

Law of the Land

Can the most powerful nation on Earth throw off the shackles of an unforeseen tyranny?

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EACH OF US AMERICANS, on average, has 190 potentially toxic organochlorine compounds in our fatty tissue and body fluids, and several hundred other chemicals that may be harmful to our health. Although the Fourth Amendment to the United States Constitution protects “the right of people to be secure in their persons, houses, papers, and effects,” the privacy of the body has been violated without our knowledge or permission, and with little accountability by those responsible.

The ubiquity of pollution makes it difficult to assign responsibility. Still more difficult to determine is which of hundreds or thousands of chemicals, mixing in ways beyond our comprehension, caused exactly what pathology in our bodies. Our knowledge of such things is inescapably general. We know that some of these substances,

singly or in combination, undermine health, reproductive potential, intelligence, ability to concentrate, and emotional stability—hence the capacity to pursue and experience life, liberty, and happiness. In some cases the effects will manifest far into the future, placing perpetrators beyond the reach of the law and leaving their victims without remedy. What, then, is the meaning of the constitutional guarantees in the Fifth and Fourteenth amendments that we cannot “be deprived of life, liberty, or property,” including property of the body, without “due process of law”?

The framers of the Constitution could not have known about carcinogenic, mutagenic, endocrine-disrupting, or radioactive substances, but we do. For many toxic substances we know that there is no safe threshold of exposure. Chemicals that disrupt the endocrine system do their work in parts per billion, wreaking havoc on the development and immune systems of children. Had they known what we now know about the pervasiveness of chemicals and their effects, would the framers have extended the protections of due process to include the fundamental right of bodily integrity? And should such protections be extended more broadly to include deprivation of other ecological necessities of life and liberty? The philosophy and logic of liberty as the framers understood it leaves little doubt that the answer is affirmative. What else would they have protected us against, had they known the kind of world we would inherit?

FOR THE FARMERS, the conquest of nature by science and technology was an unmixed blessing. In our time, we can see the limits of nature, some say its end. We know what they could not have known: that nature is an intricate web of causes and effects often widely separated in space and time, and that small changes can have very large implications. We know, too, that what we mean by nature is complicated by our being bound up in it in ways that are hard to fathom. And we know, or ought to know, that we could bring it and ourselves crashing down, gradually or quickly.

Of the founders, Thomas Jefferson is notable for his concerns about the intergenerational effects of debt, but he could not have imagined intergenerational ecological debt such as the extinction of species and toxic pollution. “We the People” meant we the present

generation, with the caveat that the framers intended to “secure the blessings of liberty to ourselves and our posterity.” To do so meant getting the legal framework in place to balance interests, avoid the tyranny of either minority or majority, provide democratic representation, create national institutions, and establish a credit-worthy government.

The framers placed no restrictions on the rights of the living relative to those of subsequent generations. It would be a mistake, however, to infer that the framers had no further regard for posterity. To the contrary, I think that they did but assumed that obligations to the future had been discharged by the creation of a durable national government. Many people now believe that future generations need more explicit protection.

In 1986 the Supreme Court of the Philippines, for example, upheld the legal rights of children to litigate in order to stop deforestation on behalf of future generations’ rights to “a balanced and healthy ecology.” To acknowledge this standing, the court drew from no specific textual reference, saying only that “these basic rights need not even be written in the Constitution for they are assumed to exist from the inception of humankind.” Indeed, there can be no good argument to the contrary. The proper question, then, is not whether succeeding generations have legitimate rights to a balanced and healthy environment, but how those rights would be determined and enforced in the present.

“IT IS TIME—LONG TIME PAST—to invigorate and greatly widen the critical examination of the Constitution and its shortcomings,” says political scholar Robert Dahl, noting that “public discussion that penetrates beyond the Constitution as a national icon is virtually nonexistent.” Although the framers did not understand how the world works as an ecological system and that the unfettered advance of technology would someday cast a dark shadow on a distant posterity, they did know that future generations would need to change the Constitution to adapt to changing circumstances. The question now is, can we adapt that document and our public life to pressing ecological realities?

One thing seems clear. If, as the Declaration of Independence claims, "all men [including those yet to live] are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are Life, Liberty, and the Pursuit of Happiness," then no generation has a license to diminish the unalienable rights of subsequent generations by changing the biogeochemical systems of Earth or impairing the stability, integrity, and beauty of biotic systems. Ignorance can no longer serve as a plausible defense for actions that compromise the legitimate rights of present and future generations. Accordingly, a truly conservative and revolutionary reading of the U.S. Constitution would build on the idea that we are trustees poised between our forebears and our posterity. In trust we are obliged by decency, fairness, justice, and affection to protect, preserve, and honor the ecological prospects of existing life and that yet to be. It is absurd to believe that the framers, seven generations ago, would have wished us to preserve the letter of the Constitution of 1788 while permitting the destruction of the very ground on which that document and life itself depend.

The founders' generation fought to overthrow the tyranny of the British monarchy, and the Constitution reflects that struggle. But tyranny in our time is far more pervasive and oppressive in two respects. First, monied interests in the form of corporations have acquired an undeserved advantage, a stranglehold as it were, over the public interest. The public is losing control over much of the commons: capital, information, airwaves, land, healthcare, employment, genetic information, and, if the acolytes of free trade have their way, the power to control our own economic affairs. Further, we the people are excluded from fundamental decisions about war and peace, nuclear weapons policy, and a growing number of decisions about the use of technologies that entail some probability of irretrievable disaster. Once we became much exercised about "taxation without representation," but the present reality is more akin to "extermination without representation."

Tyranny is now intergenerational and to a great extent irrevocable, and therefore beyond remedy. The effects of climate change, loss of species, destruction of ecosystems, and tropical deforestation are global, threaten to erode the ecological foundations of civilizations,

and are for all practical purposes permanent. In other words, the global environmental legacy of industrial-era generations casts a long shadow on future generations everywhere, for all time. If this tyranny is to be avoided, the present generation must act to restrain its appetites and behavior. Our time is far more portentous than that of the framers and calls for a more thorough consideration of law, democracy, rights, and the public trust relative to the human prospect.

THIS IS A DAUNTING TIME. We are rather like the lost traveler told that "you can't get there from here." But I do not think we are as stuck as the situation may suggest. The changes that we must make are resonant with much of our history, best values, and notions of common sense. Those standards require that we act conservatively in cases where the risks of widespread, severe, and irreversible harm are high—or simply unknown. Precaution is as commonplace in daily affairs as it seems to be radical in the realm of public policy. As individuals we buy insurance, undergo annual physical exams, and wear seatbelts, which is to say that we exercise caution for reasons so obvious as to require no explanation. In medicine, the principle of precaution is embodied in the promise of the Hippocratic oath: "First, do no harm." In public policy, we must come to acknowledge a comparable logic in situations in which the risks may be catastrophic and our ignorance far exceeds our knowledge. It is one thing for individuals to incur risks to themselves, and another thing entirely for some few to risk the welfare of the many, including those who have no say in the matter. The present situation privileges the rights of an elite that cannot be held accountable if and when things turn out badly. As things stand, the benefits of risk are, in effect, privatized, while the consequences are externalized—to the detriment of the planet and its future inhabitants—which, by any decent reckoning, is unfair.

Given the lackluster results produced by thirty years of environmental legislation, I believe the time is ripe for bold action to head off the worst of what may lie ahead, beginning with a constitutional amendment guaranteeing the right to a healthy environment. If not now, when? Public awareness of the scale, scope, and duration of the ecological crisis has grown considerably

since the last such attempt was made in 1970. Would such an initiative be controversial? Certainly, but less so than one might fear. Let those who oppose the people's rights to clean air, clean water, open space, and healthy ecosystems stand up and say so. Let them say publicly that our grandchildren have no right to a decent environment. When they do, they will lose. Opinion surveys over three decades consistently show a large majority in favor of environmental quality, clear air, limits to sprawl, energy efficiency, renewable energy, and controls on pollution. We do not lack for common ground, but rather the kind of leadership that is capable of articulating the values that unite us.

The effort to establish and pass a constitutional amendment would have salutary effects. It would focus what is now a scattered debate on the essentials of our relationship to our children, and to theirs. It would end several decades of stalemate on environmental policy. It would exert a steady gravitational pull toward a reconciliation of human interests and ecological realities, just as the civil rights legislation of 1964 and 1965 pulled the nation toward a full execution of the Thirteenth, Fourteenth, and Fifteenth amendments. The legal acknowledgment of our rights to a healthy environment, now and for those yet to live, would clarify necessary changes in policy having to do with taxes, prices, public expenditures, the proper control of corporations, and the uses of technology.

The U.S. Constitution is not just words on paper. It is an evolving document. In Bruce Ledewitz's words, it "need not be interpreted to stand mute while the environment and the interests of the future are sacrificed." It is time for our understanding and refining of that document to be reconciled with our knowledge of natural systems and our growing awareness of obligations and rights that extend broadly throughout the community of life and outward in time as far as the mind dares to imagine.