Parliament, not the courts, should decide

EMMETT MACFARLANE

David Boyd presents a forceful and interesting argument in favour of enshrining environmental rights in the Constitution. However, the idea poses a litany of problems that ultimately call into question both its desirability and the legitimacy of some of his proposals for achieving it.

In making his case Boyd cites two key arguments. One calls out Canada's poor environmental record relative to those of other industrialized nations; the other notes the health care burden associated with the impact of pollutants and environmental hazards. These are important points, making clear that Canada's substantial environmental problems need to be addressed.

But it is not clear from these facts why rights are the appropriate solution. After all, Canada faces many important policy problems, including many that have significant implications for the health care system, such as an aging population, relatively high levels of obesity (Canada ranks sixth among OECD countries' obesity levels) and poverty. By what standard do we determine when a given set of policy problems requires entrenching new rights in the Constitution?

Boyd's answer is that constitutionalizing environmental rights will compel Canadian governments to improve their policies. It is a highly questionable assertion, for a number of reasons.

First, entrenching rights effectively transfers the decision-making authority to the courts. With respect to positive rights like the right to a healthy environment, there are good reasons to question whether judges have either the legitimacy or the competence to delve into the relevant policy issues. Determining what must be done to combat climate change, for example, involves weighing a host of factors like economic interests, the basic structure of the tax system and local versus national concerns, to name a few. This balancing act is more appropriately settled in democratic rather than legal forums.

Substantive policy debates should be conducted through state-society mechanisms of representative institutions and electoral politics. Courts are not well equipped to examine or understand the various policy instruments that might be brought to bear to ensure effective environmental policy, nor do they have the expertise to evaluate the medium- and long-term consequences of various policy options. By contrast, the elected branches have the resources of the bureaucracy at their disposal, as well as the time to engage in long-term policy analysis through legislative committee work and broader policy consultation processes.

Boyd notes that most nations (more than 110) enjoy a constitutionally protected right to a healthy environment. But it is unclear whether this is meaningful. These countries differ wildly with respect to their records on the environment. He points to Norway as a success story, but it is impossible to tell from his brief analysis whether Norway's policies are derived from constitutionally entrenched rights or are simply derived from a political commitment to strong environmental policy.

By contrast, positive rights that many countries have entrenched in their constitutions — including welfare, housing and environmental rights — are far from successful. Despite attention-grabbing judicial decisions on these rights by courts in countries like South Africa or India, policies on the

Environmentalists should focus on convincing governments, political parties and the public to pursue policies that will ensure environmental protection.

Emmett Macfarlane is an assistant professor of political science at the University of Waterloo. He is the author of Governing from the Bench: The Supreme Court of Canada and the Judicial Role *(University of British Columbia Press, 2013).*

HARVEY LOCKE

ground to actually enforce and protect them have proven illusory or entirely dependent on government action.

Second, a rights framework limits our capacity for meaningful political debate and compromise. Rather than focusing on policy issues and the balancing of interests, we find rights being increasingly invoked by one side or another, employed as a trump card. Other considerations are deemed less legitimate in the face of a claim that someone's rights are being violated.

Moreover, this leads to inflationary calls for the expansion of rights. Progressive legal scholars argue that social welfare rights ought to be included in the Charter. Conservatives demand that property rights receive constitutional protection. Others propose that animal rights be considered.

These new rights often come into conflict with existing ones. And because constitutional rights are the purview of courts (at least in the eyes of some), the courts are increasingly called upon to resolve our most important political, social and policy disagreements. Politicians encourage this tendency by passing the buck. After all, why take political heat when the courts can be held accountable for tough decisions? This constant appeal to unelected arbiters is unhealthy in a democracy, where it should be expected that such challenges be addressed in the political sphere.

Boyd argues that the Constitution's current lack of clarity on the environment is a significant problem, and he sees this opaqueness as an argument for entrenching rights. But the evidence he cites — a 1912 federal Commission on Conservation report and a 1997 Supreme Court case that "came within a whisker of striking down critical provisions of the *Canadian Environmental Protection Act* because of the absence of a clear constitutional basis for the law" — is predicated not on the lack of constitutional rights but on the ambiguity of federal versus provincial jurisdictions over environmental policy. The 1997 Court decision Boyd refers to is a division of powers case. Indeed, even if environmental rights were a part of the Charter, this jurisdictional confusion would remain.

Yet the most problematic element of Boyd's argument is the suggestion that courts ought to read environmental rights into the right to "life, liberty and security of the person" section (section 7) of the Charter, through either a Charter case or a reference opinion.

Section 7 is the first provision in the "Legal Rights" section of the Charter. It was originally intended to be limited to infringements relating to procedural aspects of the criminal justice system, and while the Supreme Court quickly determined that it applied to substantive issues, the justices have limited its application to the administration of justice, specifically those subject to a criminal process. The Court has, fortunately, refused (so far) to apply section 7 to positive social or economic rights, in part because some of the justices recognize the limitations inherent in their roles.

Legal scholars who would like to see a more expansive interpretation of the right to life, liberty and security of the person rely heavily on the idea of the Constitution as a "living tree" — something that can grow and adapt to changing social realities. This makes sense when it means applying existing rights to new contexts. (It is why we can expect that freedom of expression will be protected on the Internet, even though home use of the Web did not become common until over a decade after the Charter's entrenchment.) But a version of the living tree metaphor that allows judges to add entirely new rights to the Charter is unacceptable because it completely flouts the need for a supermajoritarian (and democratic) approval process for amending the Constitution.

Notably, one area of the Constitution where environmental rights may more reasonably be said to have been (indirectly) established is section 35's Aboriginal and treaty rights. As Boyd notes, there are strong reasons to favour seeing indigenous understanding of the law as a part of broader constitutional interpretation in Canada, particularly as it relates to the rights of indigenous peoples. The environment is a cornerstone of those rights, given that the content of Aboriginal rights is intrinsically tied to the land and to traditional customs and activities like hunting and fishing. Nevertheless, even environmental rights that might emerge from a broad application of section 35 would necessarily be confined to the context of policies affecting indigenous peoples.

The only principled and legitimate way a new, broad right to a healthy environment might be added to the Charter would be through formal constitutional amendment, which is a very difficult process requiring substantial provincial consent (Parliament plus seven provinces representing at least 50 percent of the population).

Boyd notes that there have been 11 amendments to the Constitution since 1982, including two relating to the Charter, but these were all relatively minor changes (all but one were minor enough to fall under the less demanding formula of the amending process, requiring only Parliament's approval or Parliament's approval in conjunction with that of one other province). Adding new rights to the Charter would be a significant amendment and would likely precipitate wider demands from various provinces relating to constitutional reform, resulting in an unwieldy process unlikely to generate the sort of consensus that would be required for success.

None of this is to deny that Canada faces enormous environmental challenges. Successive governments have failed to address them in a resounding manner. The country's size and diversity, the relative importance of its natural resource sector to the overall economy, and political culture and public attitudes are but a handful of factors that complicate decision-making when it comes to setting environmental policy.

However, none of these are sufficient reasons to effectively replace ordinary policy-making and political debate with judicial review of constitutional environmental rights. Rather than mobilizing for constitutional change, environmentalists should focus their energies on convincing governments, political parties and the public to commit to the pursuit of policies that will ensure environmental protection.

If they cannot do that, then how do they expect to convince these governments to enshrine those same commitments in the Constitution? ■