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# BACKGROUND ENVIRONMENTAL JUSTICE: AN EXTENSION OF RAWLS'S POLITICAL LIBERALISM

Edward Abplanalp  
ea319@icc.edu

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BACKGROUND ENVIRONMENTAL JUSTICE:  
AN EXTENSION OF RAWLS'S POLITICAL LIBERALISM

by

Edward R. Abplanalp

A DISSERTATION

Presented to the Faculty of  
The Graduate College at the University of Nebraska  
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Major: Philosophy

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BACKGROUND ENVIRONMENTAL JUSTICE:  
AN EXTENSION OF RAWLS'S POLITICAL LIBERALISM

Edward Robert Abplanalp, Ph. D.

University of Nebraska, 2010

Adviser: Nelson T Potter

This dissertation extends John Rawls's mature theory of justice out to address the environmental challenges that citizens of liberal democracies now face. Specifically, using Rawls's framework of political liberalism, I piece together a theory of procedural justice to be applied to a particular constitutional democracy. I show how citizens of pluralistic democracies should apply this theory to environmental matters in a four stage contracting procedure. I argue that, if implemented, this extension to Rawls's theory would secure background environmental justice. I explain why the theory can be viewed as a partially specified political conception of environmental pragmatism, and how it relates to public environmental policy and discourse. While the framework is anthropocentric, it is one that reasonable non-anthropocentrists can endorse.

Using this theory of background environmental justice, I argue that liberal democracies must take measures to secure basic environmental rights for all presently existing and future citizens. Measures must also be in place to secure a minimum of social goods (including environmental goods) that guarantees that all citizens (present and future) can exercise their basic rights and liberties. Moreover, disparities in

environmental goods should only be tolerated if they arise in accord with Rawls's principle of fair equality of opportunity. This will require the saving of natural capital for future generations. It also requires measures to maintain social structures that will enable future citizens to compete for all other environmental goods and hardships in accord with the requirement of fair equality of opportunity. Also, there are conditions under which regressive ecological tax policies are justified. Moreover, due to Rawls's constraint of just savings, irrespective whether global climate change is caused by human activity, citizens of liberal democracies should significantly reduce their use of petroleum and coal, and turn to alternative forms of energy. I discuss carbon taxes, as well as carbon allocation trading schemes. I also argue that free democracies should employ precautionary reasoning when attempting to meet the demands of background environmental justice.

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Moreover, parts of the first three chapters were presented in a paper entitled "Rawlsian Political Liberalism and Environmental Discourse," which I presented at "Globalization, Environmental Ethics, and Environmental Justice, An International Conference," organized by the Lyman Briggs School of Science, Michigan State

University, on August 25, 2006. I would like to thank a number of anonymous session participants for their helpful comments. Moreover, I would like to thank Samuel Freeman for several email correspondences regarding the details of Rawls's theory.

Also, parts of chapters four, five, six, and seven were presented in a paper called "Rawlsian Background Environmental Justice: The Role of Fair Equality of Opportunity," which I presented at a conference at the University of Delaware, Newark, Delaware, October 31, 2009. The conference—"The Ethics of Climate Change: international justice and the global challenge"—was hosted by the Science, Ethics and Public Policy (SEPP) program at the University of Delaware. The Delaware Humanities Forum, the American Philosophical Association, and the National Science Foundation also sponsored the conference. I would like to thank the conference participants, and especially Scott Forschler, for many fruitful comments and discussions regarding the prospects of using Rawls's theory as a framework for environmental justice. I would also like to thank the Department of Social Sciences at Illinois Central College for generously providing funds for my trip to the conference.

Lastly, I would like to thank my wife, Natalia, and my stepdaughter, Marta, for their loving support. Over the past several years I have done an absurd amount of teaching. Between the both of them, they somehow ensured that I had time in my hectic schedule to complete this project. They have provided an infinite amount of encouragement, and have gone to great lengths to ensure that our home possesses the sort of warmth and peacefulness that any writer would envy.

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## Introduction

There are many environmental matters that constitutional democracies must now deal with on a routine basis. A short list of such issues include air and water quality, sustainability, the protection of endangered species, the introduction of genetically modified crops, biodiversity conservation, hazardous waste management, human population growth, water management, opening protected public areas to oil and gas development, desertification, environmental justice (e.g., environmental racism, classism and sexism), and global climate change. Moreover, many of these concerns have become bona fide political issues that will likely increase in magnitude as time passes. It is not surprising, then, that as these issues have become more acute in recent years, the literature relating normative environmental philosophy, green political theory, and so on, to public environmental policy has exploded, as well. It is unfortunate, then, that normative environmental philosophers have paid insufficient attention to John Rawls (1921–2002)—who is one of the most distinguished moral and political philosophers of our time—especially after his shift from the moral to the political. One aim of this project, then, is to fill in many gaps connecting Rawlsian political liberalism with normative environmental philosophy.

Admittedly, Rawls has not been completely overlooked in the environmental literature. In fact, there was an initial excitement towards the prospect of extending Rawls's justice as fairness into the domain of environmental ethics after his seminal *Theory of Justice (TJ)*. Still, the secondary literature concerning the relevance of Rawls's mature theory—his *Political Liberalism (PL)* and beyond—to practical environmental

matters is still relatively scant. Moreover, many authors who have attempted to connect Rawls's theory to environmental policy have not applied his theory correctly. In what follows, then, I shall not focus on the numerous criticisms of Rawls's conception of justice. Neither will I concentrate on how Rawls argued for his theory. Rather, my aim is merely to develop a unique extension to Rawls's mature theory of political liberalism. In doing so, I wish to show how it can serve as a cogent framework for citizens within a pluralistic constitutional democracy to utilize when they publicly discuss and adjudicate such important environmental matters, and how it could ideally be used to secure background environmental justice. By doing this, I hope to demonstrate the relevance of this robust contractualist model of political justice to academic philosophers, policy makers, as well as those working within the domain of contemporary environmentalism—the ecology movement, the environmental movement, the green movement, the conservation movement, etc.

In order to do this I will proceed as follows. First, it is necessary to explicate the basics of Rawls's own theory of justice before extending it into the domain of normative environmental philosophy. Accordingly, the first chapter, "Rawls's Political Liberalism," is a concise overview of the elements of Rawls's Political Liberalism that relate to my overall project. In it, I explain how Rawls argued for his theory, and why it is a form of constructivism. I introduce the burdens of judgment, and the idea of an overlapping consensus. I explain why Rawls's viewed his mature theory as a free-standing conception of justice, and why my extension is, similarly, not supposed to be committed to any particular theory of the good. Other authors have argued that Rawls's model is inadequate as a normative ground for environmental ethics, and most environmental ethicists have

given up on Rawls. Thus, I also begin to explain why his mature theory is a political conception of justice, and not intended to be a comprehensive moral doctrine.

Of course, if Rawls's finished theory were a comprehensive doctrine, it would be the type of framework we might use to judge other things besides basic justice—e.g., people's actions or moral character. Thus, as it relates to normative environmental philosophy, it would be a serious misconstrual of John Rawls's mature project to think of it as we might J. Baird Callicott's land ethic, which we should view as an entire ecological worldview.<sup>1</sup> However, changed from his earlier *TJ*, Rawls's mature theory is now merely a political conception of justice; and, hence, is intended to apply only to the basic structure (i.e., the main social and political institutions) of a society composed of citizens who possess conflicting religious, philosophical, and moral doctrines.

Accordingly, my extension to Rawls's theory should be a framework that any reasonable citizen should—in principle—find agreeable. And this holds no matter whether his or her comprehensive worldview is best described as ecocentrist, Kantian, feminist, atheist, Jewish, Christian, Muslim, and so on.

Accordingly, my framework for Rawlsian background environmental justice must be constructed upon ideas found within the public political culture of pluralistic constitutional democracies that are capable of being an object of an overlapping consensus. Thus, in chapter two, "Examining the Anthropocentric Model," I examine the following elements of Rawls's domestic model: (1) society as a fair system of cooperation; (2) a well-ordered society is characterized as being effectively regulated by a political conception of justice; (3) the idea of the basic structure of society; (4) Rawls's

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<sup>1</sup> See J Baird Callicott , *In Defense of the Land Ethic: Essays in Environmental Philosophy* (Albany: SUNY Press, 1989)

original position of equality; (5) persons as free and equal; and (6) the idea of public justification. I inspect these six items because they are the fundamental elements Rawls used to construct his theory of political liberalism. I show how each of these relate to his overall theory, as well as their potential bearing on any Rawlsian framework of environmental justice. I illustrate Rawls's three levels of justice (i.e., local, domestic, and global), and emphasize that my extension to Rawls's theory is merely a framework for domestic background environmental justice. I explain that my extension of his political liberalism must remain anthropocentric because a non-anthropocentric axiology could not be the object of a reasonable overlapping consensus, and that a pluralistic society well-ordered by non-anthropocentrism would not be stable for the right reasons. Nevertheless, although the resulting model is anthropocentric, I argue that it is a political theory that reasonable non-anthropocentrists should find attractive. Specifically, I argue that the Rawlsian model of background environmental justice can be embraced by reasonable non-anthropocentrists who wish to view themselves as free and equal citizens of a constitutional liberal democracy.

Moreover, what is conspicuously missing in the environmental philosophy literature is a robust examination of how Rawls's mature theory is relevant to public environmental discourse and public environmental policy decisions at the domestic level. This would include discussion of Rawls's emphasis on public justification, which includes the idea of public reason and his liberal principle of legitimacy. Accordingly, within chapter three, "Anthropocentric Public Reason and Political Legitimacy," I argue that background environmental justice can only be actualized if the fundamental systems that distribute environmental goods and hardships favor no comprehensive theory of the good. I discuss

Rawls's principles of public reason and political legitimacy in more detail, and explain their relevance to public environmental policy and discourse—e.g., public environmental policies must be supported by reasons that could be an object of an overlapping consensus of reasonable worldviews. I suggest that a society well-ordered by the Rawlsian model would respect a wide variety of comprehensive moral doctrines, along with a panoply of incompatible environmental values freely held by its citizens. Following Rawls, I also maintain that political power is legitimate only when it is exercised by a basic structure of society that all citizens, as reasonable and rational, can endorse in the light of their common human reason. I consider how this principle is applicable to a number of environmental issues, policies, and agencies.

Rawls's theory has not been applied correctly within the literature on environmental ethics and environmental justice. Rawls thought that his theory of justice should be applied in a four-stage contracting sequence. The second stage is the constitutional convention. Accordingly, within chapter four, "Domestic Environmental Justice—The Constitution," I explain how Rawls's first principle of justice—the equal liberty principle (i.e. every person must have the same inalienable claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all)—is to be applied to the constitution of a constitutional liberal democracy. I do not address the criticisms made against Rawls's priority of liberty by authors such as H.L.A. Hart, Brian Barry, Henry Shue, and Norman Daniels.<sup>2</sup> Rather, I merely show how the Rawlsian model of background environmental justice can incorporate constitutionally protected basic environmental rights. Following, Rawls, I also argue that while the right

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<sup>2</sup> See Robert Taylor, "Rawls's Defense of the Priority of Liberty: A Kantian Reconstruction," *Philosophy & Public Affairs* 31 (2003): 246–271.

hold personal property is a basic right that must be constitutionally protected, the right to own and control a society's means of producing goods and services is not. This implies that a society that has attained background environmental justice would not view the right to own natural resources (rivers, forests, mountains, etc.) as a basic property right. I also suggest that a number of important environmental goods should be included within Rawls's constitutional social minimum.

In chapter five, "Domestic Environmental Justice—Fair Equality of Opportunity," I move on to the legislative stage of the contracting process. I argue that at this point in the Rawlsian heuristic the contracting parties will agree to implement certain federal environmental laws, agencies, and policies. I contend that if an environmental good is generally needed for citizens of liberal democracies to exercise their fundamental rights and liberties, then it should be considered within the domain of the constitutionally protected social minimum. Thus, at the legislative stage, the parties will agree to a variety of measures that will assure that no citizen is denied his or her constitutionally guaranteed amount of environmental goods. Moreover, I argue that the parties will employ precautionary reasoning when deliberating about such matters. Accordingly, if a policy might cause citizens to fall below the constitutionally guaranteed social minimum (e.g., it might cause health problems or death), or if it could cause citizens to lose the environmental goods they need in order to effectively exercise their basic rights and liberties (safe levels of air, water, soil, etc.), the parties will not permit it unless the scientific consensus is that it is safe.

Moreover, at the legislative stage, the contracting parties are employing Rawls's principle of fair equality of opportunity. Background environmental justice accordingly

requires that once safe levels are established, disparities in environmental goods/hardships only then be tolerated if they arise in accord with the principle of fair equality of opportunity—i.e., all citizens must have a fair equal opportunity to be made more or less advantaged by the disparities. This is part of how the present model explains the wrongness of environmental racism, classism, etc. Securing this sort of fair equality of opportunity (which is necessary for background environmental justice) will require measures to avoid excessive concentrations of wealth, progressive taxation, as well as universal education. I argue that background environmental justice also requires limits on political lobbying, criminalizing the selling of the public trust, restrictions on corporate speech, as well as campaign finance reform.

Like Rawls's own framework of political liberalism (i.e., justice as fairness), my extension is limited to a particular constitutional democracy. How, then, does background environmental justice at the domestic level relate to the supranational arena? Within chapter six, "Diverging from Rawls's Framework," I explain Rawls's own solution—The Law of Peoples—and how my project differs from it. I do not employ a second (international) agreement that governs relations between nation-states. While I believe such a contractualist/contractarian project could be made viable (along the lines of Pogge, Beitz, Barry, et al.), it is out of the scope of the present project to do so. Rather, I simply suppose that, during the legislative stage of the domestic model, the contracting parties are constrained by important supranational structures—such as reasonably just international laws and treaties. I argue that this divergence from Rawls's own system is reasonable and realistic. Supposing legitimate international treaties on the regulation of greenhouse gas emissions can be actualized, I introduce three carbon rationing options a

liberal democracy might employ in order to meet a particular “cap” level: micromanaged direct regulation, direct taxation of greenhouse gas emissions, and cap and trade schemes. I begin to discuss the bearing the present model has on such policies—the concern that carbon taxes could be regressive, that cap and trade schemes must comply with fair equality of opportunity, etc.

Any account of Rawlsian environmental justice will be procedural (not allocative). That is, a distribution of environmental benefits and burdens is just only when it arises within a system of processes (within a liberal democracy) that is itself fair. I have been referring to this as “background environmental justice,” and to complete its description we must consider the last two key elements of Rawls’s special conception of justice: the principle of just savings, and the difference principle. I do so in chapter seven, “Just Savings and the Difference Principle.” Rawls thought that the principle of just savings (a principle that all generations would want preceding generations to have followed) holds *between* generations, and that the difference principle holds within generations. I suggest (following Rawls) that during the legislative stage of the contracting procedure, the principle of just savings is to constrain the application of the difference principle. Thus, I argue that the demands of the equal liberty principle and the principle of fair equality of opportunity must be extended for an indefinite number of future generations.

Thus, independently of the difference principle, background environmental justice requires liberal democracies to take measures to guarantee basic environmental rights for future citizens. Rawlsian sustainability implies not only that segments of the natural environment must be restored and saved for future generations. It implies that human made institutions (environmental agencies, policies, etc.) must be preserved, as well.

Moreover, society must conserve enough natural and social capital to secure a social minimum of environmental goods for future generations. In addition, certain amounts of natural capital will need to be restored and saved so that future citizens can compete for environmental goods/hardships in accord with the principle of fair equality of opportunity.

I also briefly address Parfit-type non-identity environmental concerns—i.e., that future citizens cannot be wronged by lax environmental standards and the destruction of presently existing environmental goods. I suggest that the way to skirt the non-identity problem is to avoid subjunctive comparisons altogether. With the prior principles in place, I then address the full bearing of Rawls's difference principle on a number of issues such as public subsidies for green technology, cap and trade, carbon taxes, etc. I provide several illustrations of how the model of background environmental justice can be applied. The first is a critique of "sky trust" proposals for curbing global warming. The second involves mountaintop removal coal mining. Then, before moving onto the next chapter, I argue that irrespective of whether global climate change is caused by human activity, our generation has a duty of justice to significantly reduce our use of petroleum and coal, and turn to alternative forms of energy.

Recently, under what has become to be known as "environmental pragmatism," some have argued that environmental philosophers should give up on controversial axiological claims, and instead focus on "what works" as pragmatic solutions to our environmental woes. Thus, in chapter eight, "Rawlsian Environmental Pragmatism," I argue that because it is not part of a comprehensive theory of the good (i.e., it is not committed to any particular moral or religious outlook), the extended form of Rawls's mature theory I

have laid out in the dissertation can adequately serve as a partially specified environmental pragmatism. I admit, however, that my Rawlsian framework will not have the overall shape that some environmental philosophers have thought an environmental pragmatism would have. Environmental pragmatists argue that philosophers should stop trying to use the idea of natural entities possessing intrinsic value as a foundation for a viable environmental ethic. I argue that this is mistaken. An ecocentric axiology, for example, seems entirely fitting for an environmental ethic. However, we must make a fundamental distinction, like Rawls, between moral and political theory. Also, following Rawls, I contend that while the principles generated by the Rawlsian model are the most reasonable, we need not view them as being true. Thus, non-anthropocentric environmental philosophers should continue to embrace non-anthropocentric axiologies when explicating and defending their comprehensive moral theories. However, non-anthropocentrist thinkers ought to embrace Rawlsian background environmental justice as a political theory. I maintain that it is merely political philosophers who should abandon the notion of the intrinsic value of nature.

## Chapter 1

### Rawls's Political Liberalism

Shortly after the publication of John Rawls's *Theory of Justice (TJ)*, some authors lamented that his unique version of social contract theory was unsuitable as a basis for a *comprehensive* environmental ethic.<sup>1</sup> Rawls would not balk at such accusations. In his *Political Liberalism (PL)*, Rawls readily admitted that his earlier theory failed to adequately distinguish between *moral* and *political* philosophy.<sup>2</sup> A mature Rawls thought that justice as fairness is not the sort of doctrine in moral theory that attempts to account for all the particular first order moral judgments people make. These, I might add, would include the various disparate value judgments concerning the natural environment now made by citizens of pluralistic democracies—Christians, Muslims, atheists, Deep Ecologists, ecofeminists, etc. If he had developed such a contractualist moral doctrine, it would be called “rightness as fairness.”<sup>3</sup> Rather, as a mere political conception of justice, justice as fairness is now no longer part of a comprehensive doctrine and, accordingly, is not supposed to do that sort of work.

In its most mature and refined form, we are to understand John Rawls's model of political justice as free-standing. That is to say, the justice as fairness of everything he published after, and including, *PL* is intended to operate free of substantial commitments

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<sup>1</sup> Here I am thinking of (in chronological order): Michael S. Pritchard and Wade L. Robison, “Justice and the Treatment of Animals: A Critique of Rawls,” *Environmental Ethics* 3 (1981), 55–61; Russ Manning, “Environmental Ethics and Rawls' Theory of Justice,” *Environmental Ethics* 3 (1981), 155–165; Brent A. Singer, “An Extension of Rawls' Theory of Justice to Environmental Ethics,” *Environmental Ethics* 10 (1988), 217–231; Peter S. Wenz, *Environmental Justice* (Albany: SUNY Press, 1988), ch. 11; Daniel P. Thero, “Rawls and Environmental Ethics: A Critical Examination of the Literature,” *Environmental Ethics* 17 (1995), 93–106.

<sup>2</sup> John Rawls, *Political Liberalism* (New York: Columbia University Press, 1996), p. xvii.

<sup>3</sup> John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971), p. 111.

to particular comprehensive philosophical, moral, or religious doctrines. What precipitated Rawls's switch to the political? Rawls thought that because of certain ineliminable burdens of judgment (i.e., causes of reasonable disagreement), reasonable citizens could pass through narrow reflective equilibrium, into a state of wide reflective equilibrium, and still possess radically different considered judgments about political values.<sup>4</sup> He argued that due to different experiences, conflicting evidence, the complexity of data, variations in weighing considerations, and the vagueness of the concepts involved, it is exceedingly improbable that the political judgments held by reasonable citizens within a free constitutional democracy will ever converge.<sup>5</sup>

So, in reaction to the fact that the burdens of judgment inevitably lead to a reasonable pluralism, Rawls eventually viewed his justice as fairness as merely a mutual political standpoint to which all the differing and conflicting reasonable worldviews of society could acquiesce. This was a colossal change. Rawls claimed that—contrasted with his earlier *TJ*—justice as fairness now addresses a different question. Namely: “How is it possible for those affirming a comprehensive doctrine, religious or non-religious, and in particular doctrines based on religious authority, such as the Church or the Bible, also to hold a reasonable political conception of justice that supports a constitutional democratic society?”<sup>6</sup> We are now supposed to view his earlier theory as merely one of a number of reasonable comprehensive moral doctrines to which a moral agent might subscribe, and we are to think of his mature theory as one that any reasonable citizen of a liberal

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<sup>4</sup> Rawls earlier called these the “burdens of reason.” See John Rawls, *Collected Papers*, Samuel Freeman ed. (Cambridge: Harvard University Press, 1999), pp. 475–478.

<sup>5</sup> Rawls, *Justice as Fairness: a restatement*, ed. Erin Kelly (Cambridge: Harvard University Press, 2001), pp. 35–36.

<sup>6</sup> John Rawls, “Idea of Public Reason Revisited,” in his *Collected Papers*, pp. 614–615.

constitutional democracy should hold—irrespective of her or his particular comprehensive worldview.

Additionally, in shifting to the political, Rawls drastically changed his conception of stability. Since his earlier justice as fairness was supposed to be just one of a number of comprehensive theories reasonable citizens might hold, Rawls recognized that it is only via the tyrannical use of governmental force that a society could be made stable (i.e., become well-ordered) by his earlier model.<sup>7</sup> Still, even though reasonable citizens undoubtedly have divergent worldviews, Rawls thought that they could still agree on a political conception of justice. If a framework could be built on certain ideas that one finds within the public political culture of pluralistic democratic societies (I shall discuss these in detail in chapter two), he thought it would be uncontroversial enough to be the object of an overlapping consensus.<sup>8</sup> Accordingly, since reasonable citizens of a pluralistic democracy, who possess radically divergent conceptions of the good, would still reach an agreement on political justice (i.e., Rawls's mature framework of political liberalism), such a consensus would be stable for the right reasons—and ultimately not as a mere *modus vivendi*.<sup>9</sup> Similarly, I am optimistic that a liberal democracy well ordered by my extension to Rawls's conception of justice will not only have secured background environmental justice—such a society will *also* be stable for the right reasons. However, before discussing Rawls's test of stability, I shall briefly consider how Rawls's model (and my extension to it) is best viewed as a form of political constructivism.

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<sup>7</sup> See Rawls, *Political Liberalism*, p. 37.

<sup>8</sup> See Rawls's "The Idea of an Overlapping Consensus," in *Justice as Fairness*, pp. 32–38.

<sup>9</sup> See Rawls, *Justice as Fairness*, p. 192.

### **Rawlsian Political Constructivism**

Like Onora O'Neill, Scanlon, Korsgaard, et al., Rawls is a constructivist. More specifically, in Lecture III of his *PL*, Rawls adumbrates the ways one should view his theory as a form of political constructivism.<sup>10</sup> In broad terms, my extension follows his view in the following respects. Moral autonomy (vs. political autonomy) requires that a moral agent undertake a deep philosophical process of questioning all her moral values. Supposing that an agent has attained the age of reason, she must then consider a wide variety of moral topics. She must investigate what (if anything) she truly believes regarding such issues, and contemplate the nature of her core moral values. If an agent fails to do this in a serious manner, she might very well go through life acting in accord with principles and values that are imposed upon her by external forces—her parents, her peers, the media, and so forth.

According to moral constructivism of the Kantian sort, an agent's practical reason is the moral power through which morality is grounded. For example, one form of Kantian moral constructivism maintains that it is through the categorical imperative that an agent's practical reason constructs moral principles that subsequently apply to the agent. An agent might ask: "What do I think of stealing?" If the maxim of stealing is not one that she can rationally want all others to adopt, practical reason tells her that she must not adopt it, as well. The selection of principles for herself (in some such process), and incorporating them in her wider set of beliefs, will eventually culminate in a state of wide reflective equilibrium. She has then developed her own distinct moral character, and has attained some level of moral autonomy.

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<sup>10</sup> Rawls, *Political Liberalism*, pp. 89–129.

Rawlsian political constructivism, on the other hand, is not predicated upon a uniquely Kantian conception of an agent's moral autonomy. Being doctrinally autonomous in terms of morality, Rawlsian political constructivism is not wedded to any particular normative or metaethical view regarding the status of moral goodness. While moral autonomy requires a particular agent to examine her own values, political autonomy requires that free and equal citizens undertake a deep philosophical process of questioning the central values of their society. A society is not politically autonomous if it is well ordered by principles imposed by external forces—kings, demagogues, the media, etc. No doubt, democracies can take various shapes, but Rawls thought political autonomy requires deliberative democracy.<sup>11</sup> According to Rawlsian political constructivism, within such a society, it is the public reason shared by free and equal citizens that acts as a vehicle through which the principles of a political (not a moral) conception of justice are grounded. (I shall return to this point in chapter three, “Anthropocentric Public Reason and Political Legitimacy.”) Specifically, with a distinct similarity to Kantian moral constructivism, Rawlsian political constructivism maintains that it is through a certain contracting situation and process that the public reason of a liberal society constructs principles that are to be used to well-order a society of free and equal citizens (and thus secure background justice).<sup>12</sup> Just as Kant thought that the maxim of a person's action is constrained by his categorical imperative procedure, Rawls thought that the agreement made in the original position (which will be discussed later in this chapter, as well as the next) is constrained by constructivist procedure—i.e., the

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<sup>11</sup> See Samuel Freeman, *Rawls* (New York: Routledge, 2007), p. 363.

<sup>12</sup> See Freeman, *Rawls*, pp. 351–357.

conditions imposed upon the contracting parties.<sup>13</sup> In this sense, the original position “constructs” the fundamental political principles of justice for a liberal democracy. This then leads us to Rawls’s argument for the core principles of his theory—principles that I will use later in my explication of background environmental justice for a liberal constitutional democracy. As we will see, background environmental justice of the Rawlsian sort is procedural—it asks us to consider whether a distribution of environmental goods (and hardships) has come about within a system of social structures that are fair (i.e., organized by Rawls’s lexically ordered principles of political justice).

### **An Overview of Rawls’s Mature Argument**

In reaction to utilitarian thinking regarding social and political justice, Rawls put forward what he thought to be a theory that “carries to a higher level of abstraction” the modern social contract theory of Locke, Rousseau, and Kant.<sup>14</sup> The model we shall primarily focus on here—justice as fairness—is limited to the nation-state, and is not intended as a framework for international justice. (How my extension relates to supranational justice is discussed in chapter six.) I have noted the ways Rawls theory (along with my extension) should be viewed as a form of political constructivism. But what is the argument for his unique form of political liberalism? In its mature form, the argument for his political conception of justice has two parts, and both are grounded in organizing ideas Rawls finds within in the public political culture of liberal democracies.<sup>15</sup>

It is well beyond the scope of this project to explicate all of the details regarding Rawls’s argument for his principles of justice; and it is not the aim of the present project

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<sup>13</sup> Rawls, *Justice as Fairness*, pp. 81–82.

<sup>14</sup> Rawls, *Theory of Justice*, p. 11.

<sup>15</sup> For example, see Rawls, *Political Liberalism*, p. 175.

to do so. Much more of his original position argument will be discussed in the next chapter. I am presently assuming that his definitive argument(s) is contained within Part III of his *Justice as Fairness*.<sup>16</sup> And I wish now to make the following remarks regarding his polemic, as they are important to later parts of my project. The first part of his argument for his (special) conception of justice is theoretical. One is to imagine each citizen having a representative within Rawls's original position of equality. Later, we shall notice that we are not supposed to imagine these representatives as being fully autonomous moral agents. Rather, these contracting parties are beings imbued with a rational autonomy that is aimed only at maximizing the good of the citizen whom they represent. (I shall discuss how this is done later.) The parties to the hypothetical agreement are autonomous in terms of being free to make choices. However, because they are tasked with selecting principles that will be the best means to securing their citizen's final ends, one must view them as being only instrumentally rational. That is, they lack a moral sensibility beyond thinking in terms of hypothetical imperatives.<sup>17</sup> Thus, in this sense, the contracting representatives found within Rawls's original position are *not* reasonable.

The contracting representatives, then, must ask themselves which set of principles—if used to well-order society—would best promote their citizen's aims and interests. However, because of the veil of ignorance, any particular representative's basis of reasoning is quite constricted. Rawls says:

In the original position, the parties are not allowed to know the social positions or the particular comprehensive doctrines of the persons they

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<sup>16</sup> Rawls, *Justice as Fairness*, pp. 80–134.

<sup>17</sup> See John Rawls, "Kantian Constructivism in Moral Theory," in his *Collected Papers*, p. 309. See also his *Justice as Fairness*, p. 7, as well as pp. 81–82.

represent. They also do not know persons' race and ethnic group, sex, or various native endowments such as strength and intelligence, all within normal range.<sup>18</sup>

Of course, one aim of his veil of ignorance is to ensure impartiality in this imagined selection process. For example, if a representative knew that she was representing a gay man, she would have to select principles favoring homosexual men. Similarly, if a party in the original position knew that the citizen she was representing was Wiccan, she would have to vote for principles that favor Wicca. Thus, it is vitally important to restrict such information till the later phases of the four-stage selection and application process, which will be discussed later.

Next, reasoning only in (non-moral) terms of the interests of those whom they represent, Rawls argued that his principles of political justice are the ones these symmetrically situated contracting parties would choose behind such a veil of ignorance. That is, Rawls maintained that the lexically ordered principles of his special conception of justice would do the best job of realizing the two moral powers possessed by free and equal citizens of a constitutional liberal democracy. The two moral powers of citizens are the capacity for conception of the good, and the capacity for a sense of justice.<sup>19</sup> And the principles most suited to actualizing these powers include: an equal liberty principle, a principle of fair equality of opportunity, a difference principle (maintaining that social and economic inequalities are to be to the greatest benefit of the least-advantaged members of society<sup>20</sup>), a just savings principle, as well as the principles of public reason and political legitimacy. All these principles (which will be used in my extension to his

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<sup>18</sup> Rawls, *Justice as Fairness*, p. 15.

<sup>19</sup> *Ibid.*, pp. 18–19.

<sup>20</sup> *Ibid.* p. 43.

political liberalism), as well as citizens' moral powers, will be discussed in further detail later.

The second component of Rawls's argument for his mature theory is practical. Given that the aforementioned representatives within the original position of equality would select the principles contained in his model, Rawls argued that his framework additionally passes the test of stability. Due to the fact that his special conception of justice is built on notions contained within the public political culture of pluralistic democratic societies, it is capable of being the object of an overlapping consensus of reasonable conceptions of the good. Again, instead of being a *modus vivendi*, a society well ordered by his model of political liberalism would be stable for the rights reasons. Therefore, Rawls argued that it could be viable as a real world theory of political justice. Subsequently, a principal thought is that this conception of political justice could actually secure background justice—a fair playing field for all persons and groups—if we actually applied it to the major institutions of a pluralistic constitutional democracy.<sup>21</sup> Thus, irrespective of whether Rawls's model can adequately serve as a comprehensive moral theory, and thus as a basis for an environmental ethic (I do not think that it can), the aim of what follows remains unscathed: to explore the possibility of utilizing Rawls's political liberalism as a model for securing background environmental justice. Moreover, following Rawls, if successful, a liberal democracy well ordered by my extension to Rawls's political liberalism will be stable for the rights reasons, and not be a mere *modus vivendi*. Accordingly, like Rawls, the hope is that the present framework of background environmental justice will be a feasible theory for the real world—allowing free and

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<sup>21</sup> Rawls says, "A just basic structure secures what we may call background justice," *Ibid.*, p. 10. See also *Justice as Fairness*, pp. 53–54.

equal citizens of constitutional democracies to peacefully cohabit on fair terms with each other as they grapple with the many controversial environmental matters that humanity now faces.

## Chapter 2

### Examining the Anthropocentric Model

In the last chapter I introduced Rawls's political liberalism. I provided a brief overview of how he argued for his mature theory, and why we should view it as a form of political constructivism. As I mentioned earlier, Rawls said little regarding environmental justice, and he never used the expression "background environmental justice."

Is his theory, then, strong enough to complete such a task? Some, like Peter Wentz, have complained that the Rawlsian framework cannot account for our duties of justice to non-sentient elements of the natural environment.<sup>1</sup> In order to investigate the possibility of extending such a framework in a manner that will assist us in grappling with real world environmental issues and policy decisions that are required for securing background environmental justice, it will thus be instructive to now review each of the key elements of his polemic. My hope is that by taking each of the principle components of his theory and assessing them for relevance to our relation to the non-human environment, we shall be able to determine the ways in which Rawls's mature justice as fairness can be "turned green."

Within this chapter, then, we shall examine the six centrally interrelated ideas that Rawls employs in the final construction of his theory. These ideas—which hang together via reflective equilibrium—are Rawls's complex notions of: (a) society as a fair system of cooperation; (b) a well-ordered society is characterized as being effectively regulated by a political conception of justice; (c) the idea of the basic structure of society; (d)

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<sup>1</sup> See Peter S. Wentz, *Environmental Justice* (Albany: SUNY Press, 1988), chapter 11.

Rawls's original positions of equality; (e) persons as free and equal; and (f) the idea of public justification.

Why are these features most germane to his theory? Rawls used these concepts in the construction of his theory because he thought that, except for the original position of equality, these are the actual core ideas of liberal constitutional democracies. And, as a form of Rawlsian political constructivism, my extension is “constructed” from these same ideas, which must match our considered convictions. In the remainder of this chapter, then, we shall see how these core concepts of Rawls's political liberalism fit together, and present them in the light of a number of pressing practical issues within contemporary environmental philosophy. In the next chapter I focus on how these ideas hang together and cohere with Rawls's notion of public reason, as well as his liberal principle of legitimacy. Along the way, I show how some of the fundamental ideas and the principles selected can be modified in order to fit together into the extended Rawlsian framework we are now considering.

### **Society Viewed as a Fair System of Social Cooperation**

Rawls began with the basic idea of *society* viewed as a fair system of social cooperation over time, from one generation to the next. By social cooperation, he meant those socially coordinated activities guided by publicly recognized rules and procedures.<sup>2</sup> Moreover, he viewed this cooperation as the joint activities and efforts of groups of autonomous persons only. (The idea of free and equal persons will be discussed later.) We are supposed to imagine this society as being self-contained, and having no

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<sup>2</sup> Rawls, *Justice as Fairness*, pp. 5–6.

relationships with other societies.<sup>3</sup> One might undoubtedly find this unrealistic, as societies are globally connected in important ways. While these concerns are legitimate, they fall under supranational justice. As a result, they will be discussed later in chapter six, when I make a fairly robust departure from Rawls's own framework.

Rawls maintained that the agreement that would be reached by free and equal people, from the standpoint of what they regard as their reciprocal advantage (i.e., their good),<sup>4</sup> constitute the conditions of fair cooperation amongst the members of society. Moreover, it is only if the bargaining process positions the persons fairly (i.e., no one is permitted to have an unfair bargaining advantage over another<sup>5</sup>) that the conditions of fair cooperation are met. The principles selected from behind the veil of ignorance, then, identify these fair requisites of social cooperation. And because the assumptions built into the selection process are predicated on ideas that any reasonable citizen could embrace, the principles the parties select also turn out to be the most reasonable principles of political justice.

Although Rawls ultimately regarded society as fair cooperation amongst people, he did not think it is limited only to cooperation amongst human beings. For it appears that following legal parlance, Rawls did not think that only a human being could be a person. Regarding the word 'person' Rawls says:

This expression is to be construed variously depending on the circumstances. On some occasions it will mean human individuals, but in others it may refer to nations, provinces, business firms, churches, teams, and so on. The principles of justice apply to conflicting claims made by

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<sup>3</sup> Rawls, *Political Liberalism*, p. 12. Of course, this is false. He deals with the problem of international relations in his *The Law of Peoples* (1999).

<sup>4</sup> Rawls, *Justice as Fairness*, p. 15.

<sup>5</sup> Ibid.

persons of all these separate kinds. There is, perhaps, a certain logical priority to the case of human individuals: it may be possible to analyze actions of so-called artificial persons as logical constructions of the actions of human persons, and it is plausible to maintain that the worth of institutions is derived solely from the benefits they bring to human individuals.<sup>6</sup>

Although many individuals involved in today's environmental movement cringe at the notion of viewing the modern corporation (as well as other artificial non-human entities) as a person, this is so not far-fetched—at least from the perspective of contemporary political liberalism. For better or worse, there exist publicly recognized reasons for such policies. The courts of constitutional democracies actually view many non-human entities as legal persons. Standard cases include the following: subsequent to borrowing money, a church has a legal obligation to repay it; a business can enter into a legally binding contract with others; one might successfully sue a nation; and the 14<sup>th</sup> Amendment to the U.S. Constitution protects corporations. Thus, to the consternation of numerous social activists, many non-human entities, like corporations, presently possess legal rights and duties, and it is not fantastic to view them at least as legal persons. Consequently, although corporations (and similar entities) are not citizens, we must presume that, in this sense at least, we are to conceptually include them as participants in society viewed as a fair system of social collaboration from one generation to the next.

One might think, then, that one plausible method of extending Rawls's justice as fairness into the domain of environmental decision-making would be to include non-human natural entities as members of society. For example, Paola Cavalieri and Will

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<sup>6</sup> John Rawls, "Justice as Reciprocity," in *Collected Papers*, p. 193–194.

Kymlicka (1996) contend that, besides *Homo sapiens*, all the other great apes should be included as members of our society, and their interests should somehow be subsumed within the contract doctrine.<sup>7</sup> Perhaps it would not be unreasonable to suppose that if our society can grant legal rights to corporations, then it can do the same for the myriad other entities comprising the natural environment. For example, we might embrace something like Baird Callicott's land ethic as an attempt to expand the older connotation of 'community' out to cover a newer sense of 'biotic community'. Similarly, we might adopt Aldo Leopold's view, which maintains, "The land ethic simply enlarges the boundaries of the community to include soils, waters, plants, and animals, or collectively: the land."<sup>8</sup> Or, perhaps we could follow Christopher Stone's suggestion that we somehow grant many of these natural entities a legal standing of their own.<sup>9</sup> However, from the perspective Rawls's justice as fairness, such non-anthropocentric approaches are unreasonable.

Why are such maneuvers impermissible, according to Rawls's model? One reason is simply because the idea of non-human natural entities (e.g., rivers or polar bears) being members of society simply does not comport with notions that we can reasonably produce from our public culture today. Later we shall observe that the viewing of water, plants, non-human animals, and so forth, as members of society could not be an object of an overlapping consensus, and is therefore not in compliance with Rawls's conception of public reason. Indeed, no form of non-anthropocentrism can be part of a Rawlsian overlapping consensus. As we will see, to publicly advance such views would be to

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<sup>7</sup> Paola Cavalieri and Will Kymlicka, "Expanding the Social Contract," *Etica and Animali* 8 (1996): 5–33.

<sup>8</sup> Aldo Leopold, *A Sand County Almanac* (New York: Ballantine Books, 1966), p. 239. See also J Baird Callicott, *In Defense of the Land Ethic: Essays in Environmental Philosophy* (Albany: SUNY Press, 1989)

<sup>9</sup> Christopher D. Stone, *Should Trees Have Standing? And Other Essays on Law, Morals and the Environment* (Dobbs Ferry, NY: Oceana Publications, 1996)

violate our duty of public civility. As a result, it is permitted neither by Rawls's justice as fairness, nor the extension we are now considering. Because any extension to Rawls's view needs to proceed in accord with public reason, and must only employ ideas we find latent in public culture, the resulting extended model of political justice must be fundamentally anthropocentric. Will such a theory go against the most revered beliefs of non-anthropocentric thinkers? One aim of my overall project is to show that an extended Rawlsian framework is a political theory that even a reasonable ecocentrist citizen of a constitutional democracy should adopt.

### **The Notion of a Well Ordered Society**

The second of Rawls's basic organizing ideas is that a free democratic society—viewed as a fair system of social cooperation—is well-ordered when citizens effectively regulate their society in accord with a particular conception of political justice that they all accept. This occurs when all the citizens within society concur with (and understand that everyone else does, as well) the same principles of political justice, the basic structure of the society is publicly known to satisfy those principles, and the citizens have a sufficiently strong sense of justice to enable them to apply those principles of justice.<sup>10</sup> If the citizens of a society publicly recognize and embrace a particular conception of political justice (i.e., the society is well-organized), then the citizens within that society can agree upon the same principles of political justice.<sup>11</sup> In his *JF*, Rawls says: “An essential feature of a well-ordered society is that its public conception of political justice

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<sup>10</sup> Rawls, *Justice as Fairness*, pp. 8–9.

<sup>11</sup> *Ibid.*, p. 27.

establishes a shared basis for citizens to justify one another their political judgments: each cooperates, politically and socially, with the rest on terms all can endorse as just.”<sup>12</sup>

Rawls did not always hold this view. To see this, consider that there are several ways we can think of a society being well-ordered. First, we could think of a society being well-ordered by a comprehensive moral doctrine. For instance, we can imagine what a society would be like if all its citizens accepted some form of utilitarianism, and they then applied it to the basic set-up of their society. Similarly, we can competently think counterfactually about what a society would be like if it were to be well-ordered by some variety of natural law theory, or even if it were to be well-ordered by the earlier model found in Rawls’s *TJ*—i.e., rightness as fairness. To connect with environmental philosophy, in this sense of being well-ordered, we can imagine a society being well-ordered by the ecocentrist principles of Deep Ecology.

Now, this idea of a well-ordered society is precisely what we find in Rawls’s earlier *TJ*. However, Rawls eventually concluded that it was unrealistic.<sup>13</sup> As mentioned earlier, by the time he was writing *PL*, he believed that the burdens of judgment preclude reasonable citizens from substantively converging on matters of morality and religion. The upshot is that free constitutional democracies will always have to contend with the fact of reasonable pluralism. A society of free and equal citizens will never become well-ordered by a comprehensive worldview on its own. So, how can its government get all its citizens to subscribe to a single comprehensive theory of the good? Without the coercive use of force, it could not do so. Rawls called this “the fact of oppression.” In *JF*, he says:

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<sup>12</sup> Ibid.

<sup>13</sup> Rawls, *Political Liberalism*, p. xviii.

...(A) continuing shared adherence to one comprehensive doctrine can be maintained only by the oppressive use of state power, with all its official crimes and the inevitable brutality and cruelties, followed by the corruption of religion, philosophy, and science. If we say that a political society is a community when it is united in affirming one and the same comprehensive doctrine..., then the oppressive use of state power with these attendant evils is necessary to maintain political community.<sup>14</sup>

So, how can free and equal citizens—deeply divided on environmental values—come together and form a just and stable society? It might be possible for humans to force a comprehensive moral doctrine on a society. For example, we can imagine the military, the police, the courts, and the educational system trying to convert everyone to Kantian deontology. However, as I alluded to earlier, that is not the sort of stability that Rawls wanted. Rawls did not want a political agreement (for a pluralistic constitutional democracy) to be a mere *modus vivendi*. This relates directly to practical environmental philosophy. For citizens of liberal democracies routinely see the Rawlsian burdens of judgment within their environmental discourse. Simply put, reasonable citizens can (and do) disagree about environmental values. Thus, like Rawls, we should not want our extension to his theory—that of “background environmental justice”—to be acceptable merely as a *modus vivendi*.

Since ecocentric principles could not be the object of a Rawlsian overlapping consensus, the solution to the problem of how free and equal citizens—divided on environmental values—might form a just and stable society is not to force all citizens and policies to comply with ecocentrism. Again, it would require the oppressive use of state

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<sup>14</sup> Rawls, *Justice as Fairness*, p. 34.

power to well-order a society by the tenets of Deep Ecology. This would most likely involve some type of environmental fascism.<sup>15</sup> Instead, the answer the present Rawlsian framework gives is that we are to place upon society a basic structure that can be the object of an overlapping consensus made up of society's reasonable anthropocentric and non-anthropocentric worldviews.

We can now see that as Rawls amended his account of stability from *TJ* to *PL*, his own conception of a well-ordered society shifted as well. The main difference between his mature framework and his earlier *TJ* is that in his earlier theory a well-ordered society was one in which all citizens have the same comprehensive theory of the good—i.e., everyone has the same moral and religious views. In *PL* and beyond, we are to imagine a society being well-ordered by a *political* conception of justice. Again, this happens when almost all its citizens understand and accept the theory that contains that conception of political justice. Rawls now says in his *JF*:

...(I)n a well-ordered society the political conception is affirmed by what we refer to as a reasonable overlapping consensus. By this we mean that the political conception is supported by the reasonable though opposing religious, philosophical, and moral doctrines that gain a significant body of adherents and endure over time from one generation to the next. This is,

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<sup>15</sup> Some have wondered whether a liberal democracy could *ever* be sustainable—i.e., perhaps the radical changes needed for ecological sustainability would require an authoritarian type of government. Robyn Eckersley notes that "...critics [of democracy] have suggested that a sustainable society may be just as easily attained by a fascist government as a democratic one, or that ecological ideas lend themselves to fascist politics insofar as they celebrate the "blood and soil" of particular "home-grown" communities." Robyn Eckersley, "Politics," in *A Companion to Environmental Philosophy* ed. Dale Jamieson (Malden, MA: Blackwell Publishing, 2003), pp. 321–322.

I believe, the most reasonable basis of political and social unity possible to citizens of a democratic society.<sup>16</sup>

Of course, one might wonder what such a framework has to say about unreasonable or irrational comprehensive doctrines that might float around any free society. Under the “unreasonable” would include those fundamentalist elements of certain religions that think that they are a “special people,” or that the government should be run in accord with their own particular religious ideology. It would also include those that—due to extreme religious reasons—think that there is nothing wrong with the destruction of the natural environment. As it relates to environmental concerns, perhaps the “irrational” would include those that reject our best scientific results with regards to global warming or the limits of human population growth. Regarding such unreasonable and irrational theories, which will probably always be part of any free society, Rawls says: “In their case the problem is to contain them so that they do not undermine the unity and justice of society.”<sup>17</sup> In the next chapter I shall argue that background environmental justice prohibits a liberal democracy to spend tax dollars on environmental policies and agencies that promote unreasonable and irrational theories. But while much more needs to be said on how the Rawlsian framework should grapple with the “unreasonable” and “irrational,” it is out of the scope of the present project to provide a comprehensive treatment of these important matters.

### **The Basic Structure of Society**

Let us now turn our attention to the third of Rawls’s organizing ideas. This is his idea of the basic structure of society. Rawls defined the basic structure of society as “the main

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<sup>16</sup> Rawls, *Justice as Fairness*, p. 32.

<sup>17</sup> Rawls, *Political Liberalism*, p. xix.

political and social institutions and the way they fit together as one scheme of cooperation.”<sup>18</sup> It is the principal background framework for human activities and associations. Accordingly, a proper basic structure of society (i.e., one appropriately shaped by Rawls’s model) will secure background justice. And it is this—the basic structure of society—that is the central focus of his justice as fairness, and of my extension as well. In fact, an important claim of the present work is that a basic structure of society sufficiently formed by my extension to Rawls’s framework will secure background environmental justice.

What comprises the basic structure of society? Unfortunately, Rawls only gave us a short list, which includes the constitution, an independent judiciary, property rights, the economic system (e.g., capitalism), as well as the family.<sup>19</sup> In addition, no Rawlsian characterization of the basic structure of society can ever be completely specified. That is, we can never make an explicit list of what counts as part of the basic structure of a society. As free liberal constitutional democracies can have different shapes, there are a number of very different societies to which a Rawlsian model could apply. Furthermore, important aspects of a society (e.g., resource levels and technology) always change, and structures such as federal powers, offices, legislation, and agencies are always in a state of flux. Moreover, an issue that is important to citizens at one time might become irrelevant in the future (and vice versa).

If this is the case, then it might appear that a fully specified adumbration of the basic structure of society is objectively indeterminate. So, again, how are we supposed to determine what constitutes the basic structure of our society? According to Rawls, what

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<sup>18</sup> Rawls, *Justice as Fairness*, p. 4.

<sup>19</sup> *Ibid.*, p. 10.

we include as being part of the basic structure of society must always be constituted by our considered judgments in reflective equilibrium. In his *JF*, he says:

...(O)ur characterization of the basic structure does not provide a sharp definition, or criterion, from which we can tell what social arrangements, or aspects thereof, belong to it. Rather, we start with a loose characterization of what is initially a rough idea. ...(W)e must specify the idea more exactly as seems best after considering a variety of particular questions. With this done, we then check how the more definite characterization coheres with our considered convictions on due reflection.<sup>20</sup>

As will become clearer, my view of the basic structure of society—at least for the purpose of the present project—is different than Rawls’s own. I agree (broadly) with Rawls that the basic structures of a society include the main social and political institutions, and how they work together. However, I am not considering the delicate issue of how the family should (or should not) be viewed as part of the basic structure of society. The main focus of the present project is on democratic governments and federal policies—as well as the many public entities supported by taxes imposed on the various participants of contemporary democracies.

Now, by fixing the basic structure of domestic society as the target of justice as fairness, we notice that the framework under consideration does not straightforwardly apply to individuals. That is, Rawls’s principles of justice are to directly apply to fundamental political and social institutions, not moral agents.<sup>21</sup> So, while Rawls might

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<sup>20</sup> Ibid., p. 12.

<sup>21</sup> See also Rawls, *Theory of Justice*, pp. 54–60.

be pleased if an individual person were to use his theory to ascertain whether his or her possible actions are just, that is well beyond the intended scope of Rawls's model. Rawls thought that his theory is one an individual moral agent could use in a wide variety of contexts, yet his model is not suited for determining whether a person is just—at least when that person is not directly participating in the basic structure of society (e.g., acting as a government official), or acting outside the domain of public discourse. Not only is Rawls's justice as fairness not a moral theory, it is not even a complete theory of justice.

But many contractarians and contractualists think that moral principles are also to be constructed in the contracting situation. What shall we say about such principles? Here I will only note that in *TJ* Rawls claimed that moral agents have natural duties of justice, which are also agreed to in the original position. Such duties are akin to the natural moral duties all of us have. These include our natural duties of beneficence, non-maleficence, the duty to promote justice, and so on.<sup>22</sup> They also include a duty of justice, which is a duty to support and comply with just institutions.<sup>23</sup> But as such duties are not part of Rawls's political conception of justice (i.e., they do not apply to the basic structures of society), they will be discussed no further in this project. There is one exception, however, which is the duty of civility. This is a moral duty all citizens have when they argue about matters of basic justice. Rawls contended that in these situations the duty of civility requires citizens to listen to opposing arguments, to not be dogmatic, and to provide counterarguments that are grounded in the political values of public reason.<sup>24</sup>

What bearing does this have on background environmental justice? For one thing, as the natural environment does not include human-made social structures, it cannot be

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<sup>22</sup> *Ibid.*, p. 114–116.

<sup>23</sup> *Ibid.*, p. 115.

<sup>24</sup> Rawls, *Political Liberalism*, p. 217.

viewed as part of the basic structure of society. Rather, in a variety of ways the natural environment (including natural resources, such a coal and rivers) is to be regulated by the basic structure of society—federal agencies, environmental legislation, etc. Moreover, the Rawlsian model we are considering cannot directly say anything about the value of the natural environment. Remember that Rawls says, “...the status of the natural world and our proper relation to it is not a constitutional essential or a basic question of justice, as these questions have been specified...”<sup>25</sup>

Thus, while not become divisive regarding intrinsic value or final ends, the Rawlsian theory of background environmental justice must, at the same time, be worked out for a system that will (amongst other things) regulate the natural environment. One concern that must be addressed is that of scope—i.e., can the principles of Rawls’s freestanding model extend out far enough to cover the important public environmental agencies and major environmental laws that exist in the real world? In this vein, I now wish to illustrate how, in cases similar to the United States, the principles that Rawls’s framework generates can be extended out by his four-stage sequence to include domestic agencies—e.g., the U.S. Department of Agriculture (along with its U.S.D.A. Forest Service), the federal Bureau of Land Management (along with its authority to rent out public lands), and so on.

To see how the Rawlsian framework extends out to include such governmental agencies, we must remember that the original position of equality is only the first phase of Rawls’s four-stage process of selecting and applying his principles of justice.<sup>26</sup> The original position is merely where citizens’ representatives select basic principles that will

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<sup>25</sup> Ibid., p. 246.

<sup>26</sup> Rawls, *Theory of Justice*, pp. 195–201.

give form to a particular society. During their deliberations at this point, we are to envisage the contracting parties representing free and equal citizens from behind a fully shut veil of ignorance. But after selecting basic principles for the society to whom the person they represent belongs, we are to imagine the parties moving on and considering the essentials of a society's charter (i.e., what Rawls called "the highest-order system of social rules for making rules"<sup>27</sup>) during a constitutional convention. It is in this context that—while making the constitution and a bill of rights—the parties are to apply the equal liberty principle. (This is the focus of chapter four.) When this is finished, the contracting parties then move on to the legislative phase where they apply other principles, such as the principle of fair equality of opportunity, the difference principle, and the just savings principle. This is followed by a final phase, where we are to suppose that the constitution and its bill of rights is in effect, the citizens and administrators are applying the theory, and the judiciary is proactively interpreting the laws.

Now, Rawls thought that the veil of ignorance is to be progressively relaxed during the last three phases of his model. Accordingly, we are not to assess the justness of particular federal environmental law or policy from the perspective of the original position of equality. Rather, such matters are properly dealt with at the legislative phase of the Rawlsian application process, and beyond. Imagine deliberating about a federal environmental law, say, the U.S. Clean Water Act (1977). As we shall observe in chapters five, six, and seven, this should be done (in terms of ideal theory) from the perspective of the legislative stage of the contracting model. At this time, the parties still do not know whom they represent (so, for example, they do not know what their citizen thinks about the inherent value of Arctic sea ice), but they have their constitution in place.

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<sup>27</sup> Ibid., p. 222.

Moreover, at the legislative stage, the parties have a rough understanding of the society they are dealing with. For example, at this point in the heuristic, they will understand the economic system (e.g., capitalism), as well as the levels of resources and technology within the society. They will also be aware of population levels, along with other basic scientific facts regarding extinction rates, pollution levels, the carbon cycle, and so on. At this phase of the framework, the contractors will know, for example, whether their society has the technology to use earthworms to remove lead contaminants from polluted soil. They understand that it will be harder for their citizen to pursue his or her conception of the good if a hurricane destroys his or her city. It is from this perspective, then, that we must ask whether the contractors would agree to establish a Bureau of Land Management, or some sort of Federal Emergency Management Agency. Moreover, it is only after we have fully adopted this domestic (federal) stance through each phase of the Rawlsian framework that we are finally permitted to move on and consider international and local justice. Recall that in his *JF*, Rawls says:

Altogether then we have three levels of justice, moving from inside outward: first, local justice (principles applying directly to institutions and associations; second, domestic justice (principles applying to the basic structure of society); and finally, global justice (principles applying to international law). Justice as fairness starts with domestic justice—the justice of the basic structure. From there it works outward to the law of peoples [i.e. the global level] and inward to local justice.<sup>28</sup>

So, at the domestic legislative phase of Rawls's framework, we can imagine the parties deliberating and constructing federal institutions and agencies (e.g., a federal

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<sup>28</sup> Rawls, *Justice as Fairness*, p. 11.

forest service), which are then included in the basic structure of the society they are considering. At this point, they are aware of the resources of society, its technology (e.g., whether the society is able to produce hydrogen from algae), the population levels and demographics, as well as all the known relevant environmental risks and hazards. Are they aware of all of the environmental problems their society must deal with at this stage? Probably not. However, they have all the information that we (you and I) have.

Accordingly, we are to imagine that before the parties move on to other domains of the Rawlsian heuristic (i.e., the last federal phase, or down to local justice), they have adopted a wide variety of federal structures—laws prohibiting lead in gasoline, regulations on ozone-depleting substances, water quality standards, public carbon offset policies, etc. Furthermore, as we shall see in chapter three, such domestic policies must be argued for by appeals to anthropocentric risk management and sustainability, not the positive intrinsic value of nature. (The exception of Rawls's proviso will be discussed later.) And then, after fully considering the perspective of domestic justice, we can think about the framework extending down to the local level.

Once we have fully considered the legislative phase of Rawls's domestic heuristic, we can then adopt the stance of the last phase of the application process. We would do this, say, if we wanted to consider whether a particular precedent or Supreme Court ruling was just. So, this is the perspective we should take when we deliberate about the 2007 *Massachusetts v. Environmental Protection Agency* (a case involving the issue of whether the EPA has the authority to regulate greenhouse gasses). Similarly, this is how we are to think of the justness of *Defenders of Wildlife vs. Hall* (2008), in which the Supreme Court interpreted the Endangered Species Act as it applied to the killing of wolves around

Yellowstone National Park. Of course, when we think in terms of the present framework at this point, we are not to imagine that our own Constitution and federal legislation is well-ordering society. Our Constitution and legislation are less than perfect. Instead, during the last stage, we are to imagine the parties deliberating with their own principles, constitution, and federal legislation. And in this sense, we are considering ideal theory for domestic society—i.e., a society well-ordered by Rawls's special conception of justice.

Then, after we have finished contemplating the level of domestic justice, we can, following Rawls, imagine taking the parties into the spheres of international and local justice. (Again, I will explain later why we should begin with supranational justice, and then work “down” to local justice.) So, when deciding upon issues of local justice, the parties will always be deliberating with what they have consented to at the previous federal level. We can then consider, for example, what ordinances the parties would select for a local government—e.g., development plans, and wildlife management. And it is by this process that we—you and I—are to judge whether local laws and policies are just. Similarly, it is by subsequently adopting a local judicial perspective (a stance to be taken after the local legislative phase) that we are to determine whether the decision of a local judge is just. Admittedly, this is very rough. However, hopefully it serves to animate the direction such a program will take, at least for our present purposes. And, again, the central point I am now emphasizing is that the extended Rawlsian model under consideration is able to consider environmental legislation and agencies as significant political structures of society, and thus within the domain of a reasonable conception of political justice.

Still, we must realize that because this extended Rawlsian framework only applies directly to the basic structure of society, it does not straightforwardly apply to private firms or groups. Thus, it will apply directly to federal offices (e.g., the Office of Fossil Energy—U.S. Department of Energy) and agencies (e.g., the Central Intelligence Agency, the U.S. Environmental Protection Agency, and the Federal Emergency Management Agency). But it will not apply directly to entities like the Carlyle Group, or the Natural Resources Defense Council (NRDC). Again, Rawls claims that his political conception of justice does not apply directly to associations and groups.<sup>29</sup> So, while this model of political liberalism only indirectly relates (e.g., through law) to privately funded think tanks such as the American Enterprise Institute or the Heritage Foundation, it seems like its principles can target (e.g., through law) publicly funded think tanks, such as Georgetown University’s Institute for the Study of Diplomacy. Of course, this framework maintains that private entities and their agents still have a duty (ideally) to comply with whatever structures (e.g., laws) the Rawlsian model generates. This is especially relevant at the local level, where the principles selected apply directly to associations and institutions.<sup>30</sup>

However, Rawls thought that the family is also a part of the basic structure of society. What bearing does this have on my extension to his theory, and background environmental justice in general? Unfortunately, in what follows I spend little time discussing Rawls’s view of the family, and why it should be included within the basic structure of society.<sup>31</sup> Nor shall I discuss my own view regarding the family. I shall only note that for our present purposes, the family is to be regarded as an existing social entity

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<sup>29</sup> Ibid., p. 26.

<sup>30</sup> Ibid., p. 11.

<sup>31</sup> See Rawls, “Public Reason Revisited” in *Collected Papers*, pp. 573–615.

within any liberal democracy. We should not think of Rawls's special conception of justice as being straightforwardly applicable to daily family life. For example, we should not think of the Rawlsian framework mandating that all family members should employ the difference principle when making internal family policy—whether children should receive allowances, which family members should clean the dishes, and so forth. As we shall see later, the principles of justice are to be employed in a four stage series in order to directly shape the constitution, laws, and policies of a constitutional democracy. We should imagine that in a society well-ordered by the Rawlsian model, families (whatever their form) are simply following all federal, state, and local laws—just like all other participants and associations within society (e.g., corporations, churches, environmental groups).

### **The Original Position of Equality**

The next fundamental idea that Rawls used to organize his mature theory is the original position of equality. As we have seen, the primary subject of political justice is the basic structure of society, and *society* is a fair system of cooperation amongst free and equal persons over time. Rawls maintained that the conditions of fair cooperation are established by an agreement reached by those people, from the standpoint of what they regard as their reciprocal advantage (i.e., their good).<sup>32</sup> In his *JF* he noted, "...these conditions must situate free and equal persons fairly and must not permit some to have unfair bargaining advantages over others."<sup>33</sup> Consequently, in sharp contrast with the state of nature considered by the traditional social contract theorists, central to Rawls's idea of an original position of equality is the notion that the fair terms of cooperation for

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<sup>32</sup> Rawls, *Justice as Fairness*, p. 15.

<sup>33</sup> *Ibid.*

a pluralistic liberal democracy are specified by an agreement reached in a optimally fair situation—i.e., counterfactual circumstances precluding the possibility of unfair bargaining advantages resulting from social and natural contingencies.

Furthermore, especially germane to Rawls's mature view is the notion that whatever we use to build this hypothetical situation must be taken from certain core values of modern liberalism. Again, Rawls's idea is that we start with a particular set of key ideas from the tradition of political liberalism. Of course, there are many theories of political liberalism. Accordingly, in terms of theory construction, the Rawlsian can only take from them those core notions that can be an object of an overlapping consensus. If passing this legitimizing muster, they can then be infused into a (hypothetical) contracting situation as its central assumptions. Accordingly, what entities result as "output" from this constructivist model will be maximally fair—i.e., when used by citizens to regulate the basic structures of a constitutional liberal democracy. In terms of my extension to Rawls's framework, as a procedural theory, a distribution of environmental goods (and environmental burdens) will be fair if it results within a society that is well ordered over time by the present conception of background environmental justice.

Let's now consider the parties making this hypothetical agreement in the original position of equality. These representatives are only "theoretically defined" individuals.<sup>34</sup> We are not to view them as being fully human. They are not human at all. In his *JF*, Rawls said, "Rather, the parties are described according to how we want to model rational representatives of free and equal citizens."<sup>35</sup> As such, they are artificial persons,

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<sup>34</sup> Rawls, *Theory of Justice*, p. 147.

<sup>35</sup> Rawls, *Justice as Fairness*, p. 81 Note, however, that Rawls did not use the maximin in his argument for his principles of justice. See, *Justice as Fairness*, p. 94–95.

or “analytical devices,” as Burton Dreben (2003) called them.<sup>36</sup> As we have already noted, they are maximally rational, and have a fiduciary duty to secure the fundamental interests of the citizens they are representing. Each of them knows that he or she is representing the interests of a citizen of a pluralistic constitutional democracy. Every representative in the original position is autonomous (i.e., completely free to choose) and has the corresponding capacity for rational autonomy, which is then directed only at maximizing the good of the citizen he or she represents. The parties understand that their citizens exist in Humean circumstances of justice. And they believe that the society they are considering will become well-ordered by whatever principles they select.

The contracting parties are given this information, a maximin rule (i.e., with certain restrictions, they are to select principles with the best worst outcome),<sup>37</sup> and a set of primary goods to use. At this point, they are behind a “closed” veil of ignorance. So, besides the aforementioned contingencies, this also precludes the ability for them to know to what generation in society the citizen they represent belongs. (This will be discussed in chapter seven, “Just Savings and the Difference Principle.”) They are then tasked with deliberating upon, and selecting, a set of principles from a list of sets of principles from some of our main political theories.<sup>38</sup> We should imagine them thinking in terms of hypothetical imperatives—i.e., “If I wish to best secure the fundamental interests of the citizen I am representing, then I should select principle X.” Thus, we are not to view these theoretically specified contractors as being in anyway altruistic, moral, just, or impartial. Rather, the entire selection process itself is fair, and the principles it

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<sup>36</sup> Burton Dreben, “On Rawls and Political Liberalism,” in *The Cambridge Companion to Rawls* (New York: Cambridge University Press, 2003), p. 325.

<sup>37</sup> See Rawls, *Justice as Fairness*, pp. 97–100.

<sup>38</sup> *Ibid.*, p. 83.

generates comprise the most just solution to the question of how to well-organize a free democratic society.

Now, some have considered (and almost all have rejected) the idea of representing other environmental entities in Rawls's original position.<sup>39</sup> Yet, Donald VanDeVeer has suggested that, besides humans, this might be accomplished for other creatures that possess sentience.<sup>40</sup> This sort of proposal cannot be rejected straightaway. The entire Rawlsian setup does seem to grant an unfair bargaining position to *Homo sapiens*, so to speak. Why shouldn't the original position abstract away the contingency of species membership? We can surely imagine a representative (who understands biology and ecology) asking: if I wish to best secure the fundamental interests of *Canis lupus* (the gray wolf), then I should select principles X, Y, and Z. So, why not allow the parties to represent non-human natural entities within the original position of equality?

Earlier we saw that such an extension cannot be an object of an overlapping consensus. And now we can also notice that we should not allow the contractors to represent non-human entities because it would radically conflict with the first basic organizing idea we discussed, which is that society is a fair system of cooperation between free and equal persons.<sup>41</sup> Moreover, including other species in the Rawlsian heuristic would greatly complicate an index of primary goods (if such an index could even be coherently constructed). An incomplete list of Rawls's primary goods now includes: freedom of thought and religion, political freedoms, freedom of association, the right to freely choose one's occupation, the right to equal opportunity, the powers of

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<sup>39</sup> For example, see Brent A. Singer, "An Extension of Rawls' Theory of Justice to Environmental Ethics," *Environmental Ethics* 10 (1988), 217–231.

<sup>40</sup> Donald VanDeVeer, "Of Beasts, Persons, and the Original Position," *The Monist* 62 (1979): 368–77.

<sup>41</sup> Rawls, *Justice as Fairness*, p. 14.

offices and positions of authority, income, wealth, and the social bases of self-respect.<sup>42</sup> This index is established only for citizens of a free constitution democracy who are viewed as free and equal persons. For fairly obvious reasons, no single index of primary goods could work for all species.

Furthermore, allowing the parties to represent nonhumans would also make the task of applying the principles of justice at the later stages of his model virtually impossible. For example, Rawls's first principle of justice (the equal liberty principle) secures a citizen's right to participate in the fundamental political structures of society. This would include the right to vote and hold office. However, we typically do not think that nonhumans should have the right to vote or hold an office. Or, for another example, Rawls thought that if a society were to be well ordered by his special conception of justice, then the least advantaged citizens of our society would be the ones belonging to the class of citizens possessing the amount of income and wealth with the lowest expectations.<sup>43</sup> But then, according to the proposed non-speciesist model, all nonhumans would automatically become least advantaged citizens of society. These sorts of problems would multiply even further if we attempted to move past the level of sentience—e.g., by allowing the contracting parties to represent entities like trees or entire ecosystems. In light of these sorts of considerations, the present Rawlsian model of political liberalism cannot permit its contractors to represent non-human entities.

All this holds at least for justice as fairness viewed not as a complete theory of justice, but as a political framework to be directed only towards the basic structure of a liberal constitutional democracy. Still, in this project I am arguing that non-speciesist

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<sup>42</sup> Ibid., pp. 58–59.

<sup>43</sup> Ibid.

ecocentrists or animal rights activists can tolerably embrace such a model. Certainly, nothing in the present framework implies, for example, that we qua moral agents do not have moral duties to nonhuman entities. In fact, it is reasonable to assume that we do. Nor does background environmental justice (a fundamentally procedural theory) entail that citizens of liberal democracies could never adopt less strongly anthropocentric approaches on Rawlsian grounds—e.g., Germany’s granting of constitutional rights to non-human animals. If Rawlsian background environmental justice were ever to be attained, numerous environmental and animal welfare issues would still need to be adjudicated by free and equal citizens working through just democratic processes.

So, what sort of principles did Rawls think the contracting parties would select in his original position of equality? In the most mature form of his theory, Rawls thought that the parties, who are acting as trustees for free and equal citizens, would select five things from behind the veil of ignorance. Specifically, Rawls believed that they would select the two familiar principles of justice for the basic structure of society. They would also choose a just savings principle, the guidelines of inquiry of public reason, as well as the liberal principle of legitimacy. So, before we discuss Rawls’s idea of free and equal persons, I shall make some brief remarks on these principles, which will be employed throughout the remainder of the project.

For a mature Rawls, the first two principles of justice are slight variants of the familiar two principles found in his earlier *TJ*. The first is the equal liberty principle, which says that each citizen must have the same inalienable claim to a fully adequate scheme of equal basic liberties that complies with the scheme that grants the same basic liberties to

all.<sup>44</sup> (This explains the use of the term ‘liberal’ in the expression “liberal egalitarianism,” which is sometimes used to describe Rawls’s theory.) The second principle is comprised of two parts (i.e., two principles), both of which regulate social and economic inequalities. The first part of the second principle is the principle of fair equality of opportunity, which says that social and economic disparities can only be tolerated when they are attached to offices and positions open to all citizens under conditions of fair equality of opportunity.<sup>45</sup> (This is the focus of chapter five.) The other part of the second principle, which, again, deals with gaps in social and economic levels, is Rawls’s difference principle. This principle says that social and economic inequalities are to be to the greatest benefit of the least-advantaged members of society. (This explains the term ‘egalitarianism’ in “Rawlsian liberal egalitarianism.”) If implemented, Rawls thought that both parts of the second principle of justice would ensure the fair value of the political liberties secured by his first principle of justice.<sup>46</sup>

These principles of justice are somewhat well known, and discussed most frequently in the literature. However, there are other important principles included within Rawls’s framework that are not discussed as much. The first of these is Rawls’s just savings principle, which applies between generations. Remember that, behind the veil of ignorance, the contracting parties do not know the generation to which the citizens they are representing belong. Rawls argued that under these circumstances, the parties would select an intergenerational principle that requires society to save whatever proportion of its resources, products, and wealth that accords with the principle citizens of *any*

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<sup>44</sup> Ibid., pp. 42.

<sup>45</sup> Ibid., pp. 42–43.

<sup>46</sup> Ibid., pp. 148–150.

generation would want all generations to follow, no matter how far back in time.<sup>47</sup> As we shall see (in chapter seven), if adopted this principle would have serious implications for public policy. For one thing, irrespective of whether global warming is caused by human activity (or, in fact, whether it exists at all), background environmental justice implies that we still ought to drastically decrease our use of petroleum and coal, and switch to alternative forms of energy.

Another principle that plays a large role in our extension of Rawls's model into the domain of normative environmental philosophy is his principle of public reason. Rawls articulates the ideal of this principle by saying, "The point of the ideal of public reason is that citizens are to conduct their fundamental discussions within the framework of what each regards as a political conception of justice based on values that the others can reasonably be expected to endorse and each is, in good faith, prepared to defend that conception so understood."<sup>48</sup> Due to this, the framework of background environmental justice that we are considering contends that reasons (and reasoning) publicly advanced for environmental policies should be such that they can be embraced by all citizens—irrespective of their comprehensive theory of the good. Accordingly, we shall also later observe (in chapter eight) how exceedingly relevant this principle is to how the present Rawlsian framework connects to environmental pragmatism.

And lastly, the contracting parties will select the liberal principle of legitimacy. This principle says, "...political power is legitimate only when it is exercised in accordance with a constitution (written or un-written) the essentials of which all citizens, as

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<sup>47</sup> Ibid., p. 160.

<sup>48</sup> Rawls, *Political Liberalism*, p. 226.

reasonable and rational, can endorse in the light of their common human reason.”<sup>49</sup>

According to this principle, the powers of a liberal constitutional democracy are not legitimate if the basic structures of the governments favor a particular comprehensive worldview. Again, the bearing this principle has on background environmental justice will be explained after we discuss the last two fundamental organizing ideas that Rawls uses to erect his theory.

### **The Idea of Free and Equal Persons**

The next organizing idea Rawls used in the construction of justice as fairness is the notion of citizens being free and equal. Now, this is certainly not the idea that we have (or should have) complete license, or that we are all biologically or physiologically equal. When describing persons, Rawls’s model of political justice does not merely depict us as we are *qua Homo sapiens*. Instead, the theory expresses how we should view each other when we—as citizens of a free democracy—adjudicate issues surrounding political justice.<sup>50</sup> In this vein, we just observed how Rawls’s original position models the idea of free and equal people. For example, it models the equality of citizens squarely into the original position by fixing the citizens’ representatives in an initial situation of symmetry.<sup>51</sup>

Moreover, key to Rawls’s understanding of a person are the two moral powers that he believes most of us possess. These are a conception of the good, and a sense of justice.<sup>52</sup> A person’s conception of the good is constituted by the rational system of intermediate and final ends (or goals) that he or she possesses. It is what a person ultimately wants out

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<sup>49</sup> Rawls, *Justice as Fairness*, p. 41.

<sup>50</sup> *Ibid.*, p. 23.

<sup>51</sup> *Ibid.*, p. 20.

<sup>52</sup> *Ibid.*, pp. 18–19.

of life, as well as how he or she plans on attaining it. Moreover, a person's conception of the good also includes an interrelated arrangement of his or her moral and religious beliefs, which frequently shape the person's ultimate aims in important ways.

Accordingly, ecocentrism could be part of one citizen's conception of the good, while a speciesist theology could be part of another's.

On the other hand, the other moral power a normal person possesses is a sense of justice. This is not the sum total of a person's actual and dispositional intuitions regarding what is just or unjust. This, instead, is his or her ability to apply and act from the aforementioned principles of political justice. And this, then, connects with one of the highest values of modern liberalism, which is the tolerance and respect citizens show towards others who have different conceptions of the good. (And at this point we need not worry about corporations, as they are participants in society, not citizens.)

Now, different comprehensive theories will justify and express this tolerance and respect in different ways. For example, under a Kantian-Rawlsian interpretation (i.e., that of an early Rawls), it will manifest itself when citizens treat each other politically as Kantian ends-in-themselves. The salient aspect of this view is the claim that to treat each other politically as Kantian ends-in-themselves we must attempt to legislate in a way that respects the moral powers of other citizens—i.e., other citizens' views of what they want to do with their lives, and what they deem to be most meaningful in life in general. In fact, in his "The Kantian Interpretation of Justice as Fairness," Rawls suggested that we could view his original position as providing a "procedural interpretation" for Kant's notion of autonomy and the categorical imperative.<sup>53</sup> Nonetheless, while an early Rawls thought that his original position contracting situation—a heuristic device—models

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<sup>53</sup> Rawls, *Theory of Justice*, p. 256.

Kantian autonomy, we can suppose that actual practices of tolerating other's autonomy (e.g., through permitting others to freely vote, allowing the exchange of goods and services, granting a person the right to practice whatever religion he or she sees fit to follow) can be justified in various ways by other normative theories. This is significant, due to the glaring fact that Kantian deontology cannot be the object of an overlapping consensus.

Of course, a framework like the one we are considering, which ensures respect for others who have different conceptions of the good, is not committed to the thesis that all worldviews are equally valid. Nor does anything within the present model imply that citizens ought not to cogently argue (either publicly or privately) amongst themselves about religion, final ends, or environmental values. It does mean, however, that atheists should not be punished for not publicly honoring the traditional religions of Western civilization. Similarly, Christians should not in any way be required to publicly approve of Islam (and vice versa). In fact, to do so within many contexts would amount to institutionalized patronizing. Similarly, the Rawlsian model of background environmental justice that we are considering maintains that anthropocentrists must not be forced to publicly promote non-anthropocentrism—e.g., ecocentrism.

So, the idea that people have the two moral powers we have been discussing is a salient aspect of Rawls's mature theory, and something to which other similar theorists, such as Thomas Scanlon or Jürgen Habermas, for example, are less attentive.<sup>54</sup> And the

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<sup>54</sup> See Thomas Scanlon, "Contractualism and Utilitarianism," in Amartya Sen and Bernard Williams, eds. *Utilitarianism and Beyond* (Cambridge: Cambridge University Press, 1982), pp. 103–128.; and "The Significance of Choice," *The Tanner Lecture on Human Values* (Salt Lake City: The University of Utah Press, 1987), pp. 149–216.; and Jürgen Habermas, "Reconciliation Through the Public Use of Reason: Remarks on John Rawls's Political Liberalism," *The Journal of Philosophy*, Vol. 92, No. 3 (1995): 109–131.

notion that we have such moral powers connects with the notion of reasonableness in the following way. While citizens of a pluralistic liberal democracy will subscribe to a wide variety of philosophies, moralities, and religions, Rawls argued that if they are reasonable, they should be able to embrace the same political ideology—i.e., his form of democratic liberalism. One ramification of Rawls’s freestanding mature framework, then, is that we—as free and equal citizens of pluralistic democratic society—are to be careful how we publicly justify many of our normative claims.

This is relevant to practical environmental philosophy and contemporary environmentalism in general, because citizens of the world’s constitutional democracies *do* hold a number of ill assorted and irreconcilable conceptions of the good. As a result, free and equal persons will invariably end up possessing a disparate and incompatible set of environmental values as well. The fact of reasonable pluralism, to which Rawls was deeply concerned, thus permeates the cultural and social settings in which today’s environmentalists and governmental agents must operate. For example, consider the members of our society—both anthropocentric and non-anthropocentric—who work in the arena of public environmental policy. We shall soon see that the present model of political liberalism maintains that if such individuals are to truly act in accord with the view that they are members of a liberal constitutional democracy (i.e., of a group of free and equal citizens), then they frequently must justify their views in accord with public reason. That is, in the sphere of public discourse, they must sometimes provide reasons that would be acceptable to any reasonable citizen—no matter her particular philosophical or religious beliefs.

The present Rawlsian theory of background environmental justice says that, like other free and equal citizens, each environmental activist has her own conception of the good. This includes what she ultimately wants out of life. Moreover, if she is a biocentrist, then biocentrism—her believing that all life is equally intrinsically valuable—also forms a significant segment of her overall theory of the good.<sup>55</sup> So, her conception of the good (i.e., her system of pursuits, along with her moral and religious beliefs that constrain her system of ends) is one of her moral powers. Yet, we just saw that she will have another important moral power, which is her sense of justice. This does not refer to the sense of indignation she experiences upon hearing of aerial Wolf hunting in Alaska, or the infuriation she feels upon hearing of another native species being extirpated. While this is an important moral power that she has as a person, it is not what Rawls means when he describes her as a free and equal political citizen—e.g., as a free and equal voter, taxpayer, and so on.<sup>56</sup> Again, her sense of justice, in Rawls's sense, is her "...capacity to understand, to apply, and to act from (and not merely in accordance with) the principles of political justice that specify the fair terms of social cooperation."<sup>57</sup>

As we shall see, if the aforementioned biocentrist is reasonable, then she must be willing to publicly act in accord with principles that any reasonable citizen could endorse. Thus, according to the framework under consideration, if she is a reasonable citizen, she will not repress non-biocentric worldviews, if given the opportunity. Although *she* believes that all living nature ought to be conserved for its own sake, when she publicly advances environmental policies, she must limit herself to reasons that other free and

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<sup>55</sup> Paul Taylor's theory is a prime example of biocentrism. See his *Respect of Nature: a theory of environmental ethics* (Princeton: Princeton University Press, 1986)

<sup>56</sup> In fact, to do so would be to describe her as a *moral* person.

<sup>57</sup> Rawls, *Justice as Fairness*, pp. 18–19.

equal citizens could accept—no matter their particular conception of the good. Accordingly, in her public engagements, when not speaking on behalf of herself, she will frequently be delimited to prudential argumentation grounded only in ideas implicit within the Rawlsian background culture of her society.<sup>58</sup> This means, for instance, that even though she personally believes in the principle of biocentric equality, she is sometimes not permitted to publicly invoke such a principle as justification for actual or potential environmental policies that are to be implemented in the basic structure of a society of free and equal citizens. This would hold, for example, if she were speaking as a government agent, and not as a private citizen.

### **Public Justification**

This then leads to the last fundamental idea organizing Rawls's mature justice as fairness. This is that of public justification. Rawls says, "Public justification proceeds from some consensus: from premises all parties in disagreement, assumed to be free and equal and fully capable of reason, may reasonably be expected to share and freely endorse."<sup>59</sup> And this connects with the aforementioned idea of a well-ordered society in important ways. Again, Rawls says:

An essential feature of a well-organized society is that its public conception of political justice establishes a shared basis for citizens to justify to one another their political judgments: each cooperates, politically and socially, with the rest on terms all can endorse as just. This is the meaning of public justification.<sup>60</sup>

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<sup>58</sup> For Rawls's notion of "background culture," see Rawls, *Political Liberalism*, p. 14.

<sup>59</sup> Rawls, *Justice as Fairness*, p. 27.

<sup>60</sup> *Ibid.*

And, as we shall now see, this has significant implications for some of those involved with public environmental policy and planning, as well as many of those who are tasked to enforce public environmental regulations and policies.

To begin with, Rawls's idea of public justification directly applies to the arguments given for (and against) the myriad governmental environmental policies at the federal, state, and local level. According to the model under consideration, they must be such that any reasonable citizen could accept them. Furthermore, according to our extension to Rawls's own model, public justification will also apply to the government's agents. Examples at the level of domestic justice (i.e., the federal level) will include: The President of the United States, members of Congress, political candidates, The Administrator of the Environmental Protection Agency, the Administrative Officers of the National Park Service, environmental planners for the federal government, and national park rangers. As further illustrations of public justification at the domestic level, this extended Rawlsian framework maintains that the President of the United States must publicly justify his or her political appointments to top environmental posts via reasons that all citizens can endorse—irrespective of their comprehensive theory of the good. Similarly, background environmental justice beseeches individual members of the U.S. House of Representatives to argue for (and against) resolutions to permit the drilling of oil in the Arctic National Wildlife Refuge by only giving reasons that any reasonable citizen could embrace. On the other hand, although there will most likely be prudential reasons for doing so, the environmental fact sheets distributed by the Natural Resources Defense Council need *not* be such that all reasonable citizens will endorse them. This is

because the NRDC is a private group (and receives no funding from the government), and, as we shall see, more like an association.

At the level of local justice, the contracting parties finally have full knowledge of local ecosystems. When we extend the framework of political liberalism down towards this level, we can see that public justification will similarly apply to state and local environmental project managers, fish and game wardens, as well as rangers at state and local parks. For example, if a state park ranger explains to a group of teenagers why they should not litter in a state park, he or she ought to use neither purely ecocentric, nor Christian, reasons. This generally holds at least when the ranger is on the job, or publicly acting while wearing his or her uniform. Similarly, if a city mayor gives an interview to be broadcast on a local public radio or television station, he or she must not argue in a way that favors any religion, or shows a bias towards any divisive theory concerning the value of the natural environment—e.g., ecocentrism. On the other hand, according to the present model of background environmental justice, local members of the ecology movement are generally permitted to freely utter true descriptive statements such as, “I think that nature is sacred,” or “I believe that this species has a natural right to exist.” However, the present model of political liberalism obliges such citizens, when publicly speaking as an agent of the state or local government, to ground his or her arguments in reasons that other citizens could accept—no matter their particular conception of the good.

However, Rawls thought that there was a *proviso*. He says that “...reasonable comprehensive doctrines, religious or nonreligious, may be introduced in public political discussion at any time, provided that in due course proper political reasons—and not

reasons given solely by comprehensive doctrines—are presented that are sufficient to support whatever the comprehensive doctrines introduced are said to support.<sup>61</sup> So, if we accept Rawls’s proviso on public justification, it seems like public officials and governmental agents are permitted, in certain contexts, to give non-anthropocentric reasons for public environmental policy, under the condition that reasons that could be an object of an overlapping consensus (and thus that any reasonable citizen could embrace) will eventually be given. So, for example, it is legitimate for a Native American legislator to say that she supports a particular environmental policy because it will defend land that members of his or her tribe believe is sacred. The present freestanding framework of political justice implies, however, that she must, at some point, publicly provide an argument that does not contain normative content that will contradict any of the reasonable moral and religious doctrines that constitute part of our background culture (and especially that of her constituency). Of course, more details regarding how the present Rawlsian framework handles such matters of public environmental discourse still need to be explained. This will now be done in the next chapter, when we more closely examine Rawls’s important notions of public reason and political legitimacy, and demonstrate their bearing on background environmental justice.

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<sup>61</sup> Rawls, “The Idea of Public Reason Revisited,” in *Collected Papers*, p. 591

## Chapter 3

### **Anthropocentric Public Reason and Political Legitimacy**

Like the theories of Rawls and other political liberals, the present model does not subscribe to the view that legitimate political authority emanates from a divine mandate from heaven. Governments do not receive their rightful power from God or the Pope, and, more generally, “might” does not make “right.” Rather, taking ideas that were discussed by the ancients, and brought to fruition during the European Age of Reason, we are taking seriously the view that governments are human constructed entities that only possess legitimacy when they are run in accord with the consent of the governed.

Following Rawls, we are then taking certain key notions of modern liberalism, and then using them as “input” to build a partially specified model of political liberalism. We are then slowly and carefully applying the resulting framework to the issue of how we can collectively—as free and equal citizens—grapple with the many looming environmental problems that constitutional democracies now face. If I am correct, if successfully applied, the resulting model would secure background environmental justice.

We earlier took note of the many principles that Rawls thought the contracting parties would select in his original position of equality. The political principles of justice, which Rawls thought are most basic for organizing a well-ordered pluralistic liberal democracy, are the equal liberty principle, the principle of fair equality of opportunity, and the difference principle. Moreover, the just savings principle goes along with the difference principle. Recall that in his *TJ*, Rawls says, “...the complete statement of the difference

principle includes the savings principle as a constraint.”<sup>1</sup> However, there is a genuine unease about the application of these political principles of justice. Throughout most of his writing, Rawls focused on issues of basic justice. That is to say, most of his discussion is limited to Constitutional essentials, Supreme Court rulings, and very fundamental legislative matters at the federal level. Nonetheless, Rawls recognized that reasonable citizens could disagree about the details of how we are to apply these principles throughout the entire heuristic. That is, reasonable disagreements will invariably arise when we use the entire four-stage selection and application process through to all spheres of justice—local, domestic, and global. How then should we proceed? Here, we need to employ the second part of the agreement Rawls thought the parties would make in his original position of equality. In *PL*, Rawls says:

...the parties in the original position, in adopting principles of justice for the basic structure, must also adopt guidelines and criteria of public reason for applying these norms. The agreement for those guidelines, and for the principle of legitimacy, is much the same as, and as strong as, the argument for the principles of justice themselves.<sup>2</sup>

The idea, then, is this. Under the extended Rawlsian model, whatever counts as admissible “input” for the contractors in the four-stage selection and application process must be such that it is able to pass the test of public reason. That is to say, the contracting parties are only permitted reasons (and forms of reasoning) that all reasonable citizens of a pluralistic liberal society would accept—irrespective of their comprehensive theory of

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<sup>1</sup> Rawls, *Theory of Justice*, p. 292.

<sup>2</sup> Rawls, *Political Liberalism*, p. 225. He also says, “In justice as fairness, then the guidelines of public reason and the principles of justice have essentially the same grounds. They are companion parts of one agreement.” *Ibid.*, pp. 225-226.

the good. Accordingly, whatever we provide the parties with—in terms of the model’s “input”—must be neutral with respect to the various competing comprehensive worldviews that reasonable citizens of a pluralistic democracy might hold. While this can include scientific results and theories, these must be limited to what most members of the scientific community recognize as legitimate. This restriction is accordingly upheld in the next four chapters—when we work through many of the details involved in relating Rawls’s special conception of justice to the environmental policies and agencies of a particular liberal constitutional democracy.

But public reason not only serves as a constraint for the contracting parties within Rawls’s heuristic. The Rawlsian framework specifies that in the real world, the public deliberations that citizens of liberal democracies engage in must be conducted in accord with the principle of public reason. Thus, in some contexts, public reason is also to constrain us—you and I—as we actually deliberate on matters of political justice. Recall that in his “The Idea of Public Reason Revisited,” Rawls says, “A citizen engages in public reason, then, when he or she deliberates within a framework of what he or she sincerely regards as the most reasonable political conception of justice, a conception that expresses political values that others, as free and equal citizens might also reasonably be expected reasonable to endorse.”<sup>3</sup> Accordingly, when we—as citizens of a liberal democracy—publicly deliberate about matters regarding our political society, we must limit ourselves to reasons (and forms of reasoning) that all other reasonable and rational citizens will accept—irrespective of their comprehensive theory of the good. When we authentically do this, we are engaged in a type of reasoning Rawls thought is appropriate

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<sup>3</sup> Rawls, “The Idea of Public Reason Revisited,” in his *The Law of Peoples, with “The Idea of Public Reason Revisited”* (Cambridge: Harvard University Press, 1999), p. 140.

for free and equal citizens who, as a corporate body, make laws and policies that are enforced by the coercive use of state power.<sup>4</sup>

Now, I am proposing extending Rawls's framework—and here we are focused on public reason—further than perhaps Rawls himself would feel comfortable. Again, for the most part, when considering domestic justice, Rawls concerned himself with the very top structures of federal government. Again, he was primarily concerned with the issue of how public reason applies to Supreme Court rulings, fundamental legislation, and constitutional essentials. Moreover, Rawls did not think that environmental policy is a matter of basic justice. In *JF*, Rawls says:

...(W)e are concerned solely with the way the idea of public reason holds for questions of constitutional essentials and questions of basic justice. Most legislative questions do not concern these matters, although they often touch upon them, for example, tax legislation and laws regulating property; *legislation protecting the environment and controlling pollution*; laws establishing national parks and voting funds for museums and the arts.<sup>5</sup>

So I am explicitly pushing the Rawlsian model further than Rawls intended. And as we observed earlier, the most cogent way to accomplish this is by using Rawls's four-stage selection and application sequence to expand the framework out to include the constitution, legislation, and judicial processes and rulings. And then we are to drop the model down to the state and local arena of our extended basic structure of society.

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<sup>4</sup> Rawls, *Justice as Fairness*, p. 92,

<sup>5</sup> Rawls, *Justice as Fairness*, p. 91, I have added italics for emphasis.

Still, even if my proposed extension can be made coherent, there are a number of concerns it will eventually have to address. With respect to public reason, consider that our Rawlsian model maintains that the cases publicly made for controversial proposals must be couched in reasoning that contains only what is implicit within the background culture of society. But is this even possible? Can only items that can be an object of an overlapping consensus of reasonable worldviews adjudicate the countless controversial issues that liberal democracies now face? Ted Preston (2004) imagines a vegetarian “...scoffing at appeals to reasonableness, if reasonableness demands that he tolerate the ‘murder’ of billions of non-human animals each year.”<sup>6</sup> Similarly, why should a passionate environmentalist publicly limit herself to reasons (and forms of reasoning) that all reasonable citizens of a pluralistic liberal society could accept, especially when a portion of a temperate rainforest is at stake? Perhaps Rawlsian public reason—even in our extended form—can only reflect the status quo, which arguably got us into our environmental mess in the first place.

A number of things must be said. First, Rawls never claimed that all the divisive issues that liberal democracies must deal with could be resolved by the content of public reason. He knew that they could not. Secondly, we do not need to understand the content of public reason as being true (although some individuals might do so). Rather, in the mature form of Rawls’s theory, we should understand the content of public reason as being the most reasonable means to publicly reason about such controversial matters.

Rawls says:

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<sup>6</sup> Ted Preston, “Environmental Values, Pluralism, and Stability,” *Ethics, Place, and Environment* 7 (2004): 81. Ted Preston also asks: “If ‘meat is murder’, what attachment would a believer of such a claim have to a political conception of justice that permits the consumption of meat? More generally, can a well-ordered society achieve the overlapping consensus of reasonable comprehensive moral doctrines needed to achieve stability?” *Ibid.* p. 73.

Citizens realize that they cannot reach agreement or even approach mutual understanding on the basis of their irreconcilable comprehensive doctrines. In view of this, they need to consider what kinds of reasons they may reasonably give one another when fundamental political questions are at stake. I propose that in public reason comprehensive doctrines of truth or right be replaced by an idea of the politically reasonable addressed to citizens as citizens.<sup>7</sup>

The present model accordingly recognizes that some citizens are passionate about outlawing factory farms and perhaps industrial agriculture in general. But it also recognizes that some citizens firmly believe that we should make all abortions illegal. Some citizens want our government to apply the death penalty to those who rape children. And just as some citizens believe that we should outlaw same-sex sexual activities, some citizens wish to stop the harvesting of timber in old growth forests. Disputes such as these will be a part of any free pluralistic society. Given this fact, the present framework specifies how we—if we are to meet the demands of background environmental justice—should ideally proceed as free and equal citizens.

Moreover, fervent environmentalists should keep in mind that Rawlsian public reason does not criticize or attack minority positions—such as the lifestyles or philosophies associated with biocentrism or veganism. In this vein, ecocentrists should recognize that some citizens view their belief system as a fanatical type of nature worship. Passionate ecologists and animal rights activists must also remember that the first principle of justice is the equal liberty principle, which plays a vital role in protecting their freedom of thought and religion. This should be extremely important to environmentalists who have

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<sup>7</sup> Rawls, “The Idea of Public Reason Revisited,” in *Collected Papers*, p. 574.

non-standard religious beliefs (e.g., neopaganism), or perhaps no religious convictions at all. And, again, any attempt to publicly force non-anthropocentric principles (e.g., biocentrism, ecocentrism) on our society would most likely lead to civic turmoil. But even if such a society could be made stable, it would be made stable for the wrong reasons. Again, it would seem to require some sort of environmental authoritarianism, which is antithetical to any form of political liberalism.

Let's now consider what our extended Rawlsian model has to say about political legitimacy. Again, Rawls's liberal principle of legitimacy says, "...political power is legitimate only when it is exercised in accordance with a constitution (written or unwritten) the essentials of which all citizens, as reasonable and rational, can endorse in the light of their common human reason."<sup>8</sup> But we are concerned with expanding the model to *all* areas of the basic structure of society. Accordingly, under our extended Rawlsian framework, we will say that political power is legitimate only when it is exercised by a basic structure of society that all citizens, as reasonable and rational, can endorse in the light of their common human reason. Background environmental justice, then, requires that the political powers of society not to favor any particular comprehensive worldview. Similarly, the spending of tax dollars on environmental policies and agencies that promote unreasonable and irrational theories violates the requirements of background environmental justice.

Many of our present environmental policies do pass this modified test of legitimacy. Consider, for example, that the rationale behind the U.S. Environmental Protection Agency's Clean Air Act involves no non-public reasons. Its justification is simply that "...the growth in the amount and complexity of air pollution brought about by

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<sup>8</sup> Rawls, *Justice as Fairness*, p. 41.

urbanization, industrial development, and the increasing use of motor vehicles, has resulted in mounting dangers to the public health and welfare, including injury to agricultural crops and livestock, damage to and the deterioration of property, and hazards to air and ground transportation...<sup>9</sup> This sort of public justification includes no controversial claims about the intrinsic value of natural entities, nor does it contain language that would contradict any unique moral or religious doctrine. The reasoning is such that any reasonable citizen could embrace it—irrespective of his or her comprehensive theory of the good. Thus, it is legitimate under the theory we are now considering.

But exactly how far do the requirements of public reason and political legitimacy extend under our present framework? Do they include Churches and other associations? What about a non-profit organization such as Energy Action Coalition? No. Following Rawls, the present framework makes a key distinction between our political society, and an association.<sup>10</sup> In a liberal society, nobody is forced to go to a Church, Mosque, or a Synagogue. On the other hand, in order to finance the public structures of our society, all citizens are required to pay local, state, and federal taxes. The same goes for jury duty. If selected for jury duty, one must serve. One escapes a political society only by death or emigration.

But, in contrast, one's membership in (or support of) an association is voluntary. For example, in a liberal democracy, when citizens give money to religious groups, they always do so freely. And, in a liberal democracy, citizens are free to devote time and financial resources to environmental groups, such as Greenpeace, or the Nature

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<sup>9</sup> Sec. 101 (2)

<sup>10</sup> Rawls, *Justice as Fairness*, p. 93–94,

Conservancy. We—as free and equal citizens with a number of divergent worldviews—pool our money to collectively support our political society. Our political society, then, must not favor any comprehensive theory of the good. Accordingly, the principles of public reason and legitimacy apply directly to federal, state, and local governments. However, they do not directly apply to the myriad non-public associations and organizations that are found within our society—e.g., political action committees. The present model maintains that non-public associations merely have a duty to comply with laws and regulations of political society—i.e., legitimate government.

To consider the bearing on contemporary environmental policy, then, consider the following illustrations. It follows from the Rawlsian model we have been considering that, just as they ought not to favor any of the traditional Western religions or worldviews, signs in national parks—qua part of our political society—ought not to be (axiologically) ecocentric or biocentric, as well. For example, a sign in a national park attributing inherent value to a natural entity would not pass the Rawlsian constraint of public reason. However, a sign with purely descriptive content such as, “Native Americans considered this place to be sacred” would pass without difficulty. Furthermore, the principle of legitimacy requires that other policies—such as taxpayer funded sex education programs—must not be religiously biased, as well.

Moreover, according to background environmental justice, public explanations of why the environmental rules of our public society ought to be followed must be couched in language that complies with public reason. For instance, U.S.D.A. Forest Service signs, pamphlets, websites, and publications ought not to contain expressions such as, “Don’t pollute mother earth, she is sacred!” In this sense, most, if not all, of U.S. federal

environmental legislation passes the requirements of public reason and legitimacy. For example, the actual justification of the Endangered Species Act of 1974 is not non-anthropocentric. It does not appeal to biocentrism, ecocentrism, or any sort of ecological ethic. It appeals simply to mainstream values that any reasonable citizen can accept—no matter her particular worldview. Instead of claiming that natural entities protected by the act possess intrinsic value, it maintains: “...these (protected) species of fish, wildlife, and plants are of aesthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people...”<sup>11</sup> While many other examples could be mentioned, hopefully these sufficiently illustrate the important role of anthropocentric public reason and political legitimacy within the present framework.

However, many environmental philosophers will surely complain that the framework we are considering—Rawlsian background environmental justice—is simply an outdated model of humanism. For example, many non-anthropocentric Deep Ecologists and ecological feminists might object that this pragmatically humanist conception of political justice, with its permitting only the public advancement of anthropocentric values and prudential reasons, will not sufficiently raise ecological consciousness to a level that will permit our species to reconcile its destructive relationship with nature. Fritjof Capra, for instance, could very well argue that the present model is not adequate as a shared political basis for our society because, ultimately, it will not bring about the stability required to assuage the pending environmental crisis. Capra and other Deep Ecologists might argue that due to its anthropocentrism, what such a theory will do is institutionalize a shallow perception of natural entities as mere resources, and consequentially solidify the hideous crisis of perception that is at the core of our environmental woes. For example, Deep

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<sup>11</sup> *The Endangered Species Act of 1973, As Amended Through 1988* (16 USC 1531-1544), Sec. 2.

Ecologists might argue that a society well-ordered by the present model will legitimize the notion that we *own* the natural world and have the right to do with it as we wish. It is only by adopting a new ecological paradigm at all levels—one that recognizes that humans are essentially part of nature—that we can respect the natural interrelatedness of everything, and then pull ourselves back from the brink of anthropogenic ecological destruction.<sup>12</sup> Consequently, a Deep Ecologist might argue that the human centered perspective of the Rawlsian framework is simply not conducive to our long-term survival.

With the exception of Rawls's wide view of public reason (i.e., the proviso we discussed earlier), it *is* true that the present model stipulates that advocates for the natural environment should only publicly provide reasons for (or against) environmental policies that could be acceptable to every reasonable person—regardless of his or her particular comprehensive moral, religious, or philosophical doctrine. However, we should note that our present conception of Rawlsian public reason does not directly affect citizens who openly discourse in public settings, but are not acting as an agent of the government. A short list of such individuals who might be in positions of publicly justifying environmental value judgments would include: local grassroots organizers, private environmental educators, executives and directors of environmental companies, members of the independent media, associates of non-profit environmental law firms, representatives of conservation organizations and societies, and perhaps even potential eco-saboteurs. The present procedural model of background environmental justice maintains that, so long as they are not violating their duty of public civility, such

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<sup>12</sup> See Fritjof Capra, "Deep Ecology: A New Paradigm," in *Deep Ecology for the 21<sup>st</sup> Century: readings on the philosophy and practice of the new environmentalism* ed. George Sessions (Boston: Shambhala, 1995), pp. 19–25.

individuals are free to employ whatever reasoning seems appropriate to themselves, or their associations.

Moreover, the extended Rawlsian model does not simply represent the status quo. For example, Joseph Grcic (2007) has pointed out that because it cannot be an object of an overlapping consensus, the U.S. Electoral College is not in compliance with the Rawlsian test of public reason.<sup>13</sup> I mention this only to underscore the fact that while it is built upon core ideas of liberalism, the present model of background environmental justice is not wedded to what is established in the real world—whether they are electoral colleges or environmental policies. Moreover, the Rawlsian model does not maintain that we must limit ourselves to beliefs that “typical” citizens hold. It says that we are limited to what citizens could endorse in the light of their common human reason. So while reasonable people might disagree about the true value of wilderness, it is still possible for rational and reasonable citizens to agree on many important matters. Accordingly, to the aforementioned objection, the environmentally minded political liberalist must note that saving the planet from the brink of ecological destruction is, in fact, a shared value. Hence, if it could be shown that the only way we can save ourselves from environmental ruin is by turning our political society (e.g., the government) “dark green,” then non-anthropocentric public justification could easily be embraced by our extended freestanding Rawlsian model of political liberalism.

Further, it is instructive to note that this framework does not maintain that individual eco-saboteurs operating in *secret* have to comply with public reason. This Rawlsian model is merely a political conception of justice. Hence, “lone wolf” monkeywrenchers

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<sup>13</sup> Joseph Grcic, “The Electoral College and Democratic Equality,” *Florida Philosophical Review* 7 (2007): 41–51.

(like Edward Abbey's fictional character, George Hayduke), who are not participating in public reason, only have to comply with the non-political demands of their own conception of the good.<sup>14</sup> Moreover, the present framework does not maintain that radical environmentalists, such as members of Animal Liberation Front (ALF), Earth First!, or Earth Liberation Front (ELF), are always constrained by the demands of public reason—even when they publicly justify their group's actions (in the sense we have been describing).<sup>15</sup> Of course, like all citizens, such individuals do have a moral duty (not a duty of justice) of civility. Recall that Rawls says, "The duty of public civility goes with the idea that the political discussion of constitutional essentials should aim at free agreement reached on the basis of shared political values, and that the same holds for other questions bordering on those essentials, especially when they become divisive."<sup>16</sup> Thus, when arguing about fundamental matters, radical environmentalists have a moral duty to not be dogmatic, to listen to others, and to support their positions (to the extent it is possible) with reasons that other reasonable citizens could embrace. Some situations where this duty could be important—even when such individuals are acting merely as private citizens—would include public rallies, organized protests, as well as blogging, texting, and other forms of environmental cyber-activism. Of course, we are only working out the details of a model of political liberalism specified for a free constitutional democracy. Thus, it is sensible to assume that the Rawlsian constraints of public reason, political legitimacy, and citizens' duty of civility might be different in nonliberal contexts—e.g., when worked out for citizens living within a fascist regime.

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<sup>14</sup> See Edward Abbey, *The Monkey Wrench Gang* (New York: Avon Books, 1975)

<sup>15</sup> They would be constrained by the demands of the principle of public reason if, say, they were paid by taxpayer dollars.

<sup>16</sup> Rawls, *Justice as Fairness*, p. 117. I have added the italics for emphasis.

But a political climate properly well organized by the present freestanding framework of political liberalism is one that resonates with an air of civility. It is an atmosphere where citizens are asked always to not to pick up arms to settle their differences. Rather, we—as citizens of a pluralistic free democratic society—are asked to publicly provide a better argument for our fellow citizens with whom we disagree. While there are many other issues Rawlsians need to consider regarding the application of public reason and political legitimacy to environmental issues, the hope is that the framework of background environmental justice we have considered so far can serve as a cogent model that citizens of liberal democracies can realistically use and promote. I believe that this is especially relevant today as free and equal citizens of liberal democracies collectively grapple with the myriad controversial issues surrounding our generation's global environmental crisis.

## Chapter 4

### Domestic Environmental Justice—The Constitution

I shall now begin to substantively extend the Rawlsian contractualist model into the domain of domestic society and, at the same time, continue to demonstrate the framework's bearing on many environmental issues that liberal democracies now face. In chapter two we mentioned the equal liberty principle, which is Rawls's leading principle of justice. We also commented on Rawls's second principle of justice. We noted that it is comprised of two principles: the principle of fair equality of opportunity, and the difference principle. Within what follows in this and the following three chapters, I shall closely examine all these principles—which comprise Rawls's special conception of justice—and focus on their application to domestic environmental policy issues. By working out the remaining details of how the present Rawlsian framework can be employed to well-order a liberal constitutional democracy (and, thus, help it achieve background justice), the hope is that the present extension to Rawls's theory can assist citizens as they now grapple with many of the most pressing environmental concerns facing humanity, and at the same time secure background environmental justice.

Other environmental philosophers have attempted to connect Rawls's theory to environmental policy. However, they have all overlooked the importance of Rawls's four-stage contracting and application procedure. Moreover, while some environmental philosophers have employed the difference principle when considering the distribution of environmental goods, the distributive effects of the prior principles of justice have not been fully appreciated. A good example would be Derek Bell. In his "Environmental

Justice and Rawls' Difference Principle" (2004), he argues that Rawls's theory can serve as an adequate basis for environmental justice.<sup>1</sup> However, he does not discuss Rawls's four-stage sequence. Also, by mainly focusing on Rawls's difference principle, he misses many of the distributional effects of the prior principles of justice. Moreover, he does not consider environmental justice for future generations, or how the just savings principle relates to Rawls's difference principle.

This sort of misapplication of Rawls theory is unfortunate. No doubt, the difference principle is an important component of Rawls's account of distributive justice. However, the Rawlsian framework is procedural—maintaining that a distribution of goods and hardships (within a free constitutional democracy) is just only if it meets the requirements of all the principles. In *JF*, Rawls says:

It is sometimes objected to the difference principle as a principle of distributive justice that it contains no restrictions on the overall nature of permissible distributions. It is concerned, the objection runs, solely with the least advantaged. But this objection is incorrect: it overlooks the fact that the parts of the two principles of justice are designed to work in tandem and apply as a unit. The requirements of the prior principles have important distributive effects. Consider the effects of fair equality of opportunity as applied to education, say, or the distributive effects of the fair value of political liberties. We cannot possibly take the difference

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<sup>1</sup> See Derek Bell, "Environmental Justice and Rawls' Difference Principle," *Environmental Ethics* 26 (2004): 287–306.

principle seriously so long as we think of it by itself, apart from its setting within prior principles.<sup>2</sup>

Accordingly, in what follows I aim to demonstrate how the principles of the Rawlsian framework are supposed to work together, and should be applied to environmental concerns in a four-stage sequence. By doing this, I hope to fill a gap in the literature concerning the relevance of Rawlsian contractualism to contemporary environmental policy, and at the same time illustrate what background environmental justice would look like for a liberal constitutional democracy. So for now I shall not focus on Rawls's original position of equality, but rather on second stage of his contracting procedure, which is the constitutional convention.

### **The Constitutional Convention**

In order to demonstrate the potential for the present model to help us consider just domestic environmental policy, we must recall that we are dealing with a four-stage contracting procedure for a particular constitutional democracy (instead of a majoritarian democracy)<sup>3</sup> that is comprised of free and equal citizens. As discussed earlier, the citizens' representatives argue for, and agree upon, the principles of justice during the primary phase of the heuristic—i.e., the original position of equality. These principles are to distribute Rawls's primary goods—i.e., freedom of thought and religion, political freedoms, freedom of association, the right to freely choose one's occupation, the right to equal opportunity, the powers of offices and positions of authority, income, wealth, and the social bases of self-respect.<sup>4</sup> The first principle the representatives apply after they leave the original position is the equal liberty principle, which is to distribute basic rights

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<sup>2</sup> Rawls, *Justice as Fairness*, p. 46n10

<sup>3</sup> See Freeman, *Rawls*, pp. 212–219.

<sup>4</sup> Rawls, *Justice as Fairness*, pp. 58–59.

and liberties. Specifically, they apply this principle to the essentials of their society's charter during a constitutional convention.

During this stage of the framework, the symmetrically situated representatives (still behind a veil of ignorance) will agree upon a constitution that will ensure that every citizen has the same infeasible claim to a fully adequate scheme of equal basic liberties (and rights)—compatible with the same scheme of liberties (and rights) for all.<sup>5</sup> One should not think of the parties using the second principle of justice during the constitutional convention. According to Rawls:

The first principle applies at the stage of the constitutional convention, and whether constitutional essentials are assured is more or less visible on the face of the constitution and in its political arrangements and the way they work in practice. By contrast the second principle applies at the legislative stage and it bears on all kinds of social and economic legislation, and on the many kinds of issues arising at this point...<sup>6</sup>

Thus, like Rawls, the parties of the present extension will only employ the second principle of justice (i.e., the principle of fair opportunity, the difference principle, and the just savings principle) during the legislative stage—when they are shaping federal agencies, laws, and policies.

Before we move on to the details of applying the first principle of justice to the constitutional essentials of a liberal democracy, I should note three assumptions that will hold throughout the remainder of the project. First, the constitution that we are considering will establish the familiar three branches of government: executive,

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<sup>5</sup> Ibid., p. 42.

<sup>6</sup> Ibid., p. 48.

legislative, and judicial. Second, while the Rawlsian project (broadly construed) could be fruitfully adapted for both a welfare-state capitalist society and a liberal socialist regime, I shall follow Rawls in assuming that the society for which we are working out the details of extension is a property-owning democracy.<sup>7</sup> Third, we are assuming that the “real world” societies to which we might apply the present framework come close to constitutionally guaranteeing the liberties that are to be secured by the first principle of justice.

Of course, the third assumption is not true of many societies today. In such cases, Rawls maintained that we are permitted to use his general conception of justice. In his *TJ*, Rawls expressed the general conception of justice in these terms: “All social values—liberty and opportunity, income and wealth, and the bases of self-respect—are to be distributed equally unless an unequal distribution of any, or all, of these values is to everyone’s advantage.”<sup>8</sup> But the use of this general conception—with its rejection of the priority of equal basic liberty—is only permitted in contexts where it is needed to establish equal basic liberties. Thus, following Rawls, the framework we are developing shall suppose that that the society we are considering is reasonably close to a constitutional liberal democracy that can secure a sensible list of basic liberties for its citizens.<sup>9</sup>

### **The Equal Liberty Principle and Constitutional Essentials**

Again, for Rawls, the first principle of justice—the equal liberty principle—maintains that every person must have the same infeasible claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for

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<sup>7</sup> *Ibid.*, pp. 138–140.

<sup>8</sup> Rawls, *Theory of Justice*, p. 62.

<sup>9</sup> *Ibid.*, p. 152.

all.<sup>10</sup> A note of caution is in order here. While a fundamental idea is that basic liberties can only be restricted for the sake of other basic liberties, one should not understand the equal liberty principle as being a maximizing strategy.<sup>11</sup> In his earlier *TJ*, Rawls did articulate the principle by saying “each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others.”<sup>12</sup> But consider that a society can always do more to enable its citizens to utilize their basic liberties. In fact, it is theoretically possible for a society to devote all its resources to ensuring that the scheme of equal basic liberties (whatever it turns out to be) is as extensive as possible. Of course, this would leave no resources for ensuring fair equal opportunity. It would also deplete assets that could be used to make sure that social inequalities are distributed to the greatest advantage of the least well-off members of society (as required by the second principle of justice). Moreover, it would leave society with no resources to meet the intergenerational requirements of just savings. Accordingly, we shall follow Rawls in relaxing the equal liberty principle so as to guarantee only a fully adequate scheme.

This fully adequate scheme that the parties are to deliberate upon during their constitutional convention is comprised of basic rights and liberties. But most of the legitimate freedoms that citizens enjoy are not absolutes, and here it is very important to note the distinction between basic and non-basic liberties. Rawls was like the traditional social contract theorists in thinking that the parties to the social contract would agree to give up some of their liberties to the state. But what sort of liberties would the parties agree to exchange for the benefits of social cooperation? What are the most rational and

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<sup>10</sup> Rawls, *Justice as Fairness*, p. 42.

<sup>11</sup> In *TJ*, he says “...the precedence of liberty means that liberty can be restricted only for the sake of liberty itself.” Rawls, *Theory of Justice*, p. 244.

<sup>12</sup> *Ibid.*, p. 60.

reasonable principles to use when thinking about trading off autonomy for the gains of having a government in place that will allow the parties to escape the (traditionally understood) state of nature? We need a methodological approach to comprising a list of those rights and liberties that are never to be violated or traded off (within a well-ordered constitutional liberal democracy), and are thus to be considered “inalienable” and basic.

Rawls thought that the way one should draw up a list of basic liberties is by connecting them with his conception of the person.<sup>13</sup> Recall that people have two powers of moral personality: the ability to have, to revise, and rationally pursue a conception of the good (i.e., the capacity to be rational); and a sense of justice (i.e., the capacity to be reasonable).<sup>14</sup> Rawls thought that basic rights and liberties are justified only to the extent that they provide the political and social conditions required for the adequate development and full use of these powers. There are two specific cases he had in mind.<sup>15</sup> First, citizens need certain rights and freedoms in order to develop and use their moral powers to make proper judgments regarding the justness of institutions and policies. Second, certain rights and freedoms are required for citizens to develop and use their moral powers in forming and rationally pursuing their conception of the good. One must accordingly ask: if the basic structure of society were to not guarantee a particular liberty (or right), would citizens then be able to develop and fully exercise these moral powers (over a complete life) at a level that could adequately meet the demands of these two fundamental cases?<sup>16</sup> If the answer is no, then we are to view the liberty (or right) as being basic.

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<sup>13</sup> Rawls, *Political Liberalism*, p. 293.

<sup>14</sup> Rawls, *Justice as Fairness*, pp. 18–19.

<sup>15</sup> *Ibid.*, p. 45.

<sup>16</sup> Rawls, *Political Liberalism*, p. 293.

What will such a list look like? Rawls's list of equal basic liberties (and rights) includes the following.

1. Freedom of thought
2. Freedom of conscience
3. Political liberties (e.g., the right to vote, the right to participate in politics)<sup>17</sup>
4. Freedom of association
5. Rights and liberties related to the freedom and integrity of the person
6. The rights and freedoms related to the rule of law<sup>18</sup>
7. The right to hold and to have exclusive use of personal property<sup>19</sup>

Unfortunately, it is out of the scope of the present project to explicate Rawls's arguments for why each of these is required for citizens to develop and effectively use their moral powers as persons. Rather, we shall simply presume that Rawls was correct in thinking that these liberties (and rights) can be given some such proper grounding. With this supposition noted, I shall soon relate many of these basic rights and liberties to contemporary environmentalism, and to the establishment of background environmental justice within a liberal democracy. But I will first show how the Rawlsian can cogently argue that certain environmental rights ought to also be viewed as basic rights that must also be constitutionally protected.

### **The Rawlsian Case for Fundamental Environmental Rights**

There is considerable debate over whether fundamental environmental rights should be constitutionally protected. When considering the possibility of enforceable environmental rights, the Rawlsian has several options. One strategy would be to argue

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<sup>17</sup> Rawls, *Justice as Fairness*, p. 28.

<sup>18</sup> See Rawls, *Theory of Justice*, p. 244. See also Rawls, *Justice as Fairness*, p. 44.

<sup>19</sup> Rawls, *Political Liberalism*, p. 298.

that, at some point, the contracting parties would agree that certain environmental rights should be constitutionally protected. This is not unrealistic, as political interest in constitutionally guaranteeing certain rights and principles has been rising for the last thirty years. James May (2006) points out that there are about one hundred and thirty countries that now have provisions within their constitutions that address environmental norms; and in about sixty of these countries, the constitution contains fundamental environmental rights.<sup>20</sup> Tim Hayward (2003) notes: “No recently promulgated constitution has omitted reference to environmental principles, and many older constitutions are being amended to include them.”<sup>21</sup> Thus, we must at least consider whether the Rawlsian framework can be cogently expanded to include such provisions.

As we observed in chapters three and four, additions to Rawls’s conception of basic rights and liberties must be supported by reasons that comply with our conception of public reason. However, I think that the idea that certain basic environmental rights are required for people to develop and pursue a reasonable worldview is now uncontroversial enough to be an object of a Rawlsian overlapping consensus. If this is correct, then the inclusion of basic environmental rights should be able to comply with public reason. According to our earlier discussion of how Rawls connected basic rights to his conception of the person, the specific argument for such an extension is fairly straightforward.

1. If citizens of a liberal democracy need certain environmental rights in order to develop and use their moral powers in forming and rationally pursuing their

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<sup>20</sup> James R. May, “Constituting Fundamental Environmental Rights Worldwide,” *Pace Environmental Law Review* 23 (2006)

<sup>21</sup> Tim Hayward, “Constitutional Environmental Rights: A Case for Political Analysis,” in *Moral and Political Reasoning in Environmental Practice* ed. A. Light and A de-Shalit (Cambridge: The MIT Press, 2003), pp. 110–129.

- conception of the good (over a complete life), then the contracting parties would agree to treat those environmental rights as basic rights.
2. Citizens of a liberal democracy need certain environmental rights in order to develop and use their moral powers in forming and rationally pursuing their conception of the good (over a complete life).
  3. Thus, the contracting parties will agree to treat certain environmental rights as basic rights.

The justification for the second premise is fairly simple. Air pollution (e.g., from fine particulates, carbon monoxide, lead) can cause a wide array of serious health problems, and even premature death. The same holds for anthropogenic contamination found in water (e.g., industrial chemicals, pathogenic organisms) and soil (e.g., herbicides, pesticides, heavy metals). Such pollution can clearly be an impediment to pursuing a reasonable conception of the good.

At this point nothing substantial hinges on whether we view such claims as positive or negative rights—e.g., the right to clean air vs. the right not to be poisoned. The Rawlsian framework could effectively ground either sort of claim. But since negative rights are perhaps less controversial, I shall now simply maintain that the contracting parties will agree that the list of equal basic rights and liberties must include certain negative environmental rights—i.e., not to have harmful levels of air, water, and soil pollution interfere with one's rational and reasonable life plans.

If this reasoning is sound, then fundamental environmental rights must also be included as primary goods within the Rawlsian framework we are developing. Recall Rawls's original position. Beyond the fact that it is a pluralistic constitutional democracy

existing in circumstances of justice, the contracting parties do not know what type of society they are dealing with, or the person they represent. During this phase of the heuristic, we are to understand primary goods simply as the (thinly defined) fundamental rights and liberties (e.g., freedom of thought, speech, and religion, as well as other political freedoms of association), freedom of movement and free choice of opportunity, the right to equal opportunity, powers of offices and positions of authority and responsibility, income, wealth, and the social basis of self-respect.<sup>22</sup>

While not all primary goods are basic rights and liberties, Rawls thought that all the basic rights and liberties are primary goods. So, the inclusion of environmental rights as human rights (basic rights) will cause a swelling of Rawls's index of primary goods. Are we permitted to modify Rawls's list of primary goods? We are. Rawls himself advised us to make his index of primary goods more specific at the constitutional, legislative, and judicial state of his four-stage sequence.<sup>23</sup> In his *JF*, Rawls says:

As citizens we are the beneficiaries of the government's providing various personal goods and services to which we are entitled, as in the case of health care, or of its providing public goods (in the economists sense), as in the case of measures ensuring public health (clean air and unpolluted water, and the like). All of these items can (if necessary) be included in the index of primary goods.<sup>24</sup>

So, we know what primary goods are. In the hyperbolically thinnest sense, Rawls told us that they are simply the "...various social conditions and all-purpose means that are

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<sup>22</sup> Rawls, *Justice as Fairness*, pp. 58–59.

<sup>23</sup> Rawls, "The Priority of Right and Ideas of the Good," *Collected Papers*, p. 457. See also his *Justice as Fairness*, pp. 168–176.

<sup>24</sup> Rawls, *Justice as Fairness*, p. 172.

generally necessary to enable citizens adequately to develop and fully exercise their two moral powers, and to pursue their determinate conceptions of the good.”<sup>25</sup> Some environmental rights undoubtedly fit this description—e.g., the right not to be poisoned by unhealthy levels of carbon monoxide in the air. Thus, in principle, their inclusion should not be excessively difficult—even if it causes our list of primary goods to become thicker during the later phases of the Rawlsian model.

### **The Case for Deferring Environmental Rights**

While I am arguing that the Rawlsian model should include fundamental environmental rights within its listing of constitutionally protected basic rights and liberties (and this suggestion will be employed in the following chapters), there is another option for the Rawlsian system. This is to not argue that environmental rights must be included in the constitution of a liberal democracy. Rather, one might wish to simply defer such issues to the legislative stage of the Rawlsian model. The idea is that during the legislative phase the contracting representatives will agree to environmental agencies and legislation that will sufficiently protect the other basic rights and liberties—e.g., those related to the freedom and integrity of the person. Perhaps even without being grounded in fundamental constitutional environmental rights, such systems of federal agencies and law might be sufficient to establish background environmental justice.

This approach has several virtues. First, by keeping the list of basic liberties as small as possible, it will ease the problem of balancing the weight of basic liberties when conflicts arise. In his *PL*, Rawls noted: “Whenever we enlarge the list of basic liberties we risk weakening the protection of the most essential ones and recreating within the scheme of liberties the indeterminate and unguided balancing problems we had hoped to

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<sup>25</sup> *Ibid.*, p. 57.

avoid by a suitably circumscribed notion of priority.”<sup>26</sup> Also, by deferring constitutional environmental rights, there will be no need to define the content of environmental rights or modify a list of primary goods during the constitutional convention. Again, the Rawlsian could cogently maintain that such matters might be more properly handled at the later stages, when the veil of ignorance is opened more.

However, there could be a significant drawback to deferring fundamental environmental rights—i.e., not constitutionally granting citizens inalienable environmental rights. Specifically, in situations where there is lax international environmental law, citizens might be left institutionally unprotected from harmful levels of air, water, and soil pollution. James May (2006) correctly points out that the “need to entrench fundamental rights in a national constitution is especially important when extant international, national, and subnational legal mechanisms do not protect the right.”<sup>27</sup> He goes on to note that the same applies in the case of fundamental environmental rights. While this explains the importance of illustrating the best Rawlsian case for constitutionally protecting certain environmental rights, it should be noted that there is a certain degree of flexibility in the overall Rawlsian framework. While I have just explained how basic environmental rights could be cogently included in the list of basic rights and liberties, nothing essential to the overall Rawlsian project turns on whether environmental rights are constitutionally protected *per se*. Again, a Rawlsian could maintain that the environmental policy developed during the legislative stage will be strong enough to sufficiently protect citizens’ basic rights and liberties related to the freedom and integrity of the person.

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<sup>26</sup> Rawls, *Political Liberalism*, p. 296.

<sup>27</sup> May, “Constituting Fundamental Environmental Rights Worldwide,” p. 4.

### A Constitutional Minimum

Moreover, while both of the aforementioned strategies are quite viable, there could be another option for the Rawlsian. This would be to simply cover fundamental environmental protections under Rawls's constitutional minimum. Recall that Rawls also thought that a social minimum, which provides for the basic needs of all citizens, must be a constitutional essential.<sup>28</sup> The idea is that citizens are to be constitutionally entitled to enough of a minimum of social goods so that they can effectively exercise their basic liberties. However, the constitutional social minimum is not to be established by using the more demanding difference principle.<sup>29</sup> While the stronger demands of the difference principle are grounded in the idea of reciprocity between free and equal citizens, the demands of a constitutional social minimum are merely rooted in what people are owed in virtue of their humanity.<sup>30</sup>

Following Rawls, then, the present model maintains that what the difference principle specifies should not be viewed as a constitutional essential.<sup>31</sup> Rather, the constitutional social minimum simply covers the basic needs that are "essential for a decent human life."<sup>32</sup> Nonetheless, during the legislative stage, the contracting parties will understand that many environmental goods are essential for a decent human life. As a result, I shall soon argue that—irrespective of the model's position on basic environmental rights—because citizens need certain environmental goods in order to effectively exercise their other basic rights and liberties, the contracting parties will then ensure that certain environmental goods are contained within the constitutional minimum. This, then, will

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<sup>28</sup> Rawls, *Justice as Fairness*, pp. 47–48.

<sup>29</sup> *Ibid.*, p. 48. See Freeman, *Rawls*, p. 206.

<sup>30</sup> Rawls, *Justice as Fairness*, pp. 129–130.

<sup>31</sup> Rawls, *Political Liberalism*, pp. 228–229. See also Rawls, *Justice as Fairness*, p. 162.

<sup>32</sup> Rawls, *Justice as Fairness*, p. 129.

play a significant role in the overall shape of Rawlsian background environmental justice when I later include the requirement of just savings for future generations (in chapter seven).

### **Property Rights and Economic Liberties are Not Basic Rights**

Before moving on to the legislative stage, we should note that the Rawlsian system is compatible with the Lockean rights of life, liberty, and property. However, the charter agreed to by the contracting parties during their constitutional convention will not protect property rights as traditionally understood by libertarians. Rather, following Rawls, the framework I am laying out distinguishes between the right to hold personal property and the right to own and control non-personal property. While the former is a basic freedom that must be constitutionally protected in any society well-ordered by the Rawlsian framework, the latter is not. Specifically, Rawls argued that one should not view the following as basic property rights:

- (i) the right to private property in natural resources and means of production generally; including rights of acquisition and bequest;
- (ii) the right to property as including the equal right to participate in the control of the mean of production and of natural resources, both of which are to be socially, not privately, owned.<sup>33</sup>

But why should the system under consideration not treat the right to own and control society's means of producing goods and services as a fundamental constitutionally protected right? The answer is that free and equal citizens can still develop and pursue a reasonable conception of the good without the absolute right to own a phone company or a coalmine. Denying a citizen the basic property right to a river or a forest will *not*

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<sup>33</sup> Ibid., p. 114.

undercut the social basis of her self-respect. But unlike owning the means of production, personal property is undoubtedly required for reasonable citizens to pursue their conception of the good. Yet, suppose that a liberal democracy were to view economic rights as basic rights. If this were to occur, then the constitutionality of regulating concentrations of wealth and power would become precarious. But, as we shall see in the next chapter, this is required to ensure fair equality of opportunity and the full value of all citizens' equal liberties. Rawls's student, Samuel Freeman, correctly notes:

...instituting the economic liberties as basic liberties would undermine the ability of many free and equal persons to achieve economic independence and enjoy income and wealth adequate to their leading a wide range of reasonable plans of life. Unregulated economic liberties then render practically impossible many persons' adequate development of their moral powers, and therewith freedom and equality and their having fair opportunities to pursue a reasonable conception of the good. This is the underlying message in Rawls's explicit rejection of basic economic liberties.<sup>34</sup>

Thus, like Rawls, the present conception of political justice does not view the aforementioned economic liberties as basic rights. This will be a salient feature of the extension we are now considering. For the procedural model of background environmental justice implies that not only do citizens lack the basic right to do whatever they want to the natural environment (e.g., pollute), no citizen (let alone a corporation) should have the basic (constitutionally guaranteed) right to mine coal or drill for petroleum.

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<sup>34</sup> Freeman, *Rawls*, p. 58.

Moreover, the present model implies that it is not possible for environmental laws that apply to businesses and corporations to violate any of the basic property rights and economic liberties.<sup>35</sup> Such laws would also include those that guarantee adequate sanitation, regulate pollution in mines, control greenhouse gasses in factories, mandate solar panels in manufacturing facilities, etc. In a society that has secured background environmental justice, basic environmental rights must always trump the right to control non-personal property. And when there is a conflict between them, the right to a basic minimum of environmental goods—as well as to secure the rights and liberties related to the freedom and integrity of the person (e.g., not to be poisoned)—will always be prior to the right to non-personal property. With these items in place, let us now move on to Rawls’s principle of fair equality of opportunity, and the legislative phase of our extension to Rawls’s special conception of political justice.

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<sup>35</sup> See Freeman, *Rawls*, p. 57.

## Chapter 5

### Environmental Justice—Fair Equality of Opportunity

We are slowly piecing together a theory of procedural justice for a particular constitutional democracy. Accordingly, with the constitution of the preceding chapter in place, let us now move on and consider the legislative stage of the Rawlsian framework. During this phase—which is the third of the four stages of Rawls’s heuristic—the veil of ignorance is partially lifted, and the parties are aware of the availability of natural resources, as well as the levels of available technology. They will be advised of the best scientific predictions regarding the effects of deforestation, pollution, greenhouse gasses, etc. The contracting parties are aware that, in many ways, a healthy natural environment contributes to the prosperity of a society of free and equal citizens. However, the parties understand that, at some level, any well-ordered society (which is a fair system of social cooperation over time from one generation to the next<sup>1</sup>) will need to pollute the natural environment and emit greenhouse gasses. Thus, in order to secure the interests of those whom they represent, they will agree that limits must be set. Also, they will agree that, in order to ensure compliance, regulatory bodies must be implemented.

Irrespective of whether the Rawlsian system implements basic environmental rights, or simply takes advantage of Rawls’s social minimum, the parties will now agree to federal environmental institutions (i.e., laws, agencies, and policies) designed to protect the constitutionally secured rights and liberties related to the freedom and integrity of the person, which were discussed in the last chapter. The reasoning is fairly straightforward.

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<sup>1</sup> Rawls, *Justice as Fairness*, p. 5.

1. If, during the legislative stage, the contracting parties understand that certain environmental laws, agencies, and policies are needed to protect citizens' basic rights and liberties related to the freedom and integrity of the person, then the parties will agree to implement them.
2. Certain environmental laws, agencies, and policies are required to protect citizens' basic rights and liberties related to the freedom and integrity of the person.
3. Thus, during the legislative phase, the parties will agree to implement certain environmental laws, agencies, and policies.

Again, at this point within the heuristic, the contracting parties have all the scientific information relevant for constructing federal law and policy. And while the veil of ignorance is shut enough for the parties to not be aware of who they represent, they are aware of the constitution to which they have consented, the levels of the human population, which species are endangered, levels of natural resources, what sort of technology is available, and so on. They also have the same understanding our experts have regarding the dangers of mercury, arsenic, and so on. We could even imagine that at this point the symmetrically situated parties are given our best environmental hazard reports, environmental health data, toxicology reports, etc.

Each of the contracting parties is to then secure the fundamental interests of the citizen he or she represents. Under these circumstances they will accordingly agree that strong health safety laws, environmental impact assessments, and so on, will be required to protect the constitutionally protected environmental rights of the last chapter—or at least to protect the basic rights and liberties related to the freedom and integrity of the person

whom they represent (if fundamental environmental rights are not constitutionally protected). To this end, they will then agree to establish an environmental protection agency, clean water legislation, clean air legislation, clean soil legislation, environmental laws pertaining to the disposal of hazardous wastes, etc. However, we should not think of the parties establishing the policies we presently find—e.g., the U.S. Environmental Protection Agency, the U.S. Clean Water Act, or the U.S. clean air acts. In fact, there is presently no “U.S. Clean Soil Act.” At this point we are simply imagining the contracting parties agreeing to establish federal environmental laws, agencies, and policies. The overall shape such entities must have will become clearer as we consider fair equality of opportunity, the difference principle, and the just savings principle.

### **The Right to Environmental Goods Through a Social Minimum**

But before examining the remainder of Rawls’s special conception of justice, we should note another viable route for the Rawlsian. This is to reason in terms of citizens being entitled to something (e.g., clean air), instead of being protected from something—diseases, toxic chemicals, etc. Consider the following “social minimum” argument. Recall that during the constitutional convention the parties will agree to some sort of a constitutionally guaranteed social minimum—one that provides for the basic needs of all citizens. This minimum is determined by what citizens need to effectively exercise their basic rights and liberties. During the legislative stage, the parties are aware of their mandate to meet this minimum, which, again, has nothing to do with the difference principle. Rawls thought that merely in virtue of their humanity, citizens are at least entitled to the bare minimum needed to cover the fundamental needs “essential for a

decent human life.”<sup>2</sup> So, since citizens need many environmental goods (e.g., clean air, safe water) in order to make an effective use of their basic liberties, we can argue that these environmental goods must be included within the constitutionally guaranteed social minimum. Here is the argument.

1. If the contracting parties are aware that citizens need certain environmental goods in order to effectively exercise their basic rights and liberties, then the parties will agree to include these environmental goods within the constitutionally guaranteed social minimum.
2. Citizens do need certain environmental goods in order to effectively exercise their basic rights and liberties.
3. The contracting parties will agree to include certain environmental goods within the constitutionally guaranteed social minimum.

There are a wide variety of environmental goods. An incomplete list would include: protection from ultraviolet radiation (i.e., a functioning ozone layer); clean air; clean water; clean soil; protection from noise pollution; a safe workplace; access to natural surroundings (e.g., parks); aesthetically pleasing vistas; compensation for environmental burdens; and perhaps the preservation of traditional environmental practices connected to local natural resources.<sup>3</sup> Within an adequate inventory of environmental goods (whatever it might look like), we must distinguish between those that are primary (or basic, or fundamental), and those that are not to be guaranteed by the constitutional minimum. But where do we draw the line? The present extension of Rawls’s program maintains that if an environmental good is generally needed for citizens to exercise their fundamental

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<sup>2</sup> Ibid., p. 129.

<sup>3</sup> Robert Figueroa and Claudia Mills, “Environmental Justice,” in *A Companion to Environmental Philosophy* ed. Dale Jamieson (Malden, MA: Blackwell Publishing, 2003), p. 427.

rights and liberties, then it is to be considered within the domain of the constitutionally protected social minimum. We cannot demand precision at this point. However, we might suppose, for example, that the rights to clean air and water and to a safe workplace would be examples of rights to be included within the guaranteed social minimum. And, as such rights are required for citizens to exercise their moral powers and pursue a reasonable conception of the good, they must also be included within a list of primary social goods.

### **Securing Environmental Goods For All Citizens**

Suppose, then, that the parties—who are aware of the nature of environmental diseases (e.g., cancer, asthma, lead poisoning)—consent to certain environmental policies, and legislation. For example, we might imagine the parties agreeing to something like the U.S.’s Occupational Safety and Health Act of 1970, which was designed “to assure so far as possible every working man and woman in the Nation safe and healthful working conditions...”<sup>4</sup> The idea, again, is that such legislation is required to ensure that all citizens can effectively use their basic liberties. Moreover, the parties must also agree to some sort of limits. But while a complete analysis of how such limits are determined will require the remainder of Rawls’s special conception of justice, the nature of many restrictions can be ascertained without the use of the difference principle and the just savings principle.

For example, if required for all citizens to exercise their fundamental rights and liberties, some chemicals (e.g., arsenic) will be tightly regulated, and some chemicals (e.g., DDT) might be completely banned. Under the present model, background environmental justice requires ensuring that all citizens have clean air to breathe, access to clean drinking water, and so on. This starts with safe breast milk for citizens to

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<sup>4</sup> U.S. Department of Labor, “Job Safety and Health,” Fact Sheet No. OSHA 93–01.

consume while in infancy, and ends with clean air for them to gasp at the end of their life. Again, the difference principle is not needed to show that justice requires these things. The parties simply understand that having safe air to breathe, healthy food to eat, and access to clean drinking water are things that all people need in order to lead a decent life and exercise their basic liberties.

### **The Precautionary Principle**

Recall Rawls's familiar thought experiment involving two rational self-interested individuals, each of whom wants the most of a certain piece of pie. A fair procedure for these two people to cut and distribute the piece of pie would be for one of them to cut the pie, and then the other to choose which resulting piece of the pie each individual receives.<sup>5</sup> The fact that her opponent will likely choose the biggest piece of pie then constrains the rational self-interested pie cutter to slice the pie as best she can down the middle, thus guaranteeing her the least bad outcome—i.e., she will most likely receive the biggest smallest piece of pie. Similarly, although Rawls did not want us to imagine the representatives as assuming (falsely) that their citizen's placement within society is determined by a "malevolent opponent," he thought that his principles would be selected by contracting parties who held such a thought.<sup>6</sup>

It is similarly instructive to contemplate what sorts of agreements the contracting parties would produce at the legislative phase if they were thinking in terms of an enemy's selection of their citizen's placement within society. Admittedly, this is a non-standard use of the maximin rule under Rawls's own theory. Nonetheless, referring to the maximin rule, Rawls says in *JF*:

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<sup>5</sup> Rawls, *Theory of Justice*, p. 85

<sup>6</sup> *Ibid.*, pp. 152–153.

It is simply a useful heuristic device. Focusing on the worst outcomes has the advantage of forcing us to consider what our fundamental interests really are when it comes to the design of the basic structure. This is not a question that we would often, if ever, ask ourselves in ordinary life. Part of the point of the original position is that it forces us to ask that question and moreover to do so in a highly special situation which gives it a definite sense.<sup>7</sup>

So, when shaping legislation to ensure that all citizens can effectively use their basic liberties, we must suppose that the contracting parties understand that a citizen's physical environment can play a large role in determining his or her prospects for attaining a reasonable conception of the good. For example, the symmetrically situated parties will understand that lead in soil, air, and drinking water can poison children, and that the serious damage caused by lead poisoning (e.g., brain damage, neurological problems) typically engenders a precipitous decline in the likelihood that the victim will attain positions of power within society (when contrasted with those individuals not poisoned by lead). Thus, the parties understand that the citizens they represent would generally find it more difficult to secure primary goods, were they to be poisoned by lead.

Moreover, following Rawls, we must suppose that the symmetrically situated parties behind the veil of ignorance are not gamblers.<sup>8</sup> In his *TJ*, Rawls says:

...the veil of ignorance excludes all but the vaguest knowledge of likelihoods. The parties have no basis for determining the probable nature

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<sup>7</sup> Rawls, *Justice as Fairness*, p. 99.

<sup>8</sup> *Ibid.*, pp. 104–105.

of their society, or their place in it. Thus they have strong reasons for being wary of probability calculations if any other course is open to them.<sup>9</sup>

Of course, if the parties *were* gamblers, then if they knew that a policy would benefit 90% of the citizens and harm the other 10%, then they might be inclined to support it. But from the perspective of the contracting parties, the agreements made from behind the veil of ignorance are irrevocable. The parties will therefore adopt a *maximin* posture (and accordingly be particularly concerned with worst-case possibilities). So, when voting on federal policies, the parties always ask: if society were to adopt policy P, what would be the worst that could happen to the citizen I represent?

Now, even though he maintained that the contracting parties must make their selections based upon the fundamental interests of the citizens they represent, Rawls was no utilitarian. Imagine, for example, that the parties are considering two policies, A and B, for a society comprised of three individuals,  $i_1$ ,  $i_2$ , and  $i_3$ . Suppose the parties understand that policy A will lead to  $i_1$  having -10 units of utility,  $i_2$  having 100 units of utility, and  $i_3$  having 400 units of utility. Suppose that policy B will result in  $i_1$  having 70 units of utility,  $i_2$  possessing 100 units of utility, and  $i_3$  obtaining 110 units of utility. The expected net utility of policy A (290 units) is then more than that of policy B (280 units).<sup>10</sup> A utilitarian maximizing strategy would accordingly have the parties choose policy A over policy B. However, having adopted a maximin strategy, the parties will select policy B, which leaves the worst off citizen ( $i_1$ ) with 70 units of utility, instead of minus 10.

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<sup>9</sup> Rawls, *Theory of Justice*, p. 155. See also Rawls's *Justice as Fairness*, pp. 98–99.

<sup>10</sup> I am somewhat paralleling Samuel Freeman on this point. See his "Introduction: John Rawls – An Overview" in *The Cambridge Companion to Rawls* ed. Samuel Freeman (New York: The Cambridge University Press, 2003), pp. 14–17.

Along these lines, Stephen Gardner has cogently provided a Rawlsian “maximin” argument for “core” uses of the precautionary principle.<sup>11</sup> Nobody thinks it would be rational for all of us to always employ conservative precautionary reasoning. For example, it would lead to the conclusion that nobody should every go skiing, hiking, or camping. (While unlikely, such activities involve the possibility of serious bodily injury or death.) But this does not show that precautionary reasoning is always irrational. And in this fashion Gardner contends that there are some “core uses” in which a precautionary approach seems entirely befitting. One of these, he thinks, is to be found within the contracting situation of Rawls’s model.

Gardner is correct. There are certain things the parties are not willing risk losing for a greater amount of expected utility. We cannot demand precision, but examples might include the possibility of losing clean air, water, or food. So, too, would be the danger of being poisoned by toxic substances in manufactured products, as well as the risk of being an environmental refugee. Given their unique situation, and the stakes involved, this is not a foolish posture for the contracting parties to take. Freeman points out:

It is not being risk-averse, but rather entirely rational, to be unwilling to gamble, in the face of no information whatsoever about probabilities, with the liberties, opportunities, and resources needed to pursue one’s most cherished ends and commitments, all for the sake of gaining the marginally greater income and wealth that may be available in a society governed by the principle of utility.<sup>12</sup>

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<sup>11</sup> Stephen Gardiner, “Ethics and Global Climate Change,” *Ethics* 114 (2004): 577. Also see Stephen Gardiner, “A Core Precautionary Principle,” *The Journal of Political Philosophy* 14 (2006): 33–60.

<sup>12</sup> Freeman, *Rawls*, p. 178.

Thus, contra Harsanyi (and other Bayesians), if the contracting parties understand that there are potentially terrible risks involved, they will use a conservative decision-making strategy. For example, they will ask themselves what could be the worst to happen to their citizen if society places a ban on children's toys that contain phthalates (which affect citizens' hormones and cause cancer).<sup>13</sup> Similarly, they will ask: what will be the worst outcome for their citizen if society fails to place a ban on such toys?

Gardner focuses precautionary reasoning on the important issue of global climate change, to which we shall soon turn. Still, I think that the same basic argument would be embraced by the parties during the legislative stage of the domestic model, and would thus constrain them to adopt a precautionary principle, which would then be used when deliberating on a wide variety of federal environmental policies. Perhaps the most famous articulation of a precautionary principle is found in the 1992 Rio Declaration on Environment and Development: "where there are threats of serious or irreversible damage, the lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."<sup>14</sup> A constitutional liberal democracy well-ordered by the present Rawlsian framework will then adopt a precautionary approach to environmental policy—perhaps along the lines of (what is at least stated by) the European Commission.<sup>15</sup>

Therefore, instead of using a statistical cost-benefit analysis, the parties will employ a precautionary principle. If a policy might cause citizens to fall below the constitutionally guaranteed social minimum (e.g., it might cause health problems or death), or if it could

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<sup>13</sup> California banned such toys in 2007.

<sup>14</sup> United Nations Environment Programme (UNEP), Rio Declaration on Environment and Development, Principle 15 (1992). Reprinted in Kerry Whiteside, *Precautionary Politics: Principle and Practice in Confronting Environmental Risk* (Cambridge, MA: The MIT Press, 2006), p. viii.

<sup>15</sup> Again, see Whiteside, *Precautionary Politics*, pp. 18–24.

cause citizens to lose the environmental goods they need in order to effectively exercise their basic rights and liberties (safe levels of air, water, soil, etc.), the parties will not permit it unless the scientific consensus is that it is safe. Of course, the implications of injecting this sort of reasoning into the Rawlsian model are significant. During the legislative phase of Rawls's model, the contracting parties will design legislation that will force the participants within society (e.g., companies, industries) to demonstrate the long-term safety of many products (e.g., industrial chemicals) before their general use is permitted. So, the burden of proof would then fall on the chemical industry, for example, to prove that the many herbicides and pesticides that companies wish to manufacture and put on the market have no unsafe long-term synergistic health effects. The federal legislation enacted by the contracting parties will also mandate that before genetically modified organisms are made available for public use, it must be proved that their long-term use will not be dangerous to human beings. And, as we shall observe in chapter seven, the legislation agreed to by the contracting parties will require proof that the long term use of genetically modified organisms (for example) will not undermine the sustainability of core aspects of the natural environment.

### **Fair Equality of Opportunity**

We have seen that in order for a constitutional democracy to establish Rawlsian background justice, it needs to first guarantee equal basic liberties for all in accord with the equal liberty principle. We are imagining that the contracting parties have used the first principle of justice during their constitutional convention, and that they have settled upon a charter for their society that ensures that all citizens have the same indefeasible claim to a fully adequate scheme of equal basic liberties compatible with the same

scheme of liberties for all other citizens. I have shown that certain environmental rights and legislation are justified through the Rawlsian notions of basic rights and liberties, as well as a constitutional minimum. Moreover, we have seen that due to the “maximin” strategy adopted by the contracting parties, a precautionary approach must be taken when settling on human health and environmental policy. Thus, a society well ordered by the present model would not permit the implementation structures that would allow unsafe levels of environmental burdens.

But we should also suppose that the contracting parties understand that the social cooperation required for any well-ordered society will require the production of myriad goods and services. Such production, however, requires energy, and along with it, anthropogenic pollution, the emission of greenhouse gasses, and other harms to the natural environment. Background environmental justice requires that, once safe levels are established, disparities in environmental goods only then be tolerated if they arise in accord with the principle of fair equality of opportunity—i.e., all citizens must have a fair equal opportunity to be made more or less advantaged by the disparities. This is part of how the present model explains the wrongness of environmental racism, sexism, classism, etc. Again, this has nothing to do with the difference principle.

So, imagine that the contracting parties are in the legislative phase of the domestic model. The principle of fair equality of opportunity says that offices and positions must be open to all citizens—irrespective of sex, race, social status, sexual orientation, and so forth—under conditions of fair equality of opportunity. But for Rawls, this is much

stronger than formal equality, or what Nagel called “negative equality of opportunity.”<sup>16</sup>

In his *JF*, Rawls says:

...(F)air equality of opportunity is said to require not merely that public offices and social positions be open in the formal sense, but that all should have a fair chance to attain them. To specify the idea of a fair chance we say: supposing that there is a distribution of native endowments, those who have the same level of talent and ability and the same willingness to use these gifts should have the same prospects of success regardless of their social class of origin, the class into which they are born and develop until the age of reason. In all parts of society there are to be roughly the same prospects of culture and achievement for those similarly motivated and endowed.<sup>17</sup>

Accordingly, we shall now see that the sort of equality possessed by citizens of many “liberal democracies” (e.g., the U.S.) is much weaker than what is embraced by the present model. For while the principle of fair equality of opportunity will require institutional measures to make sure that society does not have monopolies, it will also require similar measures to ensure that society does not contain excessive concentrations of wealth, eliminate organized crime, as well as to make sure that citizen groups (e.g., consumer, environmental, labor) can compete for political influence on the same footing as corporations and business groups. In a society well-ordered by fair equality of opportunity, the poorest citizens and the wealthiest citizens (who are similarly motivated and talented) must have the same chance of attaining the highest offices within society.

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<sup>16</sup> Thomas Nagel, “Rawls and Liberalism,” in *The Cambridge Companion to Rawls* ed. S. Freeman (New York: Cambridge University Press, 2003), p. 68.

<sup>17</sup> Rawls, *Justice as Fairness*, pp. 43-44.

Thus, the present Rawlsian model also entails universal education and healthcare, as well as the prohibiting of political dynasties—Kennedy, Bush, Clinton, etc.

### **Avoiding Excessive Concentrations of Wealth**

Rawls thought that a democratic society well-ordered by his theory will take measures to avoid excessive concentrations of wealth. We cannot be precise when addressing the issue of when a concentration of wealth becomes excessive. Nonetheless, we might suppose that a concentration becomes excessive when it causes some to fall below a social minimum under which they cannot exercise their basic liberties. Also, a concentration of wealth is excessive when it tends to act as a barrier to both short and long term fair equality of opportunity. Rawls says: “A free market system must be set within a framework of political and legal institutions that adjust the long-run trend of economic forces so as to prevent excessive concentrations of property and wealth, especially those likely to lead to political domination.”<sup>18</sup> In this vein, in “Distributive Justice and Social Policy: Some Reflections on Rawls and Income Distribution”, (2002) Olli Kangas has discussed the fact that citizens living in countries with a high Gini coefficient—a measurement of income and asset inequalities—generally have less of income mobility.<sup>19</sup> Accordingly, background justice requires that redistributive measures be enacted to ensure that fair equality of opportunity in society’s competition for environmental goods and hardships is met for all citizens.

### **Taxation**

The present model follows Rawls in maintaining that in order to subvert such concentrations of wealth, governments (of property owning democracies) are permitted to

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<sup>18</sup> Ibid., p. 44.

<sup>19</sup> See Olli Kangas, “Distributive Justice and Social Policy: Some Reflections on Rawls and Income Distribution,” *Social Policy and Administration* 34 (2002): 510–528.

institute methods of progressive taxation, wealth taxes, inheritance taxes, and the like.<sup>20</sup>

One way to imagine Rawlsian taxation is to compare the idea of progressive taxes with the ideas of flat and regressive taxes. Under a flat tax scheme, all citizens are taxed in accord with the same percentage of their income. And regressive taxation involves the payers paying fixed amounts of money. These are not to be generally adopted under the Rawlsian framework.

Consider the following illustration:<sup>21</sup>

<u>Income Level</u>	<u>Progressive Tax</u>	<u>Flat Tax</u>	<u>Regressive Tax</u>
	Tax/% of income	Tax/% of income	Tax/% of income
\$200,000	\$50,000/25%	\$40,000/20%	\$5,000/2.5%
\$80,000	\$16,000/20%	\$16,000/20%	\$5,000/6.25%
\$20,000	\$2,000/10%	\$4,000/20%	\$5,000/25%

First, it is clear that since the parties are following a maximin strategy, they will adopt the progressive taxation scheme. Behind the veil of ignorance, the parties understand that the worst off (i.e., those at the \$20,000 income level) will be best off if, of the available options, they pay the rate that constitutes the smallest percentage of their income (10%, instead of 20% or 25%). But the parties also understand that progressive taxes (as opposed to regressive or flat taxes) make it easier for the underprivileged to secure their final ends in life. So, as it relates to Rawls's second principle of justice, progressive taxation schemes (and inheritance taxes) will be required to ensure that there are not excessive concentrations of wealth acting as barriers to positive fair equality of opportunity.

<sup>20</sup> See Rawls, *Theory of Justice*, pp. 277–279. See, also, Rawls, *Justice as Fairness*, p. 161.

<sup>21</sup> From Jim Shultz's *The Democracy Owner's Manual: a practical guide to changing the world* (New Brunswick: Rutgers University Press, 2002), p. 33.

So suppose, for example, that society wishes to devote tax money to environmental restoration, public infrastructure, and to the creation “green jobs.” The present model maintains that forcing consumers to pay regressive sales taxes (e.g., on clothes, beer, cigarettes, gasoline) for such expenditures is extremely offensive. Generally speaking, a Rawlsian fair playing field means reducing the negative effects of taxation on the least well-off members of society through progressive taxation. Of course sales taxes (which are regressive) might be permitted if the aim is to lower consumption—e.g., of coal, gasoline. However, such regressive tax measures will only be permitted if they are needed for society to maintain a fully adequate scheme of basic liberties or to secure their fair value. We shall return to this point later.

### **Universal Education**

Rawlsian political liberalism is committed to universal education. There are a number of reasons for this. One is that a “brainwashed” or highly deceived populace lacks serious autonomy. Political authority is illegitimate if it is not exercised in accord with policies freely chosen by a body of educated and informed citizens who view themselves as equals. Accordingly, education is required for citizens to view each other as free and equal—a core constraint entailed by Rawls’s version of political liberalism.<sup>22</sup>

Moreover, the efficacy any democratic regime has at maintaining just institutions will depend on an educated and informed electorate. For example, being less naïve, educated voters are less likely to fall prey to deceptive advertisements paid for by those who would benefit the most from not regulating markets, safety standards, pollution, greenhouse gasses, etc. Furthermore, a democratic regime with an uninformed electorate is potentially unstable due to the terrible choices it is most likely to eventually make—in

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<sup>22</sup> Rawls, *Justice as Fairness*, p. 56–57.

terms of the president it elects, the policies it lacks the political will to adopt, and so forth.<sup>23</sup> And citizens can only learn from past mistakes (collectively) if they are properly informed of them—e.g., nuclear disasters. Thus, if a problem (e.g., climate change) is serious, an educated public must be made aware of it.

But besides that fact that the parties are aware that they are organizing a democracy, and that the effectiveness of any democratic society requires an educated and informed citizenry, universal education is required for fair equality of opportunity. For one thing, universal education generally leads to less ignorant citizens. Thus, universal education makes possible a citizenry that is more adept at recognizing environmental injustices—e.g., environmental racism. But, more generally, within a society well-ordered by Rawls’s principle of fair equality of opportunity, any two babies that enter society must have the same chances of attaining the highest positions of authority within society (if they have the same talents, and if they are so inclined to strive for them). The contracting parties will accordingly ensure that structures are in place to guarantee that citizens who possess equal natural aptitudes (and an equal desire for a superior position within society) have the same prospects of attaining that position—no matter their sex, race, socio-economic status, sexual orientation, religion, etc. The idea, then, is that such structures will undoubtedly include universal education, which incidentally might include vouchers schemes.<sup>24</sup>

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<sup>23</sup> Along these lines, Ben Block (2010) has argued that the decline of “traditional journalism” is a real concern for environmental causes. He laments: “While online news and social media are spreading more information more widely and rapidly, the growing lack of explanatory journalism may nonetheless result in a less informed public. The trend should be a concern for anyone dedicated to environmental sustainability. Journalism’s economic adversity not only diminishes the ability of newsrooms to generate insightful, balanced reports on science-related topics such as climate change, it also limits our understanding of how governments and industry are responding to our global environmental crisis. Ben Block, “Covering Climate Change: reporting on the climate gets wider but shallower,” *World Watch* Vol. 23, No. 2 (2010): 20.

<sup>24</sup> See Freeman, *Rawls*, p. 90.

### **Lobbying and Selling of the Public Trust**

At the legislative phase, the contracting parties will deliberate on the privatization of natural resources—e.g., water, petroleum, copper. They will also consider mandatory fuel efficiency standards, the availability of public mass transportation, funding for green chemistry, and (if they know that one of the main sources of fuel is petroleum) subsidies for alternative fuels—such as biodiesel, or hydrogen. So at this stage, the principle fair equality of opportunity constrains the contracting parties to not agree upon political structures that permit certain industries (e.g., oil, coal) to unduly influence environmental standards.<sup>25</sup> The parties will similarly not consent to structures that allow special interests (e.g., corporations, specific industries) to have more access to elected officials, congressional committees, governmental agencies, and so forth, than other citizens.<sup>26</sup> If required to meet the demands of fair equality of opportunity, the parties will furthermore agree to criminalize the selling of the public trust.

We can again see that we should not think of the United States when we think of a well-ordered liberal democracy (in the sense being described). In fact, at this point it is worth noting that Rawls, himself, was concerned with the authenticity of democracy in America. In *The Chronicle Review* (2002), Samuel Freeman, who was a student and long friend of Rawls, reports the following:

The rightward drift of American politics distressed Jack [John Rawls<sup>27</sup>].

He said of Congress under Newt Gingrich's management, "They are

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<sup>25</sup> At the time of this writing, this is a concern as the U.S. Senate works on a bill to reduce greenhouse emissions, create clean energy jobs, and shift the U.S. towards a "clean energy" economy. Juliet Eilperin, "Senators ready a bill on greenhouse gases," *The Washington Post*, September 30, 2009.

<sup>26</sup> In 2008, there were 14,443 registered U.S. lobbyists—an average of twenty seven for each member of Congress. See *World Watch* Vol. 23 (No. 2): 32.

<sup>27</sup> John Rawls was called "Jack" by those who knew him well.

destroying our democracy.” He was appalled by the practice of allowing business lobbyists into committee meetings to help draft legislation. He condemned it, along with our system of corporate financing of political campaigns, as “selling the public trust.” He judged the current [George W. Bush] administration and Congress by the same high standards.<sup>28</sup>

Within a representative democracy organized by the Rawlsian model, powerful special interests should not be able to interfere with the legislative process. The details of federal energy policy are not to be worked out in secret meetings in the White house.

Background environmental justice requires that all citizens with the same talents and inclinations have the same chances of proposing federal bills and amendments regarding bioorganic fuels, solar power, fuel subsidies, and the like. This will accordingly require safeguards against corporate cronyism, as well as tough regulations on political lobbying, especially by those that would benefit the most from non-regulation—coal and oil companies, the automobile industry, etc.

### **Free Speech**

With this in mind, let us not turn our attention to the issue of free speech, which is historically an indelible part of the liberal tradition, and an important factor to consider with thinking about background environmental justice. Rawls says: “...(W)ithin the framework of background justice set up by the basic structure, individuals and associations may do as they wish insofar as the rules of institutions permit.”<sup>29</sup> Once background justice is secured, then as long as all participants observe the publicly recognized rules, then any resulting distribution of social goods (including environmental

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<sup>28</sup> Samuel Freeman, “John Rawls, Friend and Teacher,” *The Chronicle of Higher Education*, December 13, 2002

<sup>29</sup> Rawls, *Justice as Fairness*, p. 50.

goods/hardships) are to be viewed as just. Important components of these publicly recognized rules, then, are the rules pertaining to media ownership, advertising, the content of television, cable, internet, and so forth. Accordingly, we have already seen that Rawls's first principle is to guarantee everyone the same right to free speech. But clearly the value of this liberty is not the same for everyone. Freeman observes:

...(H)ow can there be equal freedom of expression when the worse off are without the means to communicate their views to others? The wealthy control mass communications (TV, radio, newspapers, book publishing, etc.) and mainly publish positions that favor and indoctrinate others in their views. Equal liberty without equal worth of liberty is an empty abstraction.<sup>30</sup>

Now, Rawls did not think that a constitutional democracy should secure the fair value of all the basic liberties. However, he did believe that in order for a society to become well-ordered by his principles it would have to guarantee the fair value of all the political liberties—fundamental rights and freedoms that enable citizens to partake meaningfully in public life.<sup>31</sup>

Consider free speech, which is a political liberty. I shall follow Rawls and presume that the second principle of justice is to secure the fair value of free speech—i.e., fair equality of opportunity is to ensure that the value of free speech is not worth more only to the most advantaged citizens (and other powerful participants, such as corporations). Recall, then, that during the legislative stage, the contracting parties are privy to a wide variety of social facts. Among these will include the fact that public opinion can be

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<sup>30</sup> Freeman, *Rawls*, p. 61.

<sup>31</sup> Rawls, *Justice as Fairness*, p. 148–149.

shaped by the media in a wide variety of ways. With the aim of ensuring the fair value of free speech, the contracting parties will therefore agree to number of policy measures. For example, it is likely that they will agree to use public money to support a variety of media outlets—public radio, television, internet, etc. If required to maintain a “fair playing field,” as specified by the second principle of justice, they might also consent to the public support of free and independent journalism (including environmental journalism).

The Rawlsian model also permits a number of restrictions on free speech. Consider that in order to obtain the autonomy required by political constructivism, free and equal citizens—and not demagogues or powerful corporate interests—must settle the content public reason. Political power is illegitimate when enacted by an ill informed public—e.g., one that has been misled by biased media coverage, extreme rhetorical tricks, or the deliberate dissemination of falsehoods. Moreover, due to the fact that not all speech has the same purpose, not all speech should be considered to be equally free by the fundamental structures of society. Hate speech (and other forms bigoted expression) generally has a different purpose than political speech. And political expression normally has a different end than commercial speech. The question posed by the Rawlsian framework, then, is what sorts of speech are required for citizens to fully develop and exercise their moral powers? While a comprehensive answer is out of the scope of the present project, it is clear that commercial speech is not needed for free and equal citizens of a constitutional democracy to expand and employ their moral powers. Thus, the equal liberty principle will not protect commercial speech in the same way it does political speech (those forms that are needed for citizens to develop and exercise their moral

powers).<sup>32</sup> Thus, restrictions on commercial speech are permitted if, for example, they are required to ensure objective media reporting on international agreements (e.g., trade, environmental), to guarantee impartial media coverage of environmental disasters, or to combat certain excesses of human consumption (e.g., those that could disrupt the stability of a just society).

Of course, it might be objected that such restrictions violate a corporation's right to free speech. At the time of this writing, the U.S. Supreme Court has made a ruling on free speech that would appear to be exceptionally odious according to the model we are examining. On January 21, 2010, the Supreme Court ruled—in *Citizens United v. Federal Election Commission*—that, because corporations have a right to free speech, for-profit corporations are permitted to use corporate profits to purchase political campaign advertisements. However, corporations do not have a constitutionally guaranteed right to free speech under the Rawlsian framework. As we have previously noted, corporations are participants in society, not citizens. Thus, they lack a standing (they have no representation) within the Rawlsian contracting procedure. During the legislative stage, the contracting parties understand that corporations exist within society, but they are not concerned to secure their fundamental interests.

But could the Rawlsian model simply extend the fundamental right to free speech (along with the other basic liberties) out to corporations? This is unlikely. Recall that Rawls said, “the worth of institutions is derived solely from the benefits they bring to human individuals.”<sup>33</sup> As we noted earlier, the significance of a liberty depends on how much it is required to ensure the full use of citizens' moral power in at least one of the

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<sup>32</sup> See Freeman, *Rawls*, p. 210.

<sup>33</sup> John Rawls, “Justice as Reciprocity,” in *Collected Papers*, p. 193–4.

fundamental cases—i.e., the ability to develop a sense of justice, and the capacity for a comprehensive conception of the good.<sup>34</sup> But corporations are not natural persons. As unconscious social participants, they lack a capacity for a sense of justice. Lacking practical reason, corporations cannot even philosophize about the good. Thus their commercial speech is not to be protected as a basic liberty.<sup>35</sup> Restrictions made on corporate “greenwashing,” misrepresenting scientific studies, and the like, are therefore fully justified under the present model of background environmental justice.

Some of the implications for procedural environmental justice should be clear. The society for which the present model of political liberalism is being worked out is characterized as being pluralistic. As such, it will have citizens who possess a wide variety of beliefs regarding the inherent value of the natural environment. While the Rawlsian model is anthropocentric, background environmental justice insists that powerful interests must not dictate citizens’ attitudes towards the natural environment. So, consider the raising ecological consciousness, which is an important goal of many environmentalists (and environmental groups). A society well-ordered by the present model will not require the general development of an ecological consciousness. Such a policy would be closer to political authoritarianism than political liberalism. Nevertheless, a liberal democracy shaped by the present theory would be one in which the development of a common ecological consciousness is possible.

### **Campaign Finance Reform**

Moreover, unfair elections have no place in any Rawlsian world—and this means much more than ensuring that all citizens can freely vote, that voting machines are not

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<sup>34</sup> Rawls, *Political Liberalism*, p. 335. Also, Rawls, *Justice as Fairness*, pp. 112–113.

<sup>35</sup> See Freeman, *Rawls*, p. 67.

rigged, that all citizens can access election records, etc. Recall that during the legislative phase, the contracting parties are working out the details of the fair value of the political (and other) liberties—e.g., the freedom to vote, run for political office, campaign, etc. Formal equality of opportunity guarantees that everyone has the right to run for any office. But the ideal specified by Rawls's principle of fair equality of opportunity when applied to political liberties (what Rawls calls the "the fair value of political liberties") is that the least well off citizens must have the same chance of being elected to the highest positions as the wealthiest citizens.

How is this possible if powerful entities within society control the political debates, the media, and so forth? In his *PL*, Rawls says: "...the fair values of the political liberties is required for a just political procedure, and that to insure their fair value it is necessary to prevent those with greater property and wealth, and the greater skills of organization which accompany them, from controlling the electoral process to their advantage."<sup>36</sup> Thus, at this point in the heuristic, the parties will agree to establish regulations on the financing of elections. Specifically, (following Rawls) the parties will agree that elections should be publicly financed. Moreover, they will be in agreement that restrictions on political advertising should be implemented. Again, the rationale is that such measures are required to ensure the fair value of political liberties.<sup>37</sup> In terms of background environmental justice, the function of the equal liberty principle is to protect the political liberties (e.g., the right to protest and form political parties) of those citizens who are concerned about the status of the natural environment. With elections being publicly financed and tightly controlled in accord with fair equality of opportunity, those powerful

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<sup>36</sup> Rawls, *Political Liberalism*, p. 360.

<sup>37</sup> See Freeman, *Rawls*, p. 63.

interests who would benefit the most from lax or discriminatory environmental standards will not be able to “purchase elections” or “buy candidates” favoring their own special agendas.

## Chapter 6

### Diverging from Rawls's Framework

So far, our examination of John Rawls's mature theory has focused on demonstrating its applicability to normative environmental philosophy and policy at the level of domestic justice—i.e., the level of a particular society. However, even as a model of political liberalism (as opposed to a comprehensive moral doctrine), the theory we have so far considered is far from complete. One salient feature of this incompleteness is the system's supposition that domestic societies bear no relation to other societies. This is a crucial aspect of Rawls's domestic model, which constrains the reasoning of the parties when they are undergoing their deliberations, contracting with each other, and applying the entities that they agree upon—e.g., principles of justice, a constitution, legislation, and so on.

Consequently, by viewing society as totally “closed,” it so far has nothing substantive to say, for example, about when a liberal democracy is permitted to go to war (with another country), or what its foreign trade policies should look like. The model also remains silent on timely issues such as how a society of free and equal citizens should react to world poverty, or global terrorism. And, as it relates to contemporary normative environmental philosophy, if it is separated from a global context, the framework that we have so far considered will provide inadequate guidance on supranational environmental concerns—e.g., global warming. The model hitherto conceived is simply not fit for background environmental justice above the level of nation state.

Consider, then, the Rawlsian program above the level of nation-state. In his *The Law of Peoples (LP)*, Rawls described his own extension of justice as fairness into the international arena as a “realistic utopia.” His extension is not simply an application of the principles of his domestic theory (e.g., equal liberty, fair equality of opportunity, the difference principle) to the entire world. Rather, he claimed to be following the lead of Kant—i.e., in *Perpetual Peace* (1795)—in adopting a second contracting situation where representatives of liberal peoples make a compact with representatives of other liberal peoples. Rawls asked us to imagine a group of reasonable liberal peoples coming together and forming what he called a “Society of Peoples.” He wanted us to suppose that they would make an agreement that would regulate all further relations between the members of the Society of Peoples.<sup>1</sup> While this might never actually happen, Rawls thought that the result—The Law of Peoples—is an ideal theory for thinking about a liberal democracy’s foreign policy.

For Rawls, then, we are to imagine a second agreement that will govern “the basic structure of the relations between peoples.”<sup>2</sup> If successful, such a heuristic device might be useful in addressing the question of how a free constitutional democracy should deal with other non-liberal societies, which do not permit all their citizens certain basic liberties—freedom of speech, religion, association, participation, and so on. This second agreement is Rawls’s The Law of Peoples. Like his mature justice as fairness, it is a *political* conception of justice. Yet, unlike his domestic framework, his international

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<sup>1</sup> In his *LP*, which was his last own published work on the topic, Rawls was very clear that he meant *peoples* and not *nation-states*. Rawls, *The Law of Peoples*, pp. 23–30.

<sup>2</sup> *Ibid.*, p. 33.

extension contains principles that are to regulate the mutual political relations among the free and equal peoples of a reasonable Society of Peoples.<sup>3</sup>

How should we imagine peoples coming together to make an agreement? Whereas the parties participating in Rawls's contracting process at the level of domestic justice represent citizens, the contractors of Rawls's *LP* represent peoples. That is, instead of representing individual citizens within a liberal constitutional democracy, Rawls envisaged each of the parties in the second original position as representing a liberal democratic people. Like the first (domestic) original position, Rawls's second (international) original position has a veil of ignorance. However, the veil of ignorance imposed upon the contractors at the international level ensures that they are unaware of the particular people within the Society of Peoples whom they are representing. Moreover, Rawls claimed that the parties are ignorant of the strength, population size, and geographical domain of the peoples they represent. They also do not know their people's level of economic development and natural resources. Nonetheless, Rawls says that the contractors in the second original position understand that the people they represent exist in conditions that permit the establishment of constitutional democracy.<sup>4</sup>

Within this contracting situation, then, Rawls argued that the parties would select the following eight principles. Note that these are quite different than the principles of his earlier justice as fairness. For Rawls, these principles tell peoples (the "actors"<sup>5</sup> within

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<sup>3</sup> Rawls, *The Law of Peoples*, p. 86.

<sup>4</sup> See his "Two Original Positions." *Ibid.*, pp. 30–35.

<sup>5</sup> Rawls claimed that just as citizens are "the actors" in domestic society, liberal democratic peoples and decent peoples are "the actors" in his Society of Peoples. Rawls, *The Law of Peoples*, p. 23.

the Society of Peoples) how to treat each other as peoples, and not how liberal democratic societies should treat their citizens.<sup>6</sup>

- First, peoples are free and independent, and their freedom and independence are to be respected by other peoples.
- Second, peoples are to observe treaties and undertakings.
- Third, peoples are equal and are parties to the agreements that bind them.
- Fourth, peoples are to observe a duty of non-intervention.
- Fifth, peoples have the right of self-defense, but no right to instigate war for reasons other than self-defense.
- Sixth, peoples are to honor human rights.
- Seventh, peoples are to observe certain specified restrictions in the conduct of war.
- And, lastly, peoples have a duty to assist other peoples living under unfavorable conditions that prevent their having a just or decent political and social regime.<sup>7</sup>

For Rawls, these constitute the Law of Peoples. Some (e.g., Beitz and Pogge) have wondered why these principles should be different than Rawls's principles of domestic justice? For instance, why does the Law of Peoples not include a supranational difference principle? Why do the parties to this agreement not compare sets of principles like they did behind the veil of ignorance of Rawls's heuristic for a liberal society? Beitz notes: "Assuming that Rawls's arguments for the two principles are successful, there is no reason to think that the content of the principles would change as a result of enlarging the scope of the original position so that the principles would apply to the world as a

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<sup>6</sup> Rawls, *The Law of Peoples*, p. 83.

<sup>7</sup> Rawls, *The Law of Peoples*, p. 37.

whole.”<sup>8</sup> In fact, why should the contractors at the international level represent free and equal peoples, while the parties at the domestic level represent individual free and equal citizens? Consider Singer’s critique. Like other authors, he has noted that if we were to apply “...[Rawls’s] method globally rather than for a given society, it would immediately be obvious that one fact about which those making the choice should be ignorant is whether they are citizens of a rich nation such as the United States or of a poor nation such as Haiti.”<sup>9</sup>

Many other contemporary thinkers have argued that a truly global perspective is required if moral philosophers are to adequately deal with contemporary issues we now face. For example, Peter Singer (2004) also contends:

We have lived with the idea of sovereign states for so long that they have come to be part of the background not only of diplomacy and public policy but also ethics. Implicit in the term “globalization” rather than the older “internationalization” is the idea that we are moving beyond the era of growing ties between nations and are beginning to contemplate something beyond the existing conception of the nation-state. But this change needs to be reflected in all levels of our thought, and especially in our thinking about ethics.<sup>10</sup>

In light of the fact of globalization, why should we take social contract theory seriously if it must begin (conceptually) with the level of domestic society? In this vein, Martha

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<sup>8</sup> Beitz, *Political Theory and International Relations*, p. 151.

<sup>9</sup> Singer, *One World*, p. 9.

<sup>10</sup> Peter Singer, *One World: the ethics of globalization* 2<sup>nd</sup> ed. (New Haven: Yale University Press, 2004), p. 8.

Nussbaum (2006) has recently argued that social contract theorists *should not* use the nation-state as the central starting part for their theories.<sup>11</sup>

I wholeheartedly agree with Singer, Nussbaum, and others. No account of justice can be complete without addressing phenomena above the level of nation-state. For example, as it bears on environmental justice, it is especially odious that those that bear the biggest responsibility for causing global climate change (i.e., individuals in developed countries like the U.S.) are doing the least to help assuage the problem. No account of background environmental justice can ignore supranational contexts. As a result, one major difference between Rawls's own theory and the Rawlsian version that we are now considering is this. Following themes developed by Thomas Pogge, Charles Beitz, Brian Barry, and others, I contend that the Rawlsian framework should begin at the level of supranational justice, and then proceed "downward" to the spheres of domestic and local justice.<sup>12</sup> As was discussed in chapter two, Rawls's own heuristic begins at the level of domestic justice, and then expands to other areas—i.e., local and global justice. Under my extension to Rawls's theory, the international sphere is prior to the domestic. However, by embracing the notion that parts of the national policy of a liberal constitutional democracy cannot be established without reference to the global context, I shall also depart from Rawls's own system in the following manner. Under my extension to Rawls's theory, during the legislative stage of the domestic model, we are to imagine that the parties are constrained by important structures—such as reasonably just international laws and treaties.

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<sup>11</sup> Martha Nussbaum, *Frontiers of Justice: disability, nationality, species membership* (Cambridge: The Belknap Press, 2006), p. 228.

<sup>12</sup> The notion of starting the contract heuristic with a global original position is not new. Rawls considered (and rejected) the idea. Thomas Pogge, Brian Barry and Thomas Scanlon have also explored this approach.

What can justify such a change to the Rawlsian framework? First, it is worth noting that prioritizing the supranational (when thinking about a perfectly just society) is not a recent idea. For example, in his “Idea for a Universal History with a Cosmopolitan Intent,” Kant contends: “*The problem of establishing a perfect civil constitution depends on the problem of law governed **external relations among nations** and cannot be solved unless the latter is.*”<sup>13</sup> But, while intuitively sensible, this is just a claim. What reasons can be provided? To begin with, one form of justification for my divergent extension to Rawls’s model stems from *de facto* globalization. For example, the United Nations, the International Court of Justice, the United Nation’s Framework Convention on Climate Change (UNFCCC), and the International Criminal Court have been established, and are real entities to which liberal democracies must pay heed. Moreover, federal legislation made by liberal democracies can be constrained by international treaties. For instance, most countries have signed on to the Kyoto Protocol to the UNFCCC. And the U.S. Clean Air Act has been amended by Congress to instruct the U.S. Environmental Protection Agency to phase out the production of ozone depleting substances in accord with an *international* treaty—The Montreal Protocol on Substances That Deplete the Ozone Layer.<sup>14</sup>

It seems perfectly reasonable to maintain, then, that it is in a federal legislature (or congress, or parliament, etc.) that a constitutional democracy should work out its relations with its world neighbors, as well as other international bodies. For example, at the time of this writing, the U.S. Congress is considering an appropriations bill that

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<sup>13</sup> Immanuel Kant, “Idea for a Universal History with a Cosmopolitan Intent,” in *Perpetual Peace and Other Essays* translated by Ted Humphrey (Indianapolis: Hackett Publishing Company, 1983), p. 34.

<sup>14</sup> John H. Knox, “Natural Resources Defense Council v. Environmental Protection Agency. 464 F. 3d 1.,” *The American Journal of International Law* 101 (2007): 473.

would provide millions of dollars for international family planning. Thus, this manner of modeling national-supranational relations—i.e., imagining that during the legislative stage of the domestic model the contractors are constrained by supranational agreements—is quite realistic.

Furthermore, there is simply no question that world citizens, as well as their governmental structures, are now joined in important ways. Countries are connected through global trade and international markets. The Internet and other technological advances allow people around the world to communicate virtually instantaneously. One result is that a wide variety of goods and services can now be immediately bought, sold, or traded on increasingly globalized markets. Peak oil is an important international concern. And energy or food shortages in one country can have dramatic effects in other countries. In addition, multinational corporations now often can muster more financial resources than countries, and, without much difficulty, have the ability to easily move their operations from nation-state to nation-state.

Accordingly, many thinkers have correctly argued that global problems require global solutions.<sup>15</sup> But environmental problems are also not limited by national boundaries. National boundaries are human made entities that are crossed by gas pipelines, rivers, and migrating birds. Hydrological systems extend over national boundaries. And while all people in the world share the same atmosphere,<sup>16</sup> pollution and greenhouse gasses emitted in one country can have extremely damaging effects in countries thousands of miles away. Thus, it is reasonable to think that solving our most important environmental problems will require various forms of international cooperation.

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<sup>15</sup> A good recent example is Jeffrey Sachs, *Common Wealth: Economics for a Crowded Planet* (New York: The Penguin Press, 2008)

<sup>16</sup> See Peter Singer's "One Atmosphere" in his *One World*, pp. 14–50.

Moreover, domestic societies cannot work out many of the most important issues (e.g., global warming, global pandemics, regulating of world markets) on their own. But it seems reasonable to conjecture that the solutions to such problems can be more or less fair. This leads us to think, I believe, that a supranational theory of justice must be possible. For consider (as Beitz and other have argued) that, due to many of the aforementioned concerns, the circumstances of justice presently apply above the level of nation-state. Note that, somewhat following Hume, Rawls described the circumstances of justice as “the normal conditions under which human cooperation is both possible and necessary,”<sup>17</sup> These include objective circumstances of justice, which are “circumstances of moderate scarcity and the necessity of social cooperation for all to have a decent standard of life.”<sup>18</sup> They also include subjective circumstance of justice, which are “the circumstances that reflect the fact that in a modern democratic society citizens affirm different, and indeed incommensurable and irreconcilable, though reasonable, comprehensive doctrines in the light of which they understand their conceptions of the good.”<sup>19</sup>

But this is a fairly close description of the situation people around the world are in as they attempt to grapple with global climate change. (We shall return to this topic shortly.) World citizens are not members of a global constitutional democracy. Yet, people all around the world—with divergent conceptions of the good—share the same territory (planet earth). But now world citizens (and their governments, associations, corporations, et cetera) must cooperate in order to avoid an irreversible environmental catastrophe. So, while we now share a common interest in significantly reducing greenhouse gas

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<sup>17</sup> Rawls, *Theory of Justice*, p. 126.

<sup>18</sup> Rawls, *Justice as Fairness*, p. 84.

<sup>19</sup> Ibid.

emissions, the solutions will inevitably involve conflicts of interests. Policies could be adopted to satisfy most everyone's basic needs, but no policy can fulfill everyone's wishes and desires.<sup>20</sup> It seems possible, then, that there are principles of justice that can guide us as we distribute the benefits and burdens of the social cooperation involved in combating global climate change.

Now, while this is admittedly a timely problem that any adequate theory of justice must eventually address, it is not the focus of the present project. I am presently assuming that a reasonable theory of justice can be worked out for the supranational arena—perhaps along the lines of Beitz, Pogge, Barry, Nussbaum, etc. Of course, if a Rawlsian extension above the level of nation-state is successful, international limits might be determined during the legislative and judicial stages of a supranational contracting procedure. For example, if a form of Rawlsian contractualism is eventually made viable above the level of nation-state, then perhaps we could consider the parties in the domestic model constrained by agreements made at the legislative stage of a supranational contracting and application procedure. That would be one method of modeling federal strategy (for a society of free and equal citizens) around supranational policy. But whether the Rawlsian model can serve as a global conception of political justice, or whether it is delimited to international cooperation, is an issue that is out the scope of the present work to resolve.

For now, we are focused on a framework of background environmental justice for a single constitutional democracy. I am suggesting that we should suppose that the parties (still behind a partially opened veil of ignorance) are settling upon legislation to regulate

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<sup>20</sup> Here I am closely tracking Samuel Freeman's description of Rawls's circumstances of justice. See Freeman, *Rawls*, p. 465.

greenhouse gas emissions for their society. Like legislatures in the real world, the legislative stage of the domestic model is the conceptual theater for where (and when) the parties are to deliberate on federal energy and environmental policies, including energy security. (In fact, at the time of this writing, a climate change bill is working its way through the U.S. Senate.) It is important, then, that the parties are informed of all the trade relations with other societies, for only then will they gauge the amount of their societies' natural resources that will be required at various population levels. As it relates to environmental concerns, we are now supposing that the parties are constrained by international treaties regarding how much pollution and greenhouse gases their society is permitted to emit. (We shall return to this point.) After noting this divergence from Rawls's own system, I will continue to apply the rest of the special conception of justice (i.e., the difference principle and the just savings principle) in the next chapter. But we need to first begin to examine what the model so far has to say about how a constitutional democracy might handle the problem of climate change.

### **Handling Greenhouse Gases**

We shall suppose that one foreseen consequence of the human activity required in establishing and maintaining any well-ordered society is the emission of greenhouse gasses. And we shall assume that these greenhouse gasses cause global warming. Furthermore, we shall presume that an overall increase in the earth's (near surface) temperature will be bad for the constitutional democracy we are considering.<sup>21</sup> This is not only a prime example of an important environmental challenge that all liberal

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<sup>21</sup> I shall not spend time arguing these non-philosophical points. Interested readers can consult IPCC, *Climate Change 2007: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* ed. M.L. Parry, O.F. Canziani, J.P. Palutikof, P.J. van der Linden, C.E. Hanson, Eds. (Cambridge: Cambridge University Press, 2007), pp. 7–22.

democracies must now face—it is a case in point of a problem for which the solution is extremely divisive.

Note, then, that the extension to Rawls's theory that we are developing is built upon ideas that can be an object of an overlapping consensus of reasonable comprehensive theories of the good. To attune the Rawlsian model to the issue of how to control greenhouse gas emissions, imagine that the parties—still in the legislative phase of the domestic model—are constrained by a number of just institutions—international treaties, agreements, conventions, etc. To explain how the Rawlsian model bears substantively on how liberal democracies should handle important complex issues regarding greenhouse gasses, we shall now imagine the contracting parties considering the following three sorts of “carbon rationing” options: micromanaged direct regulation, direct taxation of greenhouse gasses, and cap and trade schemes.

The first sort of national policy is not a “free-market” solution. It involves neither taxes on greenhouse gas emissions nor allocation trading schemes. Instead, the idea would be to have the government directly manage all the details of release. This would involve federal policies dictating which entities (e.g., industries, companies, factories, and individual citizens) can release greenhouse gasses, how much gas can be released, as well as when and where releases are permitted. This “tight control” process could begin with policies limiting the amount of resources (e.g., trees, petroleum, natural gas, coal) that can be legally extracted. Perhaps it would involve a federally managed phasing out of coal. It could also involve strict fuel efficiency and emission standards on vehicles. It might involve price floors for nonrenewable forms of energy. It could also entail localized prohibitions on the use of petroleum, coal, natural gas, etc. This strategy would

most likely also involve the setting of tight limits for power plants and other facilities. It could also involve mandatory carbon offset programs.

Of the three strategies for controlling greenhouse gas emissions, this would be considered the most micromanaged and obtrusive. This “command and control” approach is consequently extremely vulnerable to government corruption and cronyism. Thus, the efficacy of such policies at helping to secure background environmental justice will be inversely proportional to the corruption and incompetence of the system of government implementing them. Furthermore, this option leaves open the question of how society should pay for the costly research, development, and implementation of “clean energy” alternatives. As Kant noted, ought implies can. But what if the relevant industries (automobile, coal, etc.) do not have the capital resources available to produce goods and services (“clean” cars, electricity, etc.) that can meet the regulatory requirements?<sup>22</sup> The Rawlsian model maintains that public funds cannot be used to subsidize the required research and development of “green alternatives” unless all citizens within society will benefit—including the least well off. For as we shall see later (when we consider the difference principle), the contracting parties will not consent to using taxes levied on the least advantaged members of society in a manner that only advantages better off participants within society.

These are justifiable concerns. However, nothing in the Rawlsian model we have so far considered prohibits the use of this sort of tough regulatory strategy for combating greenhouse gas emissions *per se*. It appears, then, that the parties might adopt this sort of approach—especially if it is needed to guarantee the equal basic liberties (which might

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<sup>22</sup> For example, at the time of this writing, two United States automobile manufactures—GM and Chrysler—are at serious risk of going into bankruptcy.

include basic environmental rights), to secure a constitutionally guaranteed social minimum (that will provide for the basic needs of all citizens<sup>23</sup>), or to ensure the fair value of an adequate scheme of basic liberties. Moreover, as we shall observe later, this guarantee is to also include future citizens—not only those who presently exist and benefit the most from today’s greenhouse gas emissions.

Consider the environmental position frequently defended by political libertarians, which is known as “free-market environmentalism,” or “third-wave environmentalism.” According to this sort of theory, society should treat environmental goods as social goods—e.g., privatize them and treat them as capital resources and other fungible goods. Structures within society should then ensure that externalities are internalized (e.g., make sure that miners, loggers, and polluters pay the true costs of production), and then let the free-market run its course. Now, the Rawlsian model is certainly not committed to robust free-market environmentalism. However, if properly implemented, the following two free-market approaches for handling greenhouse gasses might be compatible with some elements of the Rawlsian framework we are considering.

The next approach, then, that the contracting parties might consider at the legislative stage would be the direct taxation of greenhouse gas emissions.<sup>24</sup> As noted earlier, to assess this strategy we conceptually begin above the level of domestic society—i.e., when presented with the best information scientists can provide, we assume that the contractors would agree to global limits on greenhouse gas emissions. The core idea of this strategy is that a constitutional democracy is to then meet its required limits on greenhouse gasses (whatever it may be) by controlling the tax rates imposed on

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<sup>23</sup> See Rawls, *Political Liberalism*, pp. 228–229.

<sup>24</sup> Al Gore, Ralph Nader, James Hansen, and others, have embraced this type of strategy. For example, see Al Gore, *Earth in the Balance: Ecology and the Human Spirit* (Boston: Houghton Mifflin, 1992)

emissions. Under this sort of national plan, there would be no explicit limit on the amount of greenhouse gasses any single participant within society can discharge. Rather, greenhouse gas emissions would be strictly monitored (perhaps by the government or by competent private contractors) and then taxed. For example, each coal plant would then have to pay a tax based upon the amount of carbon dioxide it emits into the atmosphere. Similarly, individual households might have to pay a tax on the carbon dioxide emitted from burning natural gas. Such schemes would not constitute energy taxes *per se*—but would, rather, be taxes on “dirty energy.”

Many economists prefer this sort of strategy because, when compared with the “command-and-control” policies of direct regulation, it is believed to be more efficient, cost less, and be easier for society to implement.<sup>25</sup> If society deems it necessary to lower its greenhouse gas emissions, it simply raises the taxes on them, thus constraining purchasers to utilize alternatives. Consider the coal industry as an illustration. As the taxes on greenhouse gas emissions increase, the running of coal fired electricity production facilities will become more cost prohibitive. This should then constrain the coal industry to develop and employ alternatives—e.g., carbon-capture coal plants, thermal solar electric plants, and so forth. In the case of the automobile industry, the idea is that society would be using the free market—along with consumer choice—to raise the fuel efficiency of vehicles. As the cost of automobile fuel becomes more expensive (due to the additional emissions tax), consumers will want to purchase more fuel-efficient cars that emit less greenhouse gasses, or perhaps utilize more mass public transportation.

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<sup>25</sup> Gregory Mankiw and Mark Taylor, *Microeconomics* (Cengage Learning, 2006), pp. 198–199.

However, one concern here is that such taxes could be regressive.<sup>26</sup> For example, imagine (albeit unrealistically) that all members of society need to drive automobiles in order to have gainful employment. Suppose that the least well off members of society must spend roughly the same amount of money to drive to work as the most advantaged members of society. Let's say this cost amounts to one thousand dollars a year. In a situation like this, any consumption tax in the form of a sales tax per gallon/liter of fuel will force the least well off—especially those most dependent upon personal automobiles (like those in rural areas)—to pay a larger portion of their income when compared to the most well off members of society. Thus, for reasons discussed earlier, the Rawlsian model will generally eschew such policies.<sup>27</sup>

With this anxiety duly noted, we can point out some ways the direct taxation of greenhouse gas emissions (and other forms of “eco-taxes”) can be justified. While the Rawlsian model mandates that regressive taxes not be levied on citizens (and as we shall soon see, especially the least advantaged citizens) if the aim of the taxation is simply to generate governmental revenues, the parties still might agree to implement these sorts of policies if they are required to support the existence of a just and stable society over time. That is, if “eco-taxes” taxes are necessary to ensure that all present and (as we shall see) future citizens can develop and pursue a reasonable conception of the good, then such measures would be agreed to during the legislative phase of the Rawlsian heuristic. But if the situation becomes so grave that such regressive measures must be taken, then it would appear that other (non-regressive) measures would have to be taken as well. These would include the aforementioned “command and control” carbon rationing measures, along

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<sup>26</sup> See Gilbert Metcalf, “A Distributional Analysis of Green Tax Reforms,” *National Tax Journal* 52 (1999): 655–682.

<sup>27</sup> See pp. 88–89.

with government funded advertisements aimed at reducing carbon emissions, the development of alternative public transportation, bicycle trails, and so forth.

Moreover, we have already seen that corporations are participants in society, not citizens. They are socially constructed entities (to borrow an expression from Searle<sup>28</sup>), not natural people. Therefore (as I already argued), they are not to be granted constitutionally guaranteed property rights. During the legislative stage of the contracting process, the parties within the Rawlsian system understand that they represent the fundamental interests of people, not corporations. The upshot, then, is that in principle the parties will easily consent to the application of regressive “polluter pays” taxes on non-human participants, such as corporations. (In the next chapter we will address the concern that such higher costs will be transferred to consumers, and especially the least well off members of society.)

The third type of strategy the contracting parties might consider would involve “cap and trade” policies. As before, we begin with the idea that greenhouse gas emissions limits for particular societies have been fixed at some sort of supranational level. However, instead of taxing greenhouse gas emissions, the liberal democracy we are considering will meet its limits by selling the right to emit greenhouse gasses. While the general idea is that the government allocates permits (allowances) to release greenhouse gasses, there is some degree of flexibility in the application of this market-based approach. For example, cap limits might be set for particular regions, industries, companies, and so forth. But once the distributional scheme is drawn up, the allowances are to be sold on the free-market—e.g., through an auction. Moreover, participants could

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<sup>28</sup> John Searle, *The Construction of Social Reality* (New York: The Free Press, 1995)

also be able to sell unused allowances (through some sort of open market) to other participants, thus constraining all parties to use their allowances as efficiently as they can.

At the time of this writing, liberal democracies are only beginning to implement such policies on a serious scale. Within the past year, Barack Obama and Cass Sunstein have expressed preference for this method of combating global warming. It is the method embraced by the United Nations Framework Convention on Climate Change (UNFCCC). And, in the U.S., ten states are now cooperating in the Regional Greenhouse Gas Initiative (RGGI)—a cap and trade scheme for carbon dioxide emissions.<sup>29</sup> However, experts have been considering such policies for over two decades. Bruce Yandle (1984) cogently describes the rationale in the following manner:

Such a market would make it possible both to hold air emissions to a desired level and to allocate them to those who produced the greatest economic benefits to society... Second, having to pay for air emission rights would make the value of air quality obvious to both buyers and sellers, thus leading to conservation and an efficient use of pollution control devices... After all, by reducing emissions..., a firm could generate a saleable emission right... Air quality would be maintained or even improved, efficiency enhanced, and social conflict reduced.<sup>30</sup>

Thus, due to the monetary incentives involved with such schemes, many economists believe that such programs are the most efficient and effective method for controlling greenhouse gas emissions.

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<sup>29</sup> Participating states include: Connecticut, Delaware, New Hampshire, New Jersey, New York, Maine, Maryland, Massachusetts, Rhode Island, and Vermont.

<sup>30</sup> Bruce Yandle, "The Emerging Market in Air Pollution Rights," *Regulation* 2 (1978): 21–29. Reprinted in Mark Sagoff's "Ethics and Economics in Environmental Law," in *Earthbound: new introductory essays in environmental ethics* ed. Tom Regan (New York: Random House, 1984), p. 164.

Once again, in principle it does not appear that anything we have discussed so far precludes market based “cap and trade” systems from being amalgamated into the Rawlsian model. However, it is clear that, during the legislative stage, the contracting parties would consent to such schemes only if no citizen’s basic rights will be violated. So, for us to determine whether a particular federal cap and trade scheme (which might also include carbon credits, emission reduction credits, etc.) is just, we must first ask if it will undermine any citizen’s basic rights or liberties (as specified by the first principle of justice). In the next chapter, we shall note that this includes future citizens as well as presently existing ones. The upshot is that the contractors will not agree to free-market environmental solutions that “underprice” risks—especially those risks that could violate citizens’ basic rights (including the basic environmental rights of future citizens).

Second, the parties will only agree to a policy if the conditions of fair equality of opportunity are met. In his *JF*, Rawls says, “With background institutions of fair equality of opportunity and workable competition required by the prior principles of justice, the more advantaged cannot unite as a group and then exploit their market power to force increases in their income.”<sup>31</sup> Accordingly, if the scheme involves the auctioning off and trading of greenhouse gas allowances, then such auctions and trading systems must be publicly open to all under conditions of fair equality of opportunity—e.g., so that smaller participants can compete on par with the more advantaged. Moreover, the Rawlsian model eschews the political lobbying of powerful energy industries (like coal) in order to receive allowances for free, or even at a reduced price. (This will be discussed in more detail shortly.) No allotment and trading scheme is just if it allows those who are better

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<sup>31</sup> Rawls, *Justice as Fairness*, p. 67.

off to take advantage of their market power, unless (as we shall see) such advantages are an improvement to all—including the least well-off citizens.

While we have considered three approaches to controlling greenhouse gas emissions (micromanaged direct regulation, direct taxation of greenhouse gasses, and cap and trade schemes), it would be a false dichotomy to think that these are the only options available. While these sorts of policies are the ones presently being most fiercely debated, there are surely other possibilities—e.g., mandatory decreases in human population levels. Moreover, it is theoretically feasible for a property owning constitutional democracy to bring about background justice by using combinations of these strategies—e.g., by using the tax method and the trade method. Still, we are beginning to see some of the main concerns and compatibilities the Rawlsian framework we have so far considered has with these types of policies regarding how free and equal citizens can deal with the important issue of global warming. But a more complete description of what such strategies should look like will require an examination of the last principles of Rawls's justice of fairness. These are the difference principle and the principle of just savings, to which we shall now turn our attention.

## Chapter Seven

### Just Savings and the Difference Principle

A principle aim of a theory of environmental justice is to answer the question of what constitutes a just distribution of environmental goods (e.g., benefits related to natural resources) and environmental hardships (e.g., burdens related to the despoiling of the natural environment).<sup>1</sup> We can now perceive that other attempts to connect Rawls's freestanding theory to environmental justice have been grossly oversimplified—a full account of Rawlsian environmental justice requires more than simply utilizing the difference principle. Moreover, any account of Rawlsian environmental justice will be procedural (not “allocative”<sup>2</sup>). That is, a distribution of environmental benefits and burdens is just only when it arises within a system of processes (within a liberal democracy) that is itself fair. I have been referring to this as “background environmental justice.” As we have observed, this means that disparities in environmental goods/hardships (e.g., pollution levels) can only be tolerated if nobody is below the safe level (as required by the first principle of justice). The disparities also must arise in accord with the principle of fair equality of opportunity—i.e., all citizens must have a fair equal opportunity to be made more or less advantaged by the disparities. Background environmental justice thus requires preventing excessive concentrations of wealth, as well as ensuring that structures within society do not distribute environmental goods/burdens capriciously—based upon race, sex, age, sexual orientation, religion,

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<sup>1</sup> Simon Caney defines an *environmental injustice* as “a situation in which some people either (a) lack a fair share of environmental benefits (i.e., benefits stemming from natural resources) or (b) have to bear an unfair share of environmental burdens (i.e., burdens stemming from harms to the environment).” Simon Caney, “Environmental Injustices and Reparations,” *Journal of Social Philosophy* 37 (2006): 465.

<sup>2</sup> Rawls, *Justice as Fairness*, p. 50.

disability, and so forth. It also requires measures to ensure the fair value of all the political liberties—voting, political speech, running for political office, and so forth. But this still does not suffice as a complete description of background environmental justice within a constitutional liberal democracy. To complete our description of background environmental justice, we must consider the last two key elements of the framework: the principle of just savings, and the difference principle. We shall do so now.

### **Just Savings and Sustainability**

In chapter four we observed how fundamental environmental rights could be incorporated into the Rawlsian system. In chapter five I began to provide a Rawlsian justification for the existence of federal environmental agencies and policies. I also explained how the contracting parties would employ the principle of fair equality of opportunity in making various environmental policies. We have seen that while meeting the target level “caps” on pollution and greenhouse gasses that have been established, a liberal constitutional democracy must secure fair equality of opportunity for all its citizens to participate in the production of goods and services. Thus, while competition is permitted, fair equality of opportunity prevents certain industries (e.g., petroleum, coal) from dishonestly impairing others—solar, wind, etc. Once these prior conditions—mandated by the principles of equal liberty and fair equality of opportunity—are met, it seems like Rawls’s difference principle will then permit differences in environmental goods/hardships only if everyone (including the least well off) will benefit from the disparities.

However, a Rawlsian theory of background environmental justice cannot be successful unless it can account for justice between generations. Referring to the basic

structure of society, Rawls says “...as a framework that preserves background justice *over time from one generation to the next* it realizes the idea (central to justice as fairness) of pure background procedural justice as an ideal social process...”<sup>3</sup> While presently existing citizens of liberal democracies possess myriad legitimate claims to environmental goods (e.g., natural resources), they must be counterbalanced by the claims that future generations also have to a wide variety of environmental goods. Moreover, it seems intuitive that citizens of liberal democracies should allocate some of their society’s resources to “handing off” to future citizens a society with just institutions in place. This, then, raises a number of significant questions for the present Rawlsian framework.

For example, during the legislative stage, would the contracting trustees agree to trade off certain liberties, like the right of present citizens to drive SUVs that get four miles per gallon of gasoline (merely for the purpose of recreation) in order to protect the claims of future generations? Would the representatives consent to curtail certain property rights, like the legal right of a corporation to purchase and remove the top of a mountain in order to extract coal, in order to protect claims that future generations might have to the same mountain (and the buried coal)? Recall, then, that Rawls thought that the difference principle also included a principle of just savings, which is to then provide a constraint upon the difference principle’s application.<sup>4</sup> And it is the principle of just savings, then, that should assist citizens of free democracies when grappling with issues surrounding justice between generations. Thus, before concentrating of the difference principle (in the

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<sup>3</sup> Rawls, *Justice as Fairness*, p. 57. I have added italics for emphasis.

<sup>4</sup> Rawls, *Theory of Justice*, p. 292.

second part of this chapter), we shall first examine this constraint of just savings, and examine its proper connection to background environmental justice.

Let us momentarily leave the legislative stage and return to the first stage of Rawls's contractualist apparatus—the original position of equality. While the parties in the original position do not know their citizen's generation, Rawls embraced a “present time of entry” interpretation—under which the contracting parties understand that the citizens who they represent are contemporaries.<sup>5</sup> Now, in his *Theory*, Rawls asked us to view the contracting parties as “representative men” who represent family lines, and who care about their successors.<sup>6</sup> Thus, according to his *Theory*, “...the persons in the original position are to ask themselves how much they would be willing to save at each stage of advance on the assumption that all other generations are to save at the same rates.”<sup>7</sup> But Rawls eventually thought that his account of just savings in *Theory* was defective.<sup>8</sup>

Due to suggestions given to him by Thomas Nagel and Derek Parfit, Rawls amended his earlier account of just savings.<sup>9</sup> Specifically, a mature Rawls did not think that one must view the contracting parties as men, or heads of families, or as having any sort of sentiments regarding future generations. Rather, Rawls simply argued that the principle the parties would select would be the one that the representatives would want all previous generations to have followed. In his *JF*, Rawls says:

The correct principle... is one the members of any generation (and so all generations) would adopt as the principle they would want preceding generations to have followed, no matter how far back in time. Since no

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<sup>5</sup> Ibid., p. 292.

<sup>6</sup> Ibid.

<sup>7</sup> Ibid., p. 287.

<sup>8</sup> Rawls, *Political Liberalism*, p. 20.

<sup>9</sup> See Rawls, *Justice as Fairness*, p. 160. See also, Rawls, *Political Liberalism*, p. 274.

generation knows its place among the generations, this implies that all later generations, including the present one, are to follow it. In this way we arrive at a savings principle that grounds our duties to other generations: it supports legitimate complaints against our predecessors and legitimate expectations about our successors.<sup>10</sup>

So, consider the perspective of the contracting parties during the legislative stage. One might think that at this point they understand that there is the real possibility that their citizen might end up being a member of a future generation. If this were the case, then the symmetrically situated representatives would be constrained to produce federal legislation that would ensure the least bad outcome for their citizen—irrespective of the generation of society that the citizen might be placed. Indeed, due to the maximin rule, the parties might attempt to secure the best worst outcome for their citizen—irrespective of the generation in society that he or she will be placed. This is not the case. When considering intergenerational justice, one should *not* think of a contracting situation in which the contractors are unaware of the generation into which their citizen will be placed when the veil of ignorance is lifted.<sup>11</sup> Again, due to the present time of entry feature of the Rawls's contractualist project, during the legislative phase the parties understand that the citizens whom they represent are contemporaries.

Now, Rawls's definitive statement regarding the relation between the difference principle and the just savings principle is the following: "The principle of just saving

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<sup>10</sup> Rawls, *Justice as Fairness*, p. 160.

<sup>11</sup> This has been suggested by Edith Brown Weiss, *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity* (New York: Transnational Publication and the United Nations University, 1989)

holds between generations, while the difference principle holds within generations.”<sup>12</sup>

But which principle is prior—i.e., which “trumps” the other? Rawls maintained that the contracting parties would agree to the just savings principle after the difference principle in the original position of equality. Nonetheless, the principle of just savings is to constrain the application of the (intragenerational) difference principle during the legislative stage.<sup>13</sup> If this is the case, then ascertaining the proper restrictions on the difference principle (after the requirements of the equal liberty principle and the principle of fair equality of opportunity have been met) requires us to specify what, and how much, must be saved for future generations.

In terms of just savings and sustainability, there are many environmental goods that cotemporary members of constitutional liberal democracies might save for future generations: species of plants and animals, pristine vistas, clean air, unpolluted water, uncontaminated soil, and the like. If these environmental goods are not saved, then perhaps future generations should somehow be compensated. For example, Brian Barry has argued that our generation should take measures to pay future generations for our use of natural resources that future citizens could have used. He says, “As far as natural resources are concerned, depletion should be compensated for in the sense that later generations should be left no worse off (in terms of productive capacity) than they would have been without the depletion.”<sup>14</sup> Perhaps, then, if our generation uses up most of a natural resource, like petroleum, then it has a duty to recompense future citizens by

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<sup>12</sup> Rawls, *Justice as Fairness*, p. 159.

<sup>13</sup> Rawls says: “...the savings principle is agreed to after the principles of justice for institutions, even though this [just savings] principle constrains the difference principle.” Rawls, *Theory*, p. 289.

<sup>14</sup> Brian Barry, “Intergenerational Justice in Energy Policy,” in Douglas MacLean, *Energy and the Future* ed. D. MacLean and P. Brown (Totowa, NJ: Rowman and Littlefield, 1983), reprinted in *Justice: Key Concepts in Critical Theory* ed. M. Fisk. (Atlantic Highlands, NJ: Humanities Press, 1993), p. 231.

leaving them other social goods—money, an internet, new forms of energy technology, and so forth. However, while the citizens of a free pluralistic society might have a duty to bequeath future generations such entities, from the perspective of the present model, such a duty is not grounded in compensation for our use of natural resources. For, in fact, nothing we have so far considered even suggests the notion of compensatory justice.

On the other hand, one might suppose that citizens of democratic regimes are to view themselves as collectively holding the natural environment as trustees for all citizens—including future generations. However, Rawls never explicitly made this claim.<sup>15</sup> Nonetheless, the idea that members of any particular generation are trustees of the natural environment for future generations can be an object of an overlapping consensus of reasonable conceptions of the good.<sup>16</sup> Thus, this would be an acceptable extension to his theory. And, along these lines, others have argued that our generation is obligated to “hand off” to future generations a natural environment that is in no worse an overall condition as when our generation received “control” over it.<sup>17</sup> But if all citizens (present and future) collectively “own” presently existing environmental goods, and if citizens of any generation are then trustees for future generations, then how much of society’s natural resources is any generation permitted to use? Rawls asked us to view society as a fair system of social cooperation (i.e., those socially coordinated activities guided by publicly recognized rules and procedures), over time, from one generation to the next.<sup>18</sup> But there is no theoretical limit to the number of generations to be included within society. Thus, no generation of citizens could use (non-renewable) natural resources (e.g.,

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<sup>15</sup> It might, however, be modeled into the original position of equality.

<sup>16</sup> See Brown Weiss, *In Fairness to Future Generations*, pp. 18–21.

<sup>17</sup> Again, see Edith Brown Weiss, *In Fairness to Future Generations*. Her model is international, not domestic.

<sup>18</sup> Rawls, *Justice as Fairness*, pp. 5–6. This was discussed in chapter two.

coal, oil) if doing so would not leave future generations with a natural environment in at least as good of a condition as when the citizens inherited it. If this type of constraint were placed upon the application of the difference principle, then society would not be permitted to use any of its nonrenewable natural resources—even if this would be to the detriment of the least advantaged members of society.

No doubt, a case for very strong sustainability could be made along those lines. However, from the perspective of the present framework, a more reasonable approach is as follows. In his *JF*, Rawls maintained that the salient issue for the symmetrically situated contracting parties is: “...how much (what fraction of the social product) are they prepared to save...”<sup>19</sup> By viewing the natural world (or parts of it) as natural capital, perhaps it can be included in “the social product” of society, and thus be included in the items to be saved in accord with Rawls’s just savings principle. Dorrothee Horstkötter (2004) has suggested something like this.<sup>20</sup> She is correct. However, there are several caveats. First, Rawlsian background environmental justice requires more than saving sources of energy, trees, mountains, clean water, and other forms of “natural capital” for future generations. Background environmental justice also requires the development and preservation of human-made social and political entities that can meet the demands of Rawls’s special conception of justice over time. I shall return to this point momentarily. Second, as we have been observing, like the difference principle, the intergenerational principle of just savings is not to be straightforwardly applied willy-nilly. In his *JF*, Rawls says:

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<sup>19</sup> Rawls, *Justice as Fairness*, p. 160.

<sup>20</sup> Dorrothee Horstkötter, “Sustainability and plurality: from the moderate end of the liberal equilibrium to the open end of a situated liberal neutrality,” in *Liberal Democracy and Environmentalism: the end of environmentalism?* ed. M. Wissenburg and Y. Levy (New York: Routledge, 2004), p. 157.

*Real saving is required only for reasons of justice: that is, to make possible the conditions needed to establish and to preserve a just basic structure over time.* Once these conditions are reached and just institutions are established, real savings may fall to zero. If society wants to save for reasons other than justice, it may of course do so; but that is another matter.<sup>21</sup>

Thus we must investigate what is needed to establish and preserve the institutions of background environmental justice that we have so far examined. Specifically, we must ask: what entities are needed to meet the requirements of the equal liberty principle and the principle of fair equality of opportunity, for an indefinite number of future generations? Let us begin with the first principle of justice.

### **Securing Basic Environmental Rights for Future Citizens**

Suppose, again, that we are at the legislative stage of the Rawlsian heuristic. We have so far imagined that the contractors have institutions in place to meet the requirements of the equal liberty principle as well as the principle of fair equality of opportunity for presently existing citizens. Now, I have noted that the intragenerational difference principle is constrained by the intergenerational principle of just savings. This means that—before they apply the difference principle—the contracting parties will first agree to adopt policies for society that will secure basic environmental rights for future citizens. Recall, then, that the equal liberty principle requires that all citizens have the same infeasible claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all.<sup>22</sup> We have seen that these basic

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<sup>21</sup> Rawls, *Justice as Fairness*, p. 159. I have added italics for emphasis.

<sup>22</sup> *Ibid.*, p. 42.

rights and liberties include the freedom of thought, the freedom of conscience, the basic political liberties (e.g., the right to vote, the right to participate in politics), freedom of association, the rights and liberties related to the freedom and integrity of the person, the right to hold and to have exclusive use of personal property, and the rights and freedoms related to the rule of law. In chapter four, I suggested that the contracting parties would agree that this list of equal basic rights and liberties should include certain negative environmental rights—i.e., not to have harmful levels of air, water, and soil pollution interfere with a citizen's rational and reasonable life plans.

In order to meet the demands of background environmental justice, it is accordingly necessary for liberal democracies to adopt legislation and policies that will restore, protect, and maintain the natural environment at a level that can secure these environmental rights for all citizens—present and future. This means that the policies designed to guarantee a safe level of environmental health (plans related to the control of environmental diseases, sanitation procedures, access to safe water, and so forth) have to be preserved for future generations. For example, policies must be in place to ensure that Mercury pollution from coal-fired plants is at safe levels that will not injure the health of any present or future citizen. It also means that society must devote resources to doing things like removing soil contamination—at least to levels at which no (present or future) citizen's basic environmental rights are violated. Thus, federal superfund laws and agencies must be in place to deal with unhealthy pollution. Nuclear power plants might be banned if no safe long-term solution to handling nuclear waste is available. Also, the government must maintain tight control of many synthetic chemicals. From the Rawlsian perspective, these are simply matters of basic justice. Moreover, the parties would also

agree to enact human population control measures if such measures are required to secure basic rights (including environmental rights) for future generations.

Accordingly, the previously discussed environmental impact assessments must include the long-term effects of society's proposed policies. With environmental impact assessments (to which the parties already agreed) in place, many proposed projects that could violate future citizens basic environmental rights would also be prohibited. One cannot be precise, but examples might include banning clear-cutting or mountaintop coal removal projects—if they have the potential to disturb hydrological cycles, increase the likelihood of mudslides and soil erosion, cause flash flooding, and so forth. More generally, then, the environmental laws and enforcement agencies of a constitutional democracy must not only be maintained for presently existing citizens—they must be preserved for future citizens, as well. In addition, background environmental justice accordingly requires that the system of law to bring environmental polluters to justice be preserved for an unbounded number of generations.

### **Intergenerational Justice: A Social Minimum**

Another feature of Rawls's theory that bears on the present discussion is Rawls's insistence on a social minimum that people are owed in virtue of their humanity.<sup>23</sup> In chapter four we saw that Rawls thought that this minimum ought to cover citizens' basic needs, and that it should be a constitutional essential. Accordingly, the parties at the legislative stage will agree to take measures to ensure that the environmental goods contained within the constitutional minimum are guaranteed for future citizens, as well as presently existing ones. All citizens (present and future) are to be constitutionally entitled to enough of a minimum of social goods so that they can effectively exercise their

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<sup>23</sup> Ibid., pp. 129–130.

abovementioned basic rights and liberties. Accordingly, besides the aforementioned negative environmental rights, the parties will also agree to enact measures that will ensure that future citizens are provided whatever positive environmental goods are required for a decent human life.<sup>24</sup>

If the parties were to then understand that particular environmental policies (e.g., replacing petroleum with locally grown biomass, providing public incentives to reduce one's carbon footprint) are needed to guarantee that future citizens have the myriad goods needed to pursue a decent human life, they would do so. Moreover, as I argued earlier in chapter five, the contracting parties will employ precautionary reasoning when deliberating on such matters. For these reasons, the present freestanding framework supports sustainable development (or "sustainability,"<sup>25</sup> for short)—i.e., policies that (following the World Commission on Environment and Development) require "development that meets the needs of the present without compromising the ability of future generations to meet their own needs."<sup>26</sup> The contracting representatives will consent to measures that, for example, will ensure that agricultural activities do not disrupt long-term ecological sustainability. And, more generally, if, within the confines of the other principles of justice, the risk-averse parties at the legislative stage understand that sustainable practices (sustainable agriculture, sustainable fishing, sustainable forestry, and so forth) are needed so that future citizens can exercise their basic liberties and live a decent life, they will agree to adopt them. Similarly, if the parties (who are

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<sup>24</sup> Ibid., p. 129.

<sup>25</sup> I shall use 'sustainable development' and 'sustainability' as rough synonyms. See Allan Holland, "Sustainability," in *A Companion to Environmental Philosophy* (Malden, MA: Blackwell Publishing, 2003), p. 390.

<sup>26</sup> World Commission on Environment and Development, *Our Common Future* (Oxford: Oxford University Press, 1987), p. 8. Quoted in Holland, "Sustainability," p. 390.

employing precautionary reasoning on such important matters) realize that a policy (like permitting the long term general use of genetically modified organisms) could undermine any citizen's ability to exercise his or her basic liberties or pursue a decent life, they will not consent to it.

### **Securing Fair Equality of Opportunity for Future Citizens**

We are spotlighting the idea that besides physical environmental goods (e.g., clean water, trees), Rawls's principle of just savings implies that each generation has a duty to develop and sustain just environmental policies and institutions (laws, environmental protection agencies, etc.) for future generations. We have just seen that background environmental justice requires a society of free and equal citizens to take measures to secure basic rights and liberties (including basic environmental rights) and a social minimum for future citizens. However—and again this is independent of the difference principle—liberal democracies must also take measures to secure fair equality of opportunity for future citizens, as well. Recall, then, that referring to the aim of the principle of fair equality of opportunity, Rawls says “In all parts of society there are to be roughly that same prospects of culture and achievement for those similarly motivated and endowed.”<sup>27</sup> To this end, background environmental justice requires the previously discussed policies of chapter five—universal education, prohibitions on corporate lobbying, the criminalization of selling the public trust, campaign finance reform, prohibitions on monopolies, policies to avoid excessive concentrations of wealth, etc. The present model maintains that if such institutions are not in place, a liberal constitutional democracy has a duty of justice to enact them. Moreover, the intergenerational requirement of just savings now stipulates that these structures be maintained not only to

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<sup>27</sup> Rawls, *Justice as Fairness*, p. 44.

guarantee basic rights and liberties (along with fundamental environmental rights) and a social minimum for future generations—they must also ensure fair equality of opportunity for future citizens.

Suppose, then, that the parties are aware of the fact of corruption. That is, the contracting representatives understand that when unchecked, governmental structures tend to become corrupted. The parties will agree to measures to mitigate corruption as much as possible, within the constraints of the basic principles of justice. For example, as the wealthy will have a general tendency to complain and fight certain types of taxation (progressive taxation, a wealth tax, etc.), measures must be taken so that the wealthiest citizens of any generation cannot prevent the adoption of various measures a society might take to prevent excessive concentrations of wealth. Also, if it has not done so, a liberal democracy must take measures like ensuring that large chemical companies, say, cannot interfere (e.g., by lobbying) with the legislative and regulatory processes.

Of course, certain amounts of natural capital will also undoubtedly need to be restored and saved to meet the demands of the principle of fair equality of opportunity over time. Suppose, for example, that enjoying wilderness is part of a reasonable conception of the good. Parks and wildlife refuges will then be needed so that all (similarly motivated and talented) future citizens will have the same fair chance at hiking, camping, and other forms of enjoying or communing with nature. Rawlsian background environmental justice also necessitates liberal democracies developing wildlife corridors, protecting roadless areas, maintaining coral reefs, and so forth, if failing to do so would deny present and future generations a fair chance at partaking in such opportunities. The same

holds for legitimate government purchasing land (e.g., for “green-spaces”) if doing so is required to ensure the fair equality of opportunity for all (including future) citizens.

Nevertheless, is the framework so far considered sufficiently strong to defend all citizens’ (including future citizens) right to commune with nature—in a religious sense? I have already shown that the equal liberty principle justifies constitutionally protecting citizens’ freedom of thought and religion. As was discussed in chapter two, this is relevant to environmentally minded citizens who have non-standard religious beliefs (e.g., neopaganism), or perhaps no religious convictions at all. In this vein, Aaron Lercher (2006) has argued that a person’s right to freedom of ecological conscience—“the human capability of having an idea of natural value and pursuing this as a human end”—is very similar to his or her right to freedom of religion.<sup>28</sup> Moreover, Lercher argues that destroying the natural environment is akin to destroying a church, a mosque, or a temple. While the present model of political liberalism is compatible with a general freedom of ecological conscience, it cannot embrace the latter aspect of Lercher’s polemic. This is due to the fact that the notion of the natural environment being analogous to a temple cannot be the object of an overlapping consensus of reasonable conceptions of the good. Nonetheless, the requirement of just savings maintains that if future generations are to be able to effectively utilize their right to freedom of ecological conscience, then our generation must preserve a certain amount of the natural environment for them.

Admittedly, this is still a rough sketch of what a Rawlsian framework of background environmental justice looks like. Nonetheless, at this point in the heuristic the general idea is that as a procedural theory, background environmental justice requires that fair

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<sup>28</sup> See Aaron Lercher, “Liberty of Ecological Conscience,” *Environmental Ethics* 28 (2006): 315–322.

equality of opportunity in competing for environmental goods be secured for all citizens (including future citizens). More requirements will be discussed below. Again, with such institutions in place, Rawlsian procedural justice requires that effective court systems and the rule of law then be established and preserved for future generations. The hope, then, is that a liberal democracy well-ordered by the present model would be one in which, within any generation, all citizens with the same natural aptitudes (and who are similarly motivated) have the same chances of being elected for public office, determining the society's energy policy, shaping environmental regulations, and so forth. With such institutions in place, we can consider the application of the intragenerational difference principle. We shall do so after we briefly consider the non-identity objection, which some philosophers take to be a barrier to sufficiently grounding justice to future generations.

### **The Non-Identity Objection**

No person's parents could possibly be different than his or her own. It follows, then, that nobody has any other possible ancestors than his or her own ancestors. There is no reason to suppose that this does not hold for future generations of citizens, as well. While it might appear counterintuitive, one might argue, then, that future citizens cannot be wronged (i.e., in term of basic environmental rights violations, being denied a social minimum, being subjected to unfair equality of opportunity) by our society's political corruption, lax environmental standards, and the destruction of numerous environmental goods. The idea is that if, one hundred years ago, a political culture existed that enacted and enforced stringent environmental legislation (or, in general, society had a more just basic structure), the world would be so much different than it actually is that presently

existing citizens would not exist. Other people—who are not identical to presently existing citizens—would exist, instead.

However, it is *prima facie* plausible that people are better off existing than not existing. Annette Baier has called this Parfit-style non-identity concern “The Futurity Problem.”<sup>29</sup> If the argument is sound, then we have good reasons for thinking that future citizens are not entitled to environmental goods—e.g., clean water, untrammelled forests, unpolluted soil—that are still found within our present society. The same holds for the human-made institutions that are needed to secure background environmental justice. Perhaps, then, present citizens need not concern themselves with securing basic rights and liberties, a social minimum, or fair equality of opportunity for future members of society.

Imagine that toxins in the environment cause a future citizen (say, one hundred years from now) to develop a debilitating terminal disease. Suppose that she criticizes her predecessors—arguing that she suffers because precautionary measures were not taken to sufficiently control the toxins. According to the “Futurity Problem”, she has no legitimate complaint. Because the possible worlds in which precautionary measures are taken to control the toxins are so different than the actual world, she should be grateful that the toxins that caused her disease were not banned. If they had been banned, she and her family and friends would not have come into existence. Different people would exist instead.

The way to properly grapple with these Parfit-style worries is not to employ Lewis-style modal realism. Rather, the way to skirt the non-identity problem is to avoid

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<sup>29</sup> Annette Baier, “For the Sake of Future Generations,” in *Earthbound: new introductory essays in environmental ethics* ed. Tom Regan (New York: Random House, 1984), pp. 214–246.

subjunctive comparisons altogether. That is, one does not want to compare the actual world with possible worlds in which certain environmental injustices did not occur. Every generation leaves a legacy for future generations—irrespective of such Parfit style objections. For example, many people suffer today because of high concentrations of lead and arsenic found in the soil. This is not a subjunctive comparison. Perhaps these (very same) individuals would not have existed if, one hundred years ago, tougher environmental standards had been in place to prevent the lead and arsenic pollution. Still, past pollution serves as a causal explanation for many social hardships today, like cancer and lead poisoning. This is not a counterfactual claim. The actions of past generations *have* harmed presently existing individuals. Likewise, many of our actions today—like using toxic manufacturing and agricultural techniques—can make it harder (or easier) for future people to secure primary goods. Thus, future citizens are entitled to environmental goods. Thus, within a constitutional democracy, cotemporaneous citizens of any generation must take measures to guarantee basic environmental rights for future citizens, to secure a social minimum of environmental goods for future citizens, as well as to enact and maintain social and political structures that will enable future citizens to compete for all other environmental goods and hardships in accord with the requirement of fair equality of opportunity.

### **The Difference Principle**

Again, the difference principle says that social and economic inequalities are to be to the greatest benefit of the least advantaged members of society.<sup>30</sup> However, this principle is not to be applied unsystematically. We have already seen that both the equal liberty

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<sup>30</sup> Rawls, *Justice as Fairness*, pp. 42–43.

principle and the principle of fair equality of opportunity both are prior to the difference principle. In his *JF*, Rawls says:

This priority means that in applying a principle (or checking it against test cases) we assume that the prior principles are fully satisfied. We seek a principle of distribution (in the narrow sense) that holds within the setting of background institutions that secure the basic equal liberties (including the fair value of the political liberties) as well as the fair equality of opportunity.<sup>31</sup>

This explains why we considered the equal liberty principle in chapter four, and the principle of fair equality of opportunity in chapter five. These prior principles are “pulling their weight” in terms of reducing inequalities of wealth (via progressive taxation), providing universal health care, prohibiting monopolies, setting limits on campaign contributions and lobbying by large corporate interests, ensuring that all citizens have a healthy environment in which to reside and work, etc., even before the difference principle comes into play.

As has already been noted, one should not suppose that the difference principle requires constitutional democracies to adopt policies that will steadily improve the expectations of the most disadvantaged members of society over time. Rawls says, “That would not be a reasonable conception of justice.”<sup>32</sup> Rather, Rawls thought that once the difference principle is fully realized, inequalities in the worth of equal liberties within society will be arranged so that the value of the basic liberties are maximized for

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<sup>31</sup> *Ibid.*, p. 43.

<sup>32</sup> *Ibid.*, p. 64.

society's least well off citizens.<sup>33</sup> In fact, Rawls thought that the difference principle expresses concern for all members of a society of free and equal citizens. This is because it says that the only justification for inequalities is their making the worse off members of society better off than they would be under any other scheme.<sup>34</sup>

So as an example, suppose that during the legislative stage the contracting parties agree to implement some sort of policy aimed at creating “green jobs.” The difference principle implies that this sort of policy cannot be shaped in a way that betters the most advantaged citizens in society unless it betters the least well off members, as well. Similarly, the Rawlsian model maintains that if a liberal democracy adopts the previously discussed straight “eco-taxes” (e.g., carbon taxes) or “cap and trade” policies, then such schemes must not only benefit the most advantaged. Everyone in society must gain—including the least well off. In fact, ideally, such emission (and pollution) policies would be to the maximum benefit of the least advantaged members of society. Thus, a public subsidy, in term of simply giving away the right to emit greenhouse gasses to big energy companies (as has been done in Europe, Australia, and the United States), is unjust according to the present conception of political justice.

One might think, then, that the revenues from such “cap and trade” policies must be directly distributed in accord with Rawls's difference principle—i.e., distributed directly to the benefit of the least advantaged citizens. This is not the correct application. In fact, such a reading would be a drastic oversimplification of the framework. Instead of thinking of the difference principle as implying that a constitutional democracy should take the revenues from a carbon tax (or the proceeds from the auctioning off of permits to

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<sup>33</sup> Rawls, *Theory of Justice*, pp. 204–205.

<sup>34</sup> Rawls, *Justice as Fairness*, p. 71.

pollute) and simply distribute them to the least well off members of society, the idea is that Rawlsian background justice requires that revenues from these programs be used to protect basic rights (including a right to a healthy environment), to ensure a social minimum (as required by the first principle of justice), as well as to guarantee fair equality of opportunity for all citizens (including future citizens). This does not mean, then, that the government is to print checks to all its poor citizens (although it might sometimes be justified in doing so). Rather, along with all other government money, the revenues should be spent on law enforcement, housing, food (or food vouchers), healthcare, education, job training, and so on, in a manner that benefits all citizens. Under the present extension, this means that money should also be devoted to environmental projects when required by the equal liberty principle (e.g., to ensure the safety of all citizens) and the principle of fair equality of opportunity (e.g., providing “clean” affordable public transportation, ensuring open and fair markets for electric or hydrogen cars).

As noted earlier, the Rawlsian model generally eschews regressive tax policies. Nonetheless, under certain sorts of contracting circumstances, the parties would consent to some regressive types of “eco taxes” during the legislative stage of the framework we are considering. First, one can see now that the contracting parties would agree to such measures if they were needed to secure fundamental environmental rights for present or future citizens. For example, the contracting parties would agree to “eco-taxes” that are truly needed to prevent harms to human health. Second, the parties would agree to regressive “eco taxes” if they are required to ensure that present or future citizens have the required social minimum of environmental goods (or other social goods) owed to

them in virtue of their humanity. Third, the parties would agree to regressive ecological taxes if required by the principle of fair equality of opportunity. In all of these cases, however, the aim of such taxes (e.g., a gasoline tax) must not be simply to raise revenues for the government, but to change the behavior of participants within society—to use “clean” energy, transportation, consumer products, and so forth. However, as was noted in the last chapter, if such regressive measures are truly required, then a variety of non-regressive measures have to be taken as well—environmental education, stricter environmental regulations, “clean” public transportation, publicly funding home energy audits for the least well off citizens, and so forth.

Let us now turn our attention to possible disparities in the rates of greenhouse gas taxation—say between different industries, industrial facilities, households, etc. Can this type of differential treatment by a constitutional democracy’s basic structure be justified? It can. But there are two key points to note. The first is that the Rawlsian model only condones this sort of discrimination when it will maximally benefit the least advantaged members of society, and when the requirements of the prior principles of justice are satisfied. Imagine, for example, that society embraces a carbon tax solution to controlling greenhouse gas emissions. And suppose that the government considers a policy exempting commercial airlines from paying the additional carbon tax when purchasing aviation fuel. The present framework would only allow this sort of plan if the best evidence indicates that the tax scheme will benefit the least well-off citizens of society, and if the requirements of fair equality of opportunity are not violated.

As I argued earlier, the second key point is that corporations are merely participants in society. As such, they cannot even be considered as the least advantaged citizens. This is

not anti-capitalist. Again, capitalism, along with free market strategies for combating global warming (and other types of rationing of environmental goods), is permitted under the Rawlsian model. However, capitalist structures must be regulated so that—assuming the constraints of the prior principles are met—not only the most advantaged participants (e.g., large for-profit corporations) benefit from them. Furthermore, not only is it permissible to treat corporations differently than citizens—the implication of Rawls’s difference principle is that a constitutional democracy must do so if it will benefit the least advantaged members of society. Therefore, in principle a government is obligated, for example, to set the carbon taxes for corporately owned coal plants at a much higher rate (than other participants within society) when doing so will benefit the least well-off citizens.

However, we are still left with several related problems. As we have seen, the Rawlsian model can embrace certain aspects of free market environmentalism. According to this creed, one method of distributing the right to pollute and emit greenhouse gasses is to sell it—i.e., through allocations. Another is to place taxes on pollution and the emission of greenhouse gasses. Once such measures (e.g., “cap and trade,” carbon taxes) are in place, society is to then let the free market run its course. It seems, then, that besides complying with the prior principles of justice, with the requirement of the difference principle, such measures must make the least advantaged members of society better off than if they were not implemented. With free-market solutions, the polluter must pay. However, what if those who are polluting are the least advantaged members of society? Also, it seems like many polluters (e.g., energy companies) will simply pass the

increased costs of polluting on to consumers—many of whom are the poorest members of society.

It is reasonable to assume that energy costs for the poorest members of society will increase if energy companies are permitted to pass the costs of carbon allowances (and taxes) on to customers. But while such measures would eventually end up being regressive, the result should be a decrease in “end level” consumers’ carbon-based energy usage. Perhaps, then, liberal democracies should provide vouchers for the least well off citizens. However, what motive is there for economically disadvantaged families to decrease their energy usage if the government is paying their utility bills? It appears that if a constitutional democracy merely reimburses poor citizens for their energy bills, then there will be little incentive for economically disadvantaged members of society to decrease their energy consumption.

Several points must be noted. First, as I alluded to earlier, no free-market based approach will be accepted by the risk-averse contracting parties if it permits participants within society to “underprice” environmental risks—especially risks that could undermine basic environmental rights or the social minimum of environmental goods that are required for a decent life. (So, perhaps the prices of gasoline, coal, home heating oil, etc., should be more expensive than they presently are in the United States.) Second, note that the equal liberty principle (along with a guarantee of a social minimum), the principle of fair equality of opportunity, and the principle of just saving all have priority over the difference principle. Thus, it is not the case that the parties would permit the shifting of the costs of allocations and environmental taxes on to human “end consumers” only if (assuming the conditions of the prior principles are met) doing so would benefit

the least advantaged members of society. Such regressive measures are permitted once basic rights and liberties (including basic environmental rights), a social minimum, and fair equality of opportunity are secured for all citizens. Indeed, once these conditions are satisfied, such measures (which are aimed at modifying behavior) could be mandatory if required by the previously discussed intergenerational principle of just savings. But, again, if such regressive policies are taken, then other non-regressive measures must be enacted as well—e.g., public subsidies for alternative forms of energy and transportation. This, then, leads to the topic of socializing externalities.

### **Socializing Externalities**

As was noted earlier, some of the research and development of alternative energy solutions to global warming and other environmental concerns will be expensive. So too will be the costs of environmental cleanup. So, one overriding concern with free-market “solutions” is that they will not be able to generate the amount of capital required to properly fund such programs. What should happen if companies are unable to fund “clean” energy alternatives or pay for environmental restoration. More generally, then, one must ask: to what extent should a liberal democracy “socialize” externalities—e.g., have the government pick up the tab for research and development, environmental cleanup, and so forth?

The first thing to be said is that a strictly market-based approach would insure that the price of goods and services includes all the costs of development and production. For example, the price of carbon-based energy (e.g., petroleum or coal) would have to include all the costs of producing the energy. A coal plant paying its carbon tax is simply rendering what it should (according to free-market environmentalism) for emitting

greenhouse gasses. Moreover, reductions in tax rates for such facilities provide disincentives for efficiency and the reduction of greenhouse gas emissions. The same holds for environmental cleanup. Any truly market-based solution should maintain that coal companies employing mountaintop removal techniques must take full responsibility for all the consequences of their coal extraction—including the effects to human health, hydrological systems, etc. Having the government and nonprofit organizations cleanup and restore the natural environment discourages coal companies from employing only methods of “clean” extraction—if such techniques are possible. But what if carbon-based energy industries are truly incapable of fully internalizing externalities? In this case, it seems like the inability of such pricing systems to reflect the actual costs of goods and services would then demonstrate a serious flaw with market-based approaches to environmental policy.

This does not show, however, that the Rawlsian model cannot endorse the socializing of many externalities in principle. All citizens (including the least advantaged) need transportation and energy. So perhaps a liberal democracy is justified in using public funds in the development of hydrogen fuel-cell vehicles or wind-electricity. In fact, with the difference principle in place, background environmental justice maintains that the socializing of externalities is permitted when doing so maximally benefits the least advantaged members of society. This might occur in terms of green business paying fewer taxes, government investment in environmental restoration, public funding of alternative transportation fuels, taxpayer financing of electricity transmission lines, et cetera.

### **Several Illustrations**

With all the principles of Rawls's special conception of justice now in place, I shall now turn to several illustrations of how the present model of background environmental justice might be applied. Recall, then, the (idealized) cap and trade policies of the last chapter. The first illustration I now wish to consider involves "sky trust" proposals for curbing global warming. The basic idea behind these forms of "polluters pay" policies is to cap greenhouse gas emissions and then sell the allocations (the right to emit greenhouse gasses) in some sort of open auction. The allocations would then either be used or sold in some sort of competitive carbon trading market. I have argued that the Rawlsian framework can embrace such policies. And sky trust policies do follow roughly along these lines. However, the unique feature of sky trust initiatives is that the revenues from the sale of allocations are to be placed in a "sky trust," and then distributed equally to all citizens. James K. Boyce and Matthew Riddle (2007) have defended this sort of strategy, which they call "Cap and Dividend"<sup>35</sup> They claim that the capping of emissions and the selling allocations will raise fuel and energy prices. Thus, they contend (correctly, I think) that as spending on fuel and energy represents a smaller fraction of wealthy citizens' income, such policies would regressively impact poorer citizens.

However, a point of contention with the Rawlsian framework is this. Boyce and Riddle (along with others who defend sky trust policies) contend that the fairest way to then rectify such policies would be to ensure that *every* citizen receives an equal dividend from the sale of the carbon allocations. In the case of a pure sky trust policy (which would be independent of the government), everyone would receive the same size piece of the sky trust. As the dividends paid to all citizens would offset the higher energy and fuel

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<sup>35</sup> James K. Boyce and Matthew Riddle, "Cap and Dividend: how to curb global warming while protecting the incomes of American families." *Political Economy Research Institute (PERI) Workingpaper Series* 150 (2007).

costs, Boyce and Riddle argue that the cap and dividend strategy would act as a progressive form of cap and trade. This is correct—and it seems like the contracting parties in the Rawlsian heuristic would generally prefer this sort of policy to any sort of regressive measure.

However, I do not think that the Rawlsian model (ideally) supports the strict egalitarian distribution of the revenues generated from the sale of carbon allocations. Note, first, that it is unlikely that such proposals would be countenanced even by utilitarianism. For example, sending every man, woman, and child in the U.S. a monthly (or yearly) check would probably not constitute the most efficient use of revenues from selling carbon allocations. And it is not clear that it would maximize utility (either net or average) within society, either. Many American consumers would simply purchase goods and services (like clothes made in China) in a manner that benefits entities outside the U.S.—transnational corporations, other countries, etc.

Putting efficiency and utilitarian considerations aside, one can see that the cap and dividend distribution would not pass muster with the present Rawlsian model, as well. In a constitutional liberal democracy well ordered by the present extension to Rawls's theory, dividends would be distributed in a way that will guarantee the social minimum, secure the fair worth of the equal basic liberties, and meet the demands of the difference principle (instead of simply dispensing the same amount of money to all citizens). The same holds for potential "tax and dividend" policies, under which the revenues from carbon taxes are distributed equally to all citizens.<sup>36</sup> The present model behooves us to

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<sup>36</sup> NASA climatologist James Hansen has proposed such a policy. See his, "Carbon Tax and Dividend," *YaleGlobalOnline*, May 14, 2009. <http://www.policyinnovations.org/ideas/innovations/data/000128> (accessed January 28, 2010).

consider other uses of these revenues—education, public housing, health care, public infrastructure, job training, etc.

Furthermore, cap and dividend (and other sky trust) policies, along with tax and dividend schemes, completely neglect the duties presently existing citizens have to future generations. That is, the previously discussed intergenerational principle of just savings implies that revenues from the sale of carbon allocations (or carbon taxes) must also be directed towards maintaining the previously discussed just institutions for future generations. Thus, such funds might be used to pay citizens to not participate in deforestation, to offset tax credits for energy efficient homes, to increase funding for environmental protection agencies, and so forth. The revenues could also be used to pay participants within society to grow trees (which store carbon dioxide). Moreover, it would be a complete violation of Rawls's second principle of justice for society to raid the coffers of a sky trust in a manner that (for example) simply benefits powerful interests within the petroleum industry or the military-industrial complex. It would be even more odious if the revenues from carbon taxes or the selling of carbon allocations were used to sponsor unjust wars or to bring about human rights abuses. But that is another matter.

As another illustration, let us consider the issue of mountaintop removal coal mining somewhere in U.S. Appalachia—e.g., West Virginia, Tennessee, Kentucky, etc. Such practices—which involve deforesting and removing the top of a mountain (the “overburden”), taking away the coal, and then placing the overburden back on top of the denuded mountain—are clearly unsustainable. Yet, the fact that mountaintop removal mining is unsustainable is not enough to demonstrate that it is unjust. From the perspective of background environmental justice, the first question is: do such methods of

extraction violate any citizen's (present or future) fundamental rights and liberties—including basic environmental rights? Recent evidence suggests that such methods of removing coal, which irreversibly disrupt hydrological cycles and cause the leaching of selenium, have a severe negative impact both on environmental and human health.<sup>37</sup> Thus, the present model does not permit mountaintop removal coal mining.

However, from the perspective of background environmental justice, that is only one of a number of concerns. Did the permission given to employ such techniques violate the constraint of precautionary reasoning? If the only serious scientific investigation regarding the long-term effects of mountaintop coal mining occurred over thirty years after permission was first given to conduct such mining operation, it would appear that precautionary reasoning was *not* observed.<sup>38</sup> Thus, citizens negatively affected (e.g., as a result of environmental diseases) by mountaintop removal coal mining would be right to complain that it was wrong for the government to disregard caution (and in fact act in an incredibly reckless manner) when dispensing the legal right to engage in such practices.

Moreover, what about the previously discussed demands of fair equality of opportunity? Consider ordinary citizens (e.g., not employees) who have been made unhealthy by the processes involved in the mining of the coal. We must ask: did they have a fair chance of participating and benefiting from the process of coal extraction? That is, the fact that regular citizens were negatively affected in terms of environmental health is made even more reprehensible due to the fact that they did not have a fair opportunity to participate in the activities that caused the environmental hardships. For example, suppose the toxic chemicals that his or her company caused to be released into

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<sup>37</sup> See Margaret Palmer, et al., "Mountaintop Removal Consequences," *Science* 8 (2010): 148–149.

<sup>38</sup> Again, I am referring to Margaret Palmer, et al., "Mountaintop Removal Consequences," *Science* 8 (2010): 148–149.

the natural environment poisoned the CEO of a company (that engaged in the mountaintop removal coal mining that caused the poisoning). According to the present extension to Rawls's model, this would undoubtedly be unjust—i.e., it is violation of basic justice (or human rights) if anyone is poisoned in such a manner. However, from the perspective of background environmental justice, the poisoning is less egregious since at least the CEO had the opportunity to participate in, and benefit from, the activities that poisoned him or her.

From the perspective of pure procedural environmental justice, it is unjust for those entities who benefit the most from what causes environmental diseases to use their more advantaged social positions to make it harder (e.g., through political lobbying, corporate advertising) for those who are made worse off to get important social goods, such as health care, education, money, etc. Suppose that benefits from the activities that resulted in ordinary citizens being poisoned (e.g., corporate profits) were used to deny present and future citizens fair equality of opportunity. From the perspective of background environmental justice, the injustice of mountaintop removal coal mining would be compounded if some of the corporate profits were used, for example, to pay for political lobbying that made it extremely difficult for ordinary workers to unionize. It would be even more offensive if corporate profits from mountaintop removal coal mining were used as political gifts, or to support the election of judges that made unmerited rulings—e.g., legal decisions that permitted the very same pollution that poisoned ordinary citizens.

But what about the respect a constitutional democracy owes future citizens? The coal extraction that a liberal democracy permits cannot compromise the fair equality of

opportunity of future citizens to compete for environmental and other social goods. Consider future people who will suffer from environmental diseases caused by present mountaintop removal coal mining practices. Clearly the worth of their basic liberties will be unfairly diminished. And, besides the loss of potential tourism (and the associated local tax revenues), citizens who find themselves at an already disadvantaged social position will find it harder to compete for a number of environmental goods. Besides losing the coal, some of the other vanished goods will include clean water, access to natural mountain vistas, recreational opportunities (e.g., trout fishing), and countless aesthetic experiences.

Of course, the complexity of such injustices cannot be fully adumbrated due to the fact that the long term consequences of mountaintop removal coal mining are not really known. Nonetheless, the present Rawlsian model of background environmental justice maintains that mountaintop removal coal mining is also unjust if less advantaged citizens must pay for the cleanup and restoration of an environment that was fouled by activities that only benefited the most well off participants of society—coal companies, financial investors, etc. And future citizens who enter society at a disadvantaged position should not have to pay (e.g., in terms of taxes) for the cleanup of the toxic chemicals—especially if the mountaintop removal coal mining is what caused them to be at a less advantaged position in society (e.g., due to an environmental disease). It would be especially odious if, instead of the polluters (and investors who benefited from the mountaintop removal coal mining), the grandchildren of citizens who were killed (or made unhealthy) were forced to pay for cleaning up the environmental mess that killed (or sickened) their grandparents.

With these two examples noted, before moving on to the next chapter, “Rawlsian Environmental Pragmatism,” I would like to make the following observation regarding intergenerational just savings and anthropogenic climate change. Just savings (of the Rawlsian stripe) circumvents much of the present debate over global climate change and our generation’s use of carbon based energy. By this I mean the following. Much of the public debate over whether citizens of liberal democracies (along with everyone else in the world) should decrease their use of fossil fuels and switch to “clean” energy is now focused on the scientific issue of whether global warming is anthropogenic. However, from what we have seen in this chapter, even if global warming is not anthropogenic—in fact, even if global warming is a complete hoax—citizens of liberal democracies should still comply with the demands of just savings for future generations.

We have seen that this intergenerational demand is significant, and can be the object of an overlapping consensus of reasonable worldviews. And it implies that our generation has a duty of justice to set aside significant amounts of coal, petroleum, and other natural resources—i.e., at least enough to meet the demands of the equal liberty principle, as well as the principle of fair equality—for an unbounded number of generations. And from this it logically follows that, irrespective of the science regarding the extent to which global climate change is caused by human activity, our generation should still significantly reduce our use of petroleum and coal, and turn to alternative forms of energy. With this noted, let us now focus on the extent to which the present model of background environmental justice can be viewed as a form of environmental pragmatism.

## Chapter 8

### Rawlsian Environmental Pragmatism

After the U.S. Civil War, the American philosophers John Dewey (1859–1952), William James (1842–1910), and Charles Pierce (1839–1914), developed a number of forms of pragmatism. Elements of these theories started to resurge in the 1960s, and have consequently helped to shape the contemporary pragmatisms of such notable thinkers as W.V. Quine, Richard Rorty, Jürgen Habermas, and Hilary Putnam. While pragmatism comes in many varieties, it is generally said that pragmatism focuses on “what works.” And in relation to moral philosophy, pragmatists do not concern themselves with the traditional quest for objectively true universal moral principles. Recently, under what has become to be known as “environmental pragmatism,” some have argued that environmental philosophers should give up on controversial axiological claims, and instead focus on “what works” as pragmatic solutions to our environmental woes.<sup>1</sup> Moreover, some environmental pragmatists, such as Andrew Light and Eric Katz, have questioned whether professional philosophers can say anything intelligent about how we—as a society—can actually deal with the increasing number of environmental problems that we are facing.<sup>2</sup>

I think the present extension of Rawls’s theory of political liberalism—a framework for what I have dubbed “background environmental justice”—is prepared to meet this

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<sup>1</sup> See Anthony Weston, “Beyond Intrinsic Value: Pragmatism in Environmental Ethics,” in *Environmental Ethics, An Anthology*, Andrew Light and Holmes Rolston III, eds. (Malden: Blackwell Publishing, 2003), pp. 307–318.

<sup>2</sup> They ask: “Can philosophers contribute *anything* to an investigation of environmental problems?” See Andrew Light and Eric Katz, “INTRODUCTION: Environmental pragmatism and environmental ethics as contested terrain,” in *Environmental Pragmatism*, Andrew Light and Eric Katz, eds., (New York: Routledge, 1996), p. 1.

challenge. However, it will not have the overall shape that some environmental philosophers have thought an environmental pragmatism would have. For example, the environmental pragmatists Anthony Weston and Eric Katz argue that philosophers should discontinue using the idea of natural entities possessing positive intrinsic value as a foundation for a viable environmental ethic.<sup>3</sup> This is mistaken. An ecocentric axiology, for example, seems entirely fitting for an environmental ethic.

However, one must make a fundamental distinction, like Rawls, between moral and political theory. No doubt, many environmental philosophers already do this. Nonetheless, the point I now wish to make is this. Non-anthropocentric environmental philosophers (biocentrists, ecocentrists, etc.) should continue to embrace non-anthropocentric axiologies when explicating and defending their comprehensive moral theories. No philosopher should ever be asked to not pursue what she earnestly believes is true. This holds, no matter whether the issue is the sanctity of human life, or the intrinsic value of our natural environment. At the same time, however, I contend that non-anthropocentrist thinkers ought to embrace the present form of Rawlsian political liberalism as a political philosophy. Ecocentrists, for example, should be environmental pragmatists within the domain of public society. Accordingly, Andrew Light, and other environmental pragmatists, should not argue that moral philosophers should give up defending the intrinsic value of nature. It is merely political philosophers who should abandon the notion of the positive intrinsic value of nature.

Of course, the notion of using the Rawlsian framework of background environmental justice as a basis for a type of environmental pragmatism might not be obvious to many

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<sup>3</sup> See Anthony Weston and Eric Katz's "Unfair to Swamps: a reply to Katz, Unfair to Foundations: a reply to Weston," in *Environmental Pragmatism*, Andrew Light and Eric Katz, eds. (New York: Routledge, 1996), pp. 319–324.

thinkers. However, as I alluded to earlier, Rawls's mature theory has not been discussed much in the literature on environmental pragmatism. I find this regrettable. Recall that pragmatism can be fitted to many domains. For example, legal pragmatism focuses on legal theory, and religious pragmatism concentrates on "what works" in terms of religious belief. Similarly, Rawls's mature model of political liberalism is surely pragmatist to the extent that it is ultimately a theory of "what works." But what exactly is the problem that the Rawlsian framework is addressing? After shifting from the domain of the moral to the political, the salient question for Rawls was the following: "...how can religious and secular doctrines of all kinds get on together and cooperate in running a reasonably just and effective government?"<sup>4</sup> His theory of political liberalism, he thought, was the most reasonable answer. In *JF*, he also says:

Recall that justice as fairness is framed for a democratic society. Its principles are meant to answer the question: once we view a democratic society as a fair system of social cooperation between citizens regarded as free and equal, what principles are appropriate to it? Alternatively: which principles are most appropriate for a democratic society that not only professes but wants to take seriously the idea that citizens are free and equal, and tries to realize that idea in its main institutions?<sup>5</sup>

But while the Rawlsian model we have been considering might have a pragmatist nature, due to what we observed earlier, it obviously could not serve as a comprehensive pragmatism. Accordingly, as Rawls's justice as fairness is only a partially specified

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<sup>4</sup> "Commonweal Interview With John Rawls," in Rawls, *Collected Papers*, p. 616.

<sup>5</sup> Rawls, *Justice as Fairness*, p. 39.

conception of political justice, the framework I have been defending in this project will merely constitute a partially specified political conception of environmental pragmatism.

Just as for Rawls the question (when we view ourselves as free and equal citizens of a liberal democracy) is not who has the right religion, the question within environmental pragmatism (when delimited to political society) is not who has the correct theory of the value of nature, holism, and so on. Yet, standard environmental pragmatism, as defined by Andrew Light, "...directs us to choose that political strategy which most expediently results in solutions to environmental problems, and one of the tests of such effectiveness is whether it fits the political context where it is being applied."<sup>6</sup> The Rawlsian theory presently under consideration, however, is more refined than this. No doubt, there is a certain urgency required for adequately grappling with our present environmental maladies. Nonetheless, background environmental justice of the sort I have been defending vehemently eschews expeditiousness as the criteria for policy adoption. As we have observed, the extended model of Rawlsian political liberalism recognizes that some sort of environmental authoritarianism, say, could prove to be quite effective at solving our environmental woes. But such structures must never be adopted—even within political contexts where they could be successfully applied. In a society of free and equal citizens, competence and effectiveness must never trump fairness.

But perhaps the fundamental reason the Rawlsian theory we have been examining can be properly dubbed "pragmatist" is due to its freestanding nature—i.e., its taking no particular comprehensive theory of the good as the foundation for political justice.

Consider what Rawls says in his *Commonweal* magazine interview with Bernard Prusak:

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<sup>6</sup> David Rothenberg, "Laws of Nature vs. Laws of Respect: non-violence in practice in Norway," in *Environmental Pragmatism*, Andrew Light and Eric Katz ed. (New York: Routledge, 1996), p. 251.

“I make a point in *Political Liberalism* of really not discussing anything, so far as I can help it, that will put me at odds with any theologian, or any philosopher.”<sup>7</sup> My hope is that the same applies to the present model of background environmental justice.

Moreover, as it relates to contemporary environmentalism, the extended Rawlsian model recognizes that we need not publicly debate the wrongness of the human-centered moral perspective, or the intrinsic value of nature. This is because, in the public sphere, much convergence is possible without having to engage in such controversial axiological issues.<sup>8</sup> Consider what Light says in his “Compatibilism in Political Ecology”:

Metaphilosophically inclined environmental pragmatists would argue that we need to give up on some of the debates in political ecology for no other reason than the fact that there is much that we do agree on... that has not yet been effectively put into policy or communicated to the public. From this metatheoretical perspective, environmental pragmatists are not wedded to any particular theoretical framework from which to evaluate specific problems, but can choose the avenue which best protects the long-term health and stability of the environment, regardless of its theoretical origin.<sup>9</sup>

Light is correct. Introducing divisive ecofeminist or deep ecological reasons into the main institutions of our public society seems not only to violate our duty of civility (as we observed in chapter three): it might be imprudent.

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<sup>7</sup> Rawls, *Commonweal Interview*, p. 622.

<sup>8</sup> The present work, I hope, has demonstrated the possibility of such a convergence.

<sup>9</sup> Andrew Light, “Compatibilism in Political Ecology,” in *Environmental Pragmatism*, ed. Andrew Light and Eric Katz (New York: Routledge, 1996), p. 172.

Again, the present extension of Rawls's political liberalism stipulates that we—as citizens of a liberal democracy—must limit ourselves to reasons (and forms of reasoning) that all other reasonable and rational citizens will accept (irrespective of their comprehensive theory of the good) when we publicly deliberate about how our political society will deal with the mounting environmental issues we now face. Thus, I argue that it must be included as a viable option in the new direction in environmental philosophy now known as “environmental pragmatism.” But, again, this does not necessarily mean that one should give up on the notion of the intrinsic value of the natural world. In fact, arguments regarding the intrinsic value of the natural environment can positively help to establish a greener background culture in our society. Nor does the present model claim that individual citizens should not participate in the radical environmental movement. Those involved with Earth First!, for example, can play an important role in protecting the natural environment and raising ecological consciousness. (Rawls does permit some forms of nonviolent civil disobedience.) The present Rawlsian model maintains only that controversial non-anthropocentric reasoning be excluded from the public justification of our political society.

However, while we are to understand the present model as freestanding, not all citizens will embrace it. Some will contend that political liberalism will invariably do no better than the consistently mediocre masses, with their “shallow” ecological outlook. Maybe the greatest hope for humanity, as well as the rest of the natural environment as we know it, is to be found in political structures more radical than constitutional liberal democracies. With its rush to embrace pluralism, liberalism might be too tolerant of environmentally destructive views. One might sensibly argue, for instance, that the status

quo, under political liberalism, imbued as it is with its chronic ratiocinative myopia, is simply incapable of sufficiently taking care of the natural environment in a way that comports with the flourishing of human and other natural forms of life. Perhaps modern liberalism is essentially ecologically non-sustainable. Along these lines, some notable authors, such as Robert Heilbroner, have befittingly lamented that capitalist forms of democratic liberalism are fundamentally detached from ecological sustainability.<sup>10</sup>

To this type of objection, one must admit that numerous countries that have been labeled in one way or another as “liberal democracies” have rapaciously squandered and plundered the natural environment within their domain. But does the model under consideration merely constitute an apologia of the status quo? Again, I think not. According to Rawls, the content of public reason is not fixed.<sup>11</sup> It can be turned green. It is possible for a social climate (and people’s considered convictions) to change.

And so in this vein, we must note that the Rawlsian framework we have been considering does not maintain, for example, that grassroots activists should stop working to raise ecological consciousness and change the status quo. Moreover, members of free constitutional democracies can support environmental groups, such as the World Wildlife Fund. Citizens can vote and run for office. People can work for electoral reform, write letters, blog, and organize. Free and equal citizens can peacefully protest. Community members can educate others and themselves. People can donate money to nonprofit environmental law firms, such as Earthjustice. Citizens can lobby their elected representatives. That is how a liberal constitutional democracy should work. So, not only

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<sup>10</sup> See Robert Heilbroner, *An Inquiry into the Human Prospect* (New York: Norton, 1974)

<sup>11</sup> Rawls, *Political Liberalism*, p. liii.

is the raising of ecological consciousness possible, it is possible even when the task is delimited by the constraint of Rawlsian public reason and the principle of legitimacy.

Lastly, Rawls was right to address the issue of our burdens or judgment, as well as the fact of pluralism. There are many theories of morality and justice, and people passionately disagree about which comprehensive religious or philosophical view is correct. And it is from the perspective of moral theory that the question is: which comprehensive doctrine is correct?<sup>12</sup> But while many thinkers believe that it is their own conception of the good that is correct (and that we accordingly ought to apply it to the basic setup of our society), Rawls disagrees. Again, a mature Rawls was not seeking the *true* principles of justice. Remember that in “Justice as Fairness: Political Not Metaphysical,” Rawls says:

...the aim of justice as fairness as a political conception is practical, and not metaphysical or epistemological. That is, *it presents itself not as a conception of justice that is true*, but one that can serve as a basis of informed and willing political agreement between citizens viewed as free and equal persons.<sup>13</sup>

Accordingly, the partially specified political conception of environmental pragmatism that we have been considering is not a theory of what is true. Background environmental justice is a theory of what is most reasonable for a pluralistic democratic society of free and equal citizens. While it is an anthropocentric theory (and a contingently anthropocentric theory at that), it is one that all citizens in the real world—including non-

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<sup>12</sup> For an enlightening discussion on this and related points see Jürgen Habermas, “Reconciliation Through the Public Use of Reason: Remarks on John Rawls’s Political Liberalism,” *The Journal of Philosophy*, Vol. XCII, No. 3 (1995), pp. 119–126.

<sup>13</sup> Rawls, “Justice as Fairness: Political Not Metaphysical,” in *Collected Papers*, p. 394. I have added italics for emphasis.

anthropocentrists—should embrace if they wish to be reasonable citizens of a free democratic society. To reject such a view is, in essence, to admit that human beings are incapable of coming together with their common reason and manage themselves in both a democratic and sustainable manner. To do so would be a sad regress from the enlightenment, and our cherished values of freedom and equality.

## Conclusion

John Rawls is considered by many to be the most influential political philosopher of our time. Yet, like other major historical and contemporary political philosophers, he said very little about environmental issues—at least in his published writings. Thus, the project developed in the preceding eight chapters is timely. Not only are technical scientific answers necessary for solving environmental problems. Political solutions are also now required as citizens of pluralistic liberal democracies work through a wide variety of environmental issues. But these political resolutions can range the entire gamut from being completely just, to utterly unfair.

Again, Rawls himself did not say much about environmental ethics or environmental justice. But he did not apply justice as fairness to many other important issues with which free and equal citizens must contend—e.g., he never addressed the issue of pornography. He could not have done so, as there are always an endless number of significant issues in normative social philosophy to which his theory can be applied. Thus, the venture that John Rawls started with his own justice of fairness will never be completed. Nonetheless, Norman Daniels has shown us how the Rawlsian project can be applied to health care.<sup>1</sup> Beitz and Pogge have extended it into the realm of global justice. Similarly, within this work I have presented an extension of Rawls's own political liberalism that can gauge background environmental justice as we (citizens of liberal democracies) work through our most pressing environmental concerns.

That being said, neither Rawls's own theory nor my extension to it is a panacea for the mounting environmental challenges that liberal democracies currently face. For one

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<sup>1</sup> Norman Daniels, *Just Health Care* (Cambridge: Cambridge University Press, 1985)

thing, the present extension to Rawls's political liberalism is not meant to be a complete theory of environmental justice. We have seen that it is not a supranational model of environmental justice, and is therefore inert with respect to many important issues surrounding supranational environmental justice—e.g., global climate justice. However, it is not designed to do so. In this work, background environmental justice has been merely developed for a domestic constitutional democracy comprised of free and equal citizens. Moreover, following Rawls, the present model is not put forth as the correct theory of environmental justice. Rather, the present Rawlsian contractualist framework provides the most reasonable solution to how free and equal citizens of pluralistic democracies—deeply divided on religious and moral values (including environmental values)—should grapple with the myriad environmental issues they now face. Thus, even though it is not a complete framework for environmental justice, I believe it is a significant device for thinking about how pluralistic free societies can be shaped.

Moreover, even when delimited to a single liberal democracy, Rawls's theory of political liberalism is not meant to settle every political dispute. First, the Rawlsian model is procedural. Thus, it cannot fully answer all questions regarding any issue, let alone environmental justice. Utilitarianism, on the other hand, is an allocative theory. The utilitarian doctrine says (roughly) that we should enact those environmental policies that will bring about the most utility. Like all social goods, all environmental goods must be allocated to the greatest benefit of society. Thus, a utilitarian conception of environmental justice will maintain that every rock, tree, river, hill, ecosystem, etc., should be organized—in terms of conservation, preservation, or restoration—in whatever manner will maximize the social good. But not being an allocative theory, the present framework

of background environmental justice is not equipped to precisely specify those aesthetic beauties or natural wonders that are to be restored and/or preserved for future generations. Nevertheless, this is not a detractor *per se*. To a certain extent, once the requirements of background environmental justice are met, this is to be done by free and equal citizens working through the democratic institutions of a society (ideally) ordered by the present model of background environmental justice.

In this vein, consider that Rawls, himself, thought that his theory could not (and should not) settle all the legislative questions a liberal democracy might face. In *JF*, he says, “There are many questions legislatures must consider that can only be settled by voting that is properly influenced by nonpolitical values.”<sup>2</sup> Once background environmental justice is secured, what the present model asks is that, in the public arena, debaters argue via political values that comply with public reason, and are thus such that all reasonable citizens can embrace. And clearly there are many environmental values that can pass such constraints without difficulty. In fact, Rawls provided several examples of what he had in mind. In his *PL*, he says:

There are numerous political values here to invoke: to further the good of ourselves and future generations by preserving the natural order and its life sustaining properties; to foster species of animals and plants for the sake of biological and medical knowledge with its potential applications to human health; to protect the beauties of nature for purposes of public recreation and the pleasures of a deeper understanding of the world. The

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<sup>2</sup> Rawls, *Justice as Fairness*, p. 41.

appeal to values of this kind gives what many have found a reasonable answer to the status of animals and the rest of nature.<sup>3</sup>

And these, I think, are the sorts of values and ideas that have been used in my extension to his political liberalism.

As I have argued, since it is built on ideas from our public political culture that do not engender much controversy, I believe that it should be capable of being an object of an overlapping consensus of reasonable conceptions of the good. Accordingly, like Rawls, I believe that the implementation of the present framework in free democratic societies will not result in a mere *modus vivendi*. Thus, the Rawlsian system developed in the preceding chapters can both pass the test of stability and provide us with reasonable solutions to some of our most important environmental policy challenges. Again, this is significant because, while it is not to be circumvented, the fact of reasonable pluralism is now a daunting complication that citizens of liberal democracies must inevitably contend with as they attempt to grapple with global climate change, population control, environmental health, industrialized food production, sustainability, and so forth. As was mentioned earlier in this project, due to different experiences, conflicting evidence, the complexity of data, variations in weighing considerations, and the vagueness of the concepts involved, Rawls thought that it is unlikely that the political judgments of reasonable citizens within a free constitutional democracy will ever converge.<sup>4</sup>

But in terms of Rawls's burdens of judgment, this is precisely the situation we find ourselves in today as we grapple with multifaceted environmental concerns. There are bitter debates over the science and economics of global warming. The models of natural

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<sup>3</sup> Rawls, *Political Liberalism*, p. 245.

<sup>4</sup> Rawls, *Justice as Fairness*, pp. 35–36.

biodiversity are intricate, and the data incomplete. Scientists disagree about the efficacy of nuclear, hydrogen, wind, and solar energy. Not all citizens appreciate wilderness. We have no experience running a sustainable planet with so many people on it. It should not be surprising, then, that citizens with many different religions, philosophies, and moral values will not agree about the multitude of environmental matters (which are now political issues) that constitutional democracies now face. Accordingly, it was a keen insight for Rawls to shift to a freestanding political conception of justice.

Moreover, just as the major issues that humanity must deal with are always in flux, so too are the real world social contingencies of the basic structures of society, as well as the types of participants involved in social cooperation. Corporations, treaties, and nation-states exist only contingently. Levels of technology and populations rates are never fixed. There are, and always will be, an infinite number of ways the Rawlsian model can be modified to handle the environmental issues we have been discussing. As a result, the delicate task of reformulating Rawls's basic project and relating it to background environmental justice will always be ongoing. Following Rawls, "There is not a priori guarantee that we have matters right."<sup>5</sup>

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<sup>5</sup> Rawls, *The Law of Peoples*, p. 30.