part of the “ancient constitution” of the realm, and made ancient claims of right in the “Petition of Right.”⁸ Through Blackstone’s work, the political and civil rights first articulated in Magna Carta found their way into the United States Bill of Rights.

Today, the environmental issues that have developed during the Anthropocene epoch could be mitigated by examining the environmental rights that emerged from Magna

5. Nicholas A. Robinson, *The Most Fundamental Right*, 36 ENVTL. F. 46, 49 (2019).
6. WILFRED PREST, WILLIAM BLACKSTONE: LAWS AND LETTERS IN THE 18TH CENTURY 165 (2008).
7. *See* Nicholas A. Robinson, *The Charter of the Forest: Evolving Human Rights in Nature*, *in* Magraw, *supra* note 1, at 311-77.
8. ONLINE LIBRARY OF LIBERTY, THE BEST OF THE OLL #42: SIR EDWARD COKE, PETITION OF RIGHT (1628), http://lf-oll.s3.amazonaws.com/titles/2545/Coke_PetitionRight1628.pdf [https://perma.cc/6Y5N-YESZ] (last visited Oct. 31, 2019).

Carta. What can their history tell us about humans and nature? When humans in Medieval England depended on nature, they posited in the Forest Charter a set of just relationships. They had rights, “liberties of the forest.”⁹ As we humans today contemplate our dependence on stable ecological conditions in Earth’s biosphere and agree on sustainable development goals, we are positing a right to the environment in more than 174 national constitutions.¹⁰ Does due process of law today entail such an environmental right? Counterintuitive as it may seem in the midst of today’s culture wars, it is worth considering whether or not, through due process, American jurisprudence is already primed to acknowledge a right to the environment?

In this Symposium’s initial lecture, I will (a) provide a glimpse into life in Medieval England to explain the context from which Magna Carta arose, (b) describe the evolution of environmental rights from Magna Carta to the Forest Charter, (c) explore in a case study how “liberties of the forest” functioned for 800 years in England’s Royal Forest of Dean, ultimately sustaining the ecological systems of Dean, (d) discuss the “liberties of the forest” in light of Elinor Ostom’s common pool analyses, and (e) offer some views on the question just posed. I shall start by describing the English environment itself in the 13th century.

II. Governance and the Emergence of Magna Carta in 1217

Medieval England had been upended in 1066 when the Normans occupied this Anglo-Saxon country. King William “The Conqueror” established his barons across the land, inventoried the realm in the Domesday Book, and confirmed a system of more than 150 “Royal Forests,” where he alone had authority to hunt deer and boar. But the Royal Forests were more than a hunting ground. Their timber became ships and buildings. They held fish ponds and provided water power for mills. The Forests housed valuable tin mines and foundries. Their pastures provided fodder for cattle and horses and sheep. Their mast fattened the pigs. Their wood fueled the energy demands of the Kingdom. The oak trees of Dean were used to build the Tower of London. While the King did hold some personal land, *demesne*, in the Royal Forest, they were not his alone. His prerogatives co-existed in the Royal Forests with the rights of all others located there: Barons and their manors and serfs, monasteries and other ecclesiastical places, villages, free men with their farms, and travelers who crossed through.

Two legal systems also co-existed. Generally, civil and criminal relations were adjudicated by the common law and administered by the sheriffs and judges in manorial courts

or itinerant royal courts. Uses and entitlements to natural resources were administered through the *Forest Law*, with local courts of Swaimote, which governed usufructs for domestic animals in Royal Forests, with agisters to inspect. Courts of Attachment would adjudicate violations of Forest Law, enforced by Foresters. Periodically, the King (or his *Justiciar*) dispatched a Justice Seat in Eyre—sometimes Eyre (from the French *Ire*, to go)—to hold a comprehensive inquest, adjudicate all violations of Forest Law in a place, and set new rules. *Verderers*, who were selected from among local barons and knights, provided oversight of these systems.

Often the Foresters were arbitrary in applying laws that forbade taking venison and regulated the limits of usufructs. This led to grievances. Moreover, when the King needed additional monies for his wars with the Welsh, Scots, or kingdoms across the English Channel, he would by decree expand the borders of the Royal Forests into adjacent areas. He would then declare all those within the new borders to be trespassers, fine them, order them to pay rents to remain, and extract other payments. This was called “afforestation,” and it was patently unjust. Such behavior is remembered today in the stories of Robin Hood, in Sherwood Royal Forest. When a King needed major new taxes to pay for his mercenaries, the barons would accede only if the King decreed a return to the former borders of the Royal Forest. *Regarders*, usually twelve knights selected locally, would then survey the borders and determine the proper metes and bounds. This was called “disafforestation.”

King John was aggressive in his afforestations and parsimonious in his disafforestations. His abusive taxation led to a rebellion against him and civil war. On June 10, 1215, John agreed to the Barons’ demands in Magna Carta in order to settle the civil war. Copies of Magna Carta were at once made and sent to Sheriffs across England to be read in churches and town squares. England was largely illiterate, and this oral tradition was important.

Under Chapter 48, twelve knights were to investigate and report on the “evil customs” relating to the Foresters in each county. However, within the three months, John renounced Magna Carta and the civil war resumed, with King Louis of France in England against John.¹¹ He died in October 1216, and his nine-year-old son, Henry III, became king.¹² A renowned knight, William Marshall, became Henry’s Regent and sought to end the civil war by promulgating Magna Carta anew in 1216.¹³ Marshall also had compiled the reports of the twelve knights about the evils for the Forest, and in November of 1217, at a *Curia Regis*, the text of the Forest Charter was agreed.¹⁴ In 1217, Henry III granted both a revised Magna Carta and the new Carta de Foresta.¹⁵ He would re-issue and confirm both Charters again in 1225.¹⁶ Thereafter, whenever the King needed taxes, disafforestations

9. *Charter of the Forest, 1255*, U.K. NAT’L ARCHIVES, <http://www.nationalarchives.gov.uk/education/resources/magna-carta/charter-forest-1225-westminster> [https://perma.cc/9QHF-WGME] (last visited Oct. 31, 2019).

10. Michael B. Gerrard & Edward McTiernan, *Debate Over Environmental Rights Zand State Constitutional Convention*, 258 N.Y. L. J. 1 (2017), <https://www.arndporter.com/-/media/files/perspectives/publications/2017/10/debate-over-environmental-rights-and-state-constitutional-convention.pdf> [https://perma.cc/G7DK-PSG2].

11. Robinson, *supra* note 7, at 335-36.

12. *Id.* at 336.

13. *Id.* at 335-36.

14. *Id.*

15. *Id.* at 313.

16. *Id.*

were ordered and the Charters were affirmed.¹⁷ In 1297, the Crown granted the *Confirmatio Cartorum* and confirmed the charters as statutes of the realm, binding on the Crown.¹⁸

A. From Magna Carta to Forest Charter

In the 13th century, the lands and rivers of England were the sources of its wealth, appropriated through farming and fishing, harvesting wood or other plants, and artisanal mining.¹⁹ Access to natural resources was well understood in customary law before the Norman Conquest.²⁰ The Normans confirmed most such practices.²¹ When Kings extended the Royal Forests arbitrarily, this disrupted well-settled ecological, economic, and social relations.²² It was not difficult for churchmen and barons alike to agree on King John's evil behavior about the environment.²³

I. Magna Carta of 2015 Sought to Remedy Environmental Injustices

Various clauses in Magna Carta of 2015 remedied environmental injustices:

- (1) Chapter 4: Guardians of minors who are heirs are barred from taking more than reasonable income from the heirs' lands and "without destruction of either men or goods."²⁴
- (2) Chapter 5: The Guardian with "wardship of the land is to maintain buildings, parks" (forests under forest law), "fishponds, pools, mills, and other things appertaining to the land."²⁵
- (3) Chapter 20: Penalties for free men or "villeins," including forest law violations, are to be proportional to the offense (many violations of forest law saw excessive penalties).²⁶
- (4) Chapters 28, 30, 31: No Crown officials are to take corn, horses or carts, or another man's wood, except by consent.²⁷
- (5) Chapter 33: "All fish-weirs are in [the] future to be entirely removed from the Thames and the Medway and throughout the whole of England, except on the sea-coast."²⁸
- (6) Chapter 44: Men outside the Forest do not need to attend Forest eyres (all before had to leave

work and attend the courts and be fined if they did not).²⁹

- (7) Chapter 47: All Forests afforested during King John's rule were "to be disafforested immediately, and the same [was] to be done with regard to rivers" that King John had fenced off.³⁰
- (8) Chapter 48: "All evil customs relating to forests and warrens, foresters and warreners, sheriffs and their officers, rivers and their keepers, are to be immediately investigated . . . [and] are to be completely abolished by them, never to be revived, as long as we, or our justiciar if we are not in England, know about it beforehand."³¹
- (9) Chapter 53: Disafforestations need not be done while the King is abroad on Crusade.³²
- (10) Chapter 55: Fines assessed unjustly and against the law of the land are to be remitted (this encompassed many Forest Law fines).³³

2. Magna Carta of 2016 Was Issued With a Different Set of Environmental Rights

When the Regent William Marshal caused Henry III to re-issue Magna Carta in 1216, a different set of environmental rights was provided:

- (1) Chapter 5: The duty to keep up the natural resources of wardships was extended also to wardships of ecclesiastical lands.³⁴
- (2) Chapter 15: Rights of freemen to be fined fairly for violations, were extended.³⁵
- (3) Chapter 38: All afforestations under King John were to be "disafforested; and so be it done with river-banks that were made preserves."³⁶
- (4) Chapter 42: "[B]ecause there were certain chapters in the former charter which seemed important yet doubtful, namely . . . On forests and foresters, warrens and warreners . . . On river banks and their wardens, . . . these [chapters shall be] deferred until we have fuller counsel."³⁷

The deliberations continued. This debating over environmental issues was not under any pressure of a civil war. It was a serious and conscientious struggle to define the relative rights of all those who depended on the Royal Forests. There must have been a draft text for debate at the Curia Regis in November of 1217, but no record has been found.

17. *Id.* at 337.

18. *Id.* at 338.

19. *Id.* at 326.

20. *Id.* at 324.

21. *Id.* at 325.

22. *Id.* at 324, 325.

23. *Id.* at 335.

24. MAGNA CARTA ch. 4 (1215), *in* Magraw app. C, at 390.

25. *Id.* ch. 5, *in* Magraw app. C, at 390.

26. *Id.* ch. 20, *in* Magraw app. C, at 392.

27. *Id.* chs. 28, 30, 31, *in* Magraw app. C, at 393.

28. *Id.* ch. 33, *in* Magraw app. C, at 393.

29. *Id.* ch. 44, *in* Magraw app. C, at 394.

30. *Id.* ch. 47, *in* Magraw app. C, at 395.

31. *Id.* ch. 48, *in* Magraw app. C, at 395.

32. *Id.* ch. 53, *in* Magraw app. C, at 395-96.

33. *Id.* ch. 40, *in* Magraw app. C, at 396.

34. MAGNA CARTA ch. 5 (1216), *in* Magraw app. F, at 406.

35. *Id.* ch. 15, *in* Magraw app. F, at 408.

36. *Id.* ch. 38, *in* Magraw app. F, at 410.

37. *Id.* ch. 42, *in* Magraw app. F, at 411.

3. Magna Carta of 2017 and the Forest Charter Replaced Magna Carta of 2016

In less than a month thereafter, the Forest Charter was issued, along with the 1217 version of Magna Carta. Many copies were made, and orders were sent to the sheriffs to read the two charters aloud in churches and town squares. Most environmental references were placed in the Forest Charter. Two remained in Magna Carta as they did not deal with Forests:

Chapter 20: “No river bank shall henceforth be made a preserve, except those which were preserves in the time of king Henry, our grandfather, in the same places and for the same periods as they used to be in his day.”³⁸

Chapter 29: “Henceforth all fish-weirs shall be cleared completely from the Thames and the Medway, and throughout all England, except along the sea coast.”³⁹

The rights set forth in the Forest Charter are all new. They are the result of a rigorous examination of how to establish just relations regarding uses and rights in the forests. This is an extraordinary legislative event in which the reports of the twelve knights in different English counties produced a litany of evil conduct, which the Forest Charter was to address.⁴⁰ More importantly, the Forest Charter recognized public rights in the forest, beyond what we today see as property rights. These public rights are recognized as being held and enjoyed by everyone (*omnes*) and thus may be characterized as human rights.⁴¹

The Forest Charter begins by recognizing a common right for gathering herbs and berries.⁴² This right exists to be exercised everywhere and is held by everyone in the Forest including in the king’s private demesne.⁴³

The Forest Charter provides both substantive and procedural rights. Substantive rights include:

- (1) Afforestations and fines made before King Henry III are reversed, and Forest borders are to be inspected every three years.⁴⁴ Past violations are pardoned, so long as those pardoned find sureties to pledge that they shall not commit new violations.⁴⁵
- (2) Royal rights to hunt deer are regulated.⁴⁶ The cruel practice of “lawing” dogs (cutting the toes or paws) is curbed, and hunting or travelling through the Royal Forests with dogs is banned.⁴⁷ Ecclesiastic and barons crossing a forest may take

up to two deer.⁴⁸ The penalty for unlawfully taking a deer is a fine or one-year imprisonment.⁴⁹

- (3) Foresters are prohibited from confiscating grains or sheep or pigs.⁵⁰
- (4) “Every free man” can let his animals use the Royal Forests (right of pasturage) and let his pigs eat acorns in the Royal Forests (right of pannage).⁵¹ These become recognized as commoners’ rights in future centuries.
- (5) Chapter 12: “On his own land and with his own access to water within a Royal Forest, every free man can make a mill, fishpond, dam, marsh pit or dike or reclaim arable ground, without [violating] Forest Law, so long as [his acts are] not a nuisance to any of his neighbors.”⁵²

Procedural rights include:

- (1) Chapter 8: “Foresters and Verderers are to meet every 40 days to deal with arrests for offenses of killing or hunting deer (trespass of *venison*) or harvesting [wood or] vegetation without authority (trespasses of *vert*).”⁵³
- (2) Chapter 16: “Procedures for handling offenses are regularized. No warden of a castle may hold a court to enforce Forest Law or to hear pleas of the Forest, and foresters who make arrests (*attachments*) must present [those arrested] to the Verderers, who will make a record and present them to the forest justices . . . to determine forest pleas.”⁵⁴
- (3) Chapter 17: Emergent human environmental rights;⁵⁵ the most striking chapter of the Forest Charter. It reads like a savings clause, to preserve all rights of the King or others that are not expressly addressed in the Charter.⁵⁶ It also directs that Crown and Subject have corrective duties; each is to respect the rights of the other. But it goes beyond this function, providing a legal foundation for rights that are yet to be recognized:

These liberties of the forest (*libertates de forestis*) and free customs traditionally had (*consuetudines predictas et libertates*), both within and without the Royal Forests, are granted to ecclesiastics, nobles, freeholders, and all in our realm (*omnes de regno nostro*), in short to everyone. Everyone

38. MAGNA CARTA ch. 20 (1217), *in* Magraw app. G, at 417.

39. *Id.* ch. 29, *in* Magraw app. G, at 417.

40. Robinson, *supra* note 7, at 335.

41. *Id.* at 343.

42. *Id.* at 341.

43. *Id.*

44. *Id.*

45. *Id.* at 343.

46. *Id.* at 342.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 342-43.

53. *Id.* at 342.

54. *Id.* at 343.

55. *Id.*

56. *See id.* at 344 (“The open-ended provision of chapter 17 in the Forest Charter . . . allowed future generations to elaborate and evolve new definitions of these liberties and shared rights.”).

is also obliged to observe the liberties and customs granted in the Forest Charter.⁵⁷

The Forest Charter concludes with this timeless grant of “liberties of the forest” for all, forever. This guarantee reads like a 20th century Universal Declaration of Human Rights.⁵⁸

The public in 1217 and the following centuries knew that the liberties of the forest were as important as the rule of law. In 1217, most could not read. Scribes made copies of the Forest Charter by hand, which were distributed to every county in England and read aloud in town squares and churches. This happened repeatedly, roughly thirty-two times over two centuries. All sectors of society came to revere this “sacred charter,” the companion to Magna Carta.

Over the centuries since 1217, a public expectation, or norm, has emerged. Laws could—and should—protect the public’s interest in natural places. By the 19th century, Parliament enacted legislation to protect England’s remnant Royal Forests for the people. The metes and bounds of share landscapes are known and legally protected. The evolution of this environmental norm, a right that governments must observe, is illustrated by the histories of most Royal Forests in England. Parliament reconstituted the Verderers to defend public interests in the New Forest and Epping Forest. In Ashdown, Parliament established comparable stewardship roles. In the Forest of Dean, Parliament elected to perpetuate the Verderers and the Court of Attachment, which has convened since the 12th century. The Verderers in Dean are elected for life. When one dies, the Crown directs the Sheriff to hold a special election. The Dean Verderers’ authority is derived from custom, as well as statute.⁵⁹

B. Royal Forests: The Forest of Dean

Like all of England, people have shaped the landscape since 6,000 B.C. The Roman and Saxon periods established land uses, some of which persist to this day. Norman governance and Royal Forests are the foundation of modern land trust doctrine.⁶⁰ King William’s Domesday Book of 1086 records the Forest of Dean, which persists today among the first twenty-five Royal Forests.⁶¹ The Forest of Dean is the only place where the Forest Charter is still allowed to govern.⁶² The Verderers Court still convenes four times a year, as it has since the 12th century.⁶³

The Forest of Dean, located between the Severn River and Estuary and Wales, encompasses the Wye River Valley.⁶⁴ It is

a legendary source of great oak timbers, which were used to build the Tower of London and ships for Britain’s navy and merchant marine. Iron was mined there since Roman times. Additionally, charcoal was produced, coal was mined,⁶⁵ and tanneries were operated in the Forest of Dean.⁶⁶ When the Stuart Kings sold Crown lands and timber,⁶⁷ people in neighboring parishes simply extended their customary practices. If trees were felled, then locals would graze their sheep and claim pasturage. In exchange for payments, the Crown granted free miners their own self-government in the Forest of Dean in the 14th century, and those rights are still exercised.⁶⁸ Anyone born in the hundred of St. Briavels (the pre-Norman area which encompasses the Forest of Dean) can still run sheep on the forest or become a free miner,⁶⁹ although, for economic reasons, this is less common now.⁷⁰

In 1631, the government erected fences to close off what was once open land. In response, local people revolted by tearing down these fences. In 1640, the Crown sold the Forest of Dean to make money and transfer troublesome Forest Law duties to a local lord of the new manor.⁷¹ Sir John Winter’s clear-cutting of trees for timber and enclosures infuriated the public, prompting the Crown to repossess the Forest of Dean in 1640. Under Oliver Cromwell’s Parliamentary rule, the replanting of oaks and beeches began for the first time. After Cromwell’s demise, Winter regained control and exploited the timber to such an extent that in 1668, Parliament retook the Forest of Dean and enacted an act for the increase and preservation of the timber in the Forest of Dean.⁷² The Dean Forest (Reafforestation) Act 1668 set up six districts of Forest Keepers, authorizing construction of Speech House in the middle of the Forest.⁷³

Between 1616 and 1855, the Forest of Dean supplied timber to the Navy, supervised by the Crown’s Office of Woods, by shipping 100,000 tons of oak to naval shipyards. To sustain this demand, in 1808 the Office of Woods implemented a plan to plant 3,000 acorns per acre with enclosures. Because it takes 100 years to produce good timber for ship building and steel and steam replaced wood and sails, many oaks thrived. However, the enclosures did not sit well with local residents. In 1831, the anti-enclosure movement tore down fences, and the Crown sent the Royal Monmouthshire Militia and Third Dragoons to quell the riots. Yet, in 1898, riots over enclosures recurred.

The Verderers have functioned to oversee Forest Law in the Forest of Dean since the 13th century. A “regard” was held in 1282 to sort out who held lawful uses. Verderers met at the Norman castle of St. Briavels. In 1338, the Verderers convened at Kensley House, near the center of the Forest on a Roman road. Because the Forest of Dean supplied timber for

57. *Id.* at 343.

58. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

59. CYRIL HART, *THE VERDERERS AND FOREST LAWS OF DEAN* (2d ed. 2005).

60. Judith A. Green, *Forest Laws in England and Normandy in the Twelfth Century*, 86 HIST. RES. 416 (2013).

61. N.D.G. JAMES, *A HISTORY OF ENGLISH FORESTRY* app. II (1981).

62. Robinson, *supra* note 7, at 354-55.

63. David Stock, *The Ancient Protectors of England’s Forests*, BBC (Nov. 18, 2015), <http://www.bbc.com/travel/story/20151110-the-ancient-protectors-of-eng-lands-forests> [https://perma.cc/3SQ4-Z9F5].

64. A.P. Baggs et al., *Forest of Dean: Introduction*, BRITISH HISTORY ONLINE (1996), <http://www.british-history.ac.uk/vch/glos/vol5/pp285-294> [https://perma.cc/85R7-686W].

65. Stock, *supra* note 63.

66. Baggs et al., *supra* note 64.

67. *Id.*

68. *Mining, FOREST OF DEAN LOC. HIST. SOC’Y*, <https://www.forestofdeanhistory.org.uk> [https://perma.cc/4A6Q-XRZP] (last visited Oct. 31, 2019).

69. Stock, *supra* note 63.

70. FOREST OF DEAN LOC. HIST. SOC’Y, *supra* note 68.

71. See Robinson, *supra* note 7, at 350.

72. Dean Forest (Reafforestation) Act (1668), 20 Car. 2, ch. 3 (Eng.).

73. See *id.*

the navy, the Spanish Armada was ordered in 1588 to destroy Dean to disrupt English ship building. In the Dean Forest (Reafforestation) Act of 1668, Parliament launched the preference of sustaining timber resources, as did the Dean and New Forests Act 1808.⁷⁴ In 1669, inhabitants of the Forest of Dean petitioned the English Treasury “that the keeping and holding of forest courts pursuant to the Act 1668” required a proper court room “within the liberty of the forest.”⁷⁵ “Speech House” was then built in 1675, where the Verderers Court still convene. Commoners repeatedly expanded their uses in Royal Forests, and the Crown pressed back with the Dean Forest (Encroachments) Acts 1838 and 1844. The Verderers’ authority to oversee the Forest of Dean was reaffirmed in the Dean Forest (Amendment) Act 1861,⁷⁶ and again in the Dean Forest Act 1906.⁷⁷

By the 1880s, with the convenience of rail travel from anywhere in Britain to Gloucester, and thence to most parts of the Forest of Dean, tourism became a prime “liberty of the forest.” John Bellow’s guidebook, *A Week’s Holiday in the Forest of Dean*, was popular in 1880 and in print continuously thereafter.⁷⁸ The remnant Royal Forest flourished in the late Victorian period, as public aversion to the abuses of industrialization gave rise to the romantic lake poets and naturalist and nature conservation movements in Great Britain. Bellows had toured Walden Pond with Senator George F. Hoar of Massachusetts, who in turn toured the Forest of Dean with Bellows in the late 1880s.⁷⁹ Rambling and walking in, touring, or studying nature and appreciating the natural landscape became a “liberty of the forest.” It was one that co-existed with tree farming and the timber industry,⁸⁰ as well as with local agriculture. Multiple uses were the expectation in the Crown’s forest lands. Over time, the metes and bounds were set. In the Forest of Dean, iron border survey marks today still mark the bounds, bearing the seal of Victoria and Albert.

In 1919, Parliament established the Forestry Commission to replace the Office of Woods. The Forest of Dean became a source of timber from conifers, and still is. However, recreational uses of the Forest of Dean were also increasingly popular. In 1938, responding to popular interest in tourism, public access, and landscape conservation, the Forestry Commission established the Forest of Dean as the first National Forest Park in England. The Forest of Dean’s special status was confirmed when Parliament abolished the remnant Forest Charter provisions and Forest Law in the Wild Creatures and Forest Laws Act of 1971.⁸¹ Parliament expressly provided that Verderers in the Forest of Dean shall continue and no existing right of common or pannage operating in the Forest Law shall be affected. Verderers continue to be elected and oversee liberties of the forest in the Forest of Dean. When the

government in the 1970s sought to sell off Crown lands for revenues to balance the budget without new taxes, inhabitants of the Forest of Dean organized and in the Forestry Act 1981⁸² won a remarkable victory in Parliament. Lord Clement John McNair championed the interests of the inhabitants of the Forest of Dean. Parliament barred the government from disposing of any forest lands in the Forest of Dean. The Forestry Commission’s Byelaws of 1982 provide that “nothing in these byelaws shall prejudice or be in derogation of any right, power, or duty vested in, or imposed on the Verderers of the Forest of Dean.”⁸³

Contemporary stewardship in the Forest of Dean is not easy. Hoof and mouth disease wiped out the sheep population, which makes a modest come-back under British agricultural supervision. Without sheep or ponies to eat bracken, it expands. Feral boars roam the woods, preventing pannage and rooting up lands so much that they interfere with hiking. The Forestry lands are well managed, with timber and recreation sharing the woods. The deer are fewer and automobiles increase with tourism. A dynamic, nested, and polycentric management system has become stable and shown that it has capacity to evolve to meet new conditions.

The foundation for public rights in former Royal Forests, and the continuing vitality of Verderers, is in the legitimization of the usufruct rights exercised in the Crown statutory forest. When the King in the Forest Charter ceded rights to those who customarily held them, and in the future to all others, the Crown had guaranteed these rights and was bound to respect them. The customary rights preceded the establishment of the Royal Forests, evolving into new systems enacted by Parliament. By vesting and recognizing fundamental rights in the public, successive governments found themselves bound by these basic rights. Throughout the struggles to accommodate competing rights and interests, patterns of cooperation emerged, with institutions like the Verderers to advance cooperation.

C. Interpretation of Elinor Ostrom

The Forest Charter was both the first environmental statute and the first declaration of environmental rights; it proclaimed the “liberties of the forest.” It also illustrated what Elinor Ostrom identified as systems governing the commons through institutions for collective action. The overlapping uses of the King’s “Royal Forests,” were competing as well as complementary. They covered one-third of England’s landscapes. By learning—often with great difficulty—to accommodate each other, these users of many of England’s Royal Forests produced cooperative regimes for managing natural resources that are commonly shared. In Ostrom’s terminology, the Royal Forests of medieval England are a “common pool resource.”

When resources were necessarily shared together, cooperation was encouraged. When the Crown sold off forest

74. Dean and New Forests Act (1808), 48 Geo. 3, ch. 72 (Eng.).

75. HART, *supra* note 59, at 110-17.

76. Dean Forest Act (1861), 24 & 25 VICT., c. 40 (Eng.).

77. Dean Forest Act (1906), 6 Edw. 7, ch. cxix (Eng.).

78. JOHN BELLOW, *A WEEK’S HOLIDAY IN THE FOREST OF DEAN* (2013).

79. Ian Standing, *Introduction* to JOHN BELLOW, *A WEEK’S HOLIDAY IN THE FOREST OF DEAN* (2013).

80. H.L. EDLIN, *FORESTRY AND WOODLAND LIFE* (1947).

81. Wild Creatures and Forest Laws Act 1971, c. 47 (Eng.).

82. Forestry Act 1981, c. 39 (Eng.).

83. Forestry Commission Byelaws 1982, SI 1982/648, art. 3, ¶ 4 (Eng.) (promulgated under authority granted by the §§ 46-48 of the Forestry Act of 1967).

resources, allowing private property to supplant the common lands, cooperation was diminished. When enclosures ousted access for continued exercise of usufructs, conflicts arose. Over 800 years, the extent of England's shared resources diminished in size, which continues to this day. While common pool farmlands are all but gone, common pool resources in once Royal Forests persist.

Consider the farmlands: The medieval farming regime of open fields, with plots rotating and allocated annually by inspection of a Field Jury of thirteen men, still operates in the Midlands in Laxton. A charter granted in 1232 by the lord of this manor conveyed authority to free and bond men to manage the open fields for farming. The boundary allocations of the Field Jury are confirmed by the Court Leet, which in December convenes in the Dovecote Inn to swear in the new jury, calls a roll of all local residents required to attend, confirms fines for any violations of the allocated lands, and deliberates on other matters. In most manor lands, this pattern of cooperative management was supplanted in the 18th and 19th centuries by enclosures and sale of plots to individual farmers to facilitate sale of lands and augment agricultural production. In most manors across England, the open fields commons disappeared.

However, where the manors were established by the grant of Royal Forests, as in Ashdown Forest in Sussex, open lands persisted and commoners exercised their ancestral rights to pasture cows and horses and harvest wood and plants. In the 19th century, these vast open spaces were prized for their scenic and recreational values, as well as for their pasturing animals and gathering wood. In Ashdown, Parliament established Conservators to manage the open landscapes. You know Ashdown today if you have seen the film *Goodbye Christopher Robin*, because all the film's forest scenes are of Ashdown. By Milne's day, the shared uses of Ashdown were confirmed and Pooh Bear's landscape could be celebrated.

For more than eight centuries, each Royal Forest has either produced a stable conservation regime for these natural areas, with various rights exercised over shared resources, or has not. The Royal Forests are much diminished in size but many persist. The city of London saved the Forest of Waltham Abbey in Essex from creeping enclosures and privatization in the 19th century. It is now conserved by London and is accessible by the Underground as Epping Forest. You know Sherwood Forest from Howard Pyle's *The Merry Adventures of Robin Hood* (1883) and Dartmoor Forest from Sir Arthur Conan Doyle's *The Hound of the Baskervilles* (1901-02). Public rights of access and conservation management exist in some sixty Royal Forests across England.

The Forest of Dean follows the aforementioned on a parallel pathway. Dean is familiar to contemporaries of J.K. Rowling's novels. The "Deathly Hallows, Part I" motion picture film features Coppett Hill, where Hermione tells Harry that the snowy field they traverse is in the Forest of Dean. Rowling grew up as a child in the Forest of Dean.

Among all these surviving forests, the Forest Charter played a role in legitimizing diverse customary claims to forest liberties. Commoners with ancient claims still run

free-range cattle, sheep, and horses in these places, alongside new rights to ramble and recreate and the perils of the automobile. The saga of the Forest of Dean illustrates Ostom's theories about how humans manage and conserve common pool resources.

The countryside in medieval England was the economic foundation of society, the source of all sustenance, energy, and economic activity. Royal Forests were more than woods. In 1079, William the Conqueror had established The New Forest, which thrives south of London, near Southampton. He brought deer from France and raised them in enclosures, to be harvested as needed or hunted for royal pleasure. Deer and boar were venison, which was exclusively the King's. Eventually more than 160 Royal Forests were designated, of which 143 remain, most still with commoners' rights. They encompass moors, wetlands, fields and associated flora and fauna, along with roads, tin and iron mines, mills, fishponds, farms, and other uses. This swath of countryside, covering one-third of England, was distinct from other places because it was governed by both the Common Law and by the King's Forest Law.⁸⁴ Forest Law was administered by a pervasive regime of forest officers. Unjust demands for taxes from the King and abusive behavior by forest officers led to the powerful demands for the Forest Charter.

While a number of Royal Forests were converted to other land uses, others persist for several reasons:

- (1) They are places with well-defined boundaries, whose delineation was fought over many times. Those with customary rights repeatedly demanded "perambulations" of forest borders.
- (2) There were customary rules for how entitled persons were to exercise their right to use a natural resource in the forest, measured by what an individual personally could manage to do.
- (3) The Crown and commoners struggled to assert their rights against each other, with Verderers Courts for each forest mediating conflicts. Parliament finally established modern stewardship regimes in the 19th and early 20th centuries, and has only formally registered commoners' right since the 1970s.
- (4) Verderers, and periodic "regards" or inspections held to monitor exercise of rights, and "perambulations" reset borders and rights of access. Contemporary maps emerged, confirming the Royal Forests' boundaries.
- (5) The King meted out forest justice in special courts, or Eyres, which were separate from the common law courts. Abuses of the King's Forest Law led to protests and obliged the King to grant the Forest Charter.

84. Elements of Forest Law existed before 1066 (e.g., Canute's Law of the Royal Forest of 1016). After King William I established Royal Forests, he, William II, Henry I and II elaborated the Norman Forest Laws and associated administrative regimes.

- (6) Patterns of accepted customary uses emerged, not unlike the self-government of Laxton. For example, King John granted charters to tin miners in Dartmoor for self-governance. When customary uses were arbitrarily curtailed, protests resulted and new compromises reached ad hoc.
- (7) Commoners now have associations to assert their rights, but in an era before non-governmental intrusion, they did so through Verderers Courts and other means.
- (8) The Royal Forests were nestled enterprises in which customary local uses at the county level, or by adjacent manors, monasteries, and villages, were accommodated by the King in his governance at the national level. Added to these English systems are acts of parliament for United Kingdom laws and international treaties.

These eight aspects illustrate the Design Principles that Elinor Ostrom identified for robust socio-ecological systems.⁸⁵ My study of England's Royal Forests confirms Ostrom's research on governing commons,⁸⁶ for which she was awarded the Nobel Prize in economics. Ostrom called for the social sciences to welcome studies by other disciplines about the commons, including law.⁸⁷ On accepting the Nobel Prize, she said: "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."⁸⁸

III. Conclusion

There is merit, then, in accepting Ostrom's invitation to examine concepts of fundamental rights, such as justice and the rule of law, in analyzing stewardship of the commons. The history of the Forest Charter illustrates how rights matter. Analysis of the Forest Charter and England's Royal Forests expand Ostrom's findings. She did not ask how fundamental rights, as opposed to rules, operate. Fundamental rights, such as universal human rights, serve to legitimize an individual's claims.

The United Nations General Assembly has recognized the right to water as a basic human right. Holders of these rights have a superior moral claim, which is shared with others. Since the 1992 Earth Summit in Rio de Janeiro, the role of the right to the environment has become a global norm. Today, more than 174 nations provide this right in their constitutions. More than 1,500 environmental courts now enforce environmental laws in approximately 50 nations.

Earth's natural systems are shared in common by us all. If we can learn how the Right to the Environment can become as effective as Human Rights have become since 1948, then we can manage to sustain our shared resources, even if we add an additional two billion inhabitants to the planet. The ultimate shared resource is Earth's atmosphere, and the Paris Agreement of 2015 is but one set of rules regarding its use. In September 2017, France invited the UN General Assembly to adopt a Global Pact for the Environment, which can recognize the Right to the Environment and several corollary principles.⁸⁹ If we can underpin these rules with the Right to the Environment, we can give them enhanced legitimacy and enforce them on a global scale.

85. ELINOR OSTROM, UNDERSTANDING INSTITUTIONAL DIVERSITY 258-76 (2005).

86. See generally ELINOR OSTROM, GOVERNING THE COMMONS (1990).

87. *Id.* at 216.

88. Elinor Ostrom, Nobel Prize Lecture: Beyond Markets and States: Polycentric Governance of Complex Economic Systems (Dec. 8, 2009) (transcript available at <https://www.nobelprize.org/prizes/economic-sciences/2009/ostrom/lecture>).

89. See G.A. Res. 72/277 (May 10, 2018); G.A. Res. 73/333 (Sept. 5, 2019). See generally *Global Pact for the Environment*, WORLD COMM'N ON ENVTL. L., <https://www.iucn.org/commissions/world-commission-environmental-law/wcel-resources/global-pact-environment> [<https://perma.cc/XS6U-PU2P>] (last visited Oct. 31, 2019).