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## ARTICLES

### WHY PROTECT THE ENVIRONMENT FOR OTHERS?

JACK B. WEINSTEIN<sup>†</sup>

#### INTRODUCTION

Why should you and I worry about the environment that *others* must live in during this and succeeding generations?<sup>1</sup> Why should you and I hesitate to grab what we can and live it up? Why should we not embrace a “not in my back yard” and a “not in my lifetime” attitude? If others cannot defend their backyards, then too bad for them.

Is it only self-interest that spurs us to protect the environment in which others live? Is the public health rationale for protection of our air and water the only one that can explain the work of environmentalists?

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<sup>†</sup> Senior Judge, United States District Court, Eastern District of New York. I appreciate the suggestions of Marc Falkoff, Esq. This Article is based upon a speech given to the Environmental Law Alumni and Environmental Law Society of St. John's University School of Law on February 20, 2003.

<sup>1</sup> See, e.g., John Edward Davidson, *Tomorrow's Standing Today: How the Equitable Jurisdiction Clause of Article III, Section 2 Confers Standing on Future Generations*, 28 COLUM. J. ENVTL. L. 185 (2003) (arguing for protection of the substantive rights of future generations by expanding standing through equity); Richard L. Revesz, *Environmental Regulation, Cost-Benefit Analysis, and the Discounting of Human Lives*, 99 COLUM. L. REV. 941 (1999) (in the case of harms to future generations, discounting is a means of privileging the interests of the current generation). See generally RICHARD B. STEWART AND JONATHAN B. WIENER, *RECONSTRUCTING CLIMATE POLICY* 18-36 (2003) (prudent investment in regulation to protect the atmosphere); EDITH BROWN WEISS, *IN FAIRNESS TO FUTURE GENERATIONS: INTERNATIONAL LAW, COMMON PATRIMONY, AND INTERGENERATIONAL EQUITY* (1989).

Our attempts in New York to control emissions from coal-burning plants in Ohio, for example, can be explained in terms of simple self-interest in our own air quality. If self-interest is the alpha and omega of environmental action, as many “bottom-liners” and legal econometricians suggest, then perhaps environmentalists should disband.

A majority of the Supreme Court has been wary of public control of land. It has increasingly interpreted the takings clause to allow property owners largely untrammelled rights as against the public's needs. Two examples will suffice. In *Nollan*, the Court allowed private, beachfront property owners to triumph over the public's access to the shoreline in California.<sup>2</sup> In *Lucas*, it would not permit the state to protect against beachfront erosion by banning the development of a “critical area” of the coast unless the state paid in full for the property—an almost impossibly expensive alternative.<sup>3</sup>

In the arena of environmental action, the present administration has tilted the scales against protection. Examples are our failure to endorse the Kyoto Protocol,<sup>4</sup> a sustained drive to drill for oil in Alaska,<sup>5</sup> and granting increased freedoms to loggers.<sup>6</sup> These theories, legal holdings, and political acts are, no doubt, in the short-term economic interests of at least some Americans. Why, then, do environmentalists oppose them?

For me there are the reasons of aesthetics, of conservatism in the face of unknown dangers, of utilitarianism, of protection of

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<sup>2</sup> See *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 827, 841–42 (1987).

<sup>3</sup> See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1006–07, 1032 (1992).

<sup>4</sup> See, e.g., Andrew C. Revkin, *Study of Antarctic Points to Rising Sea Levels*, N.Y. TIMES, Mar. 7, 2003, at A8 (explaining that experts believe a rise in sea levels due to the warming of Antarctica will result in costs “in lost shorelines, salt in water supplies, and damaged ecosystems [that] would be borne by many future generations”).

<sup>5</sup> See Andrew C. Revkin, *Experts Conclude Oil Drilling Has Hurt Alaska's North Slope*, N.Y. TIMES, Mar. 5, 2003, at A16 (citing a National Research Council report).

<sup>6</sup> An overview of the administration's environmental record may be found in Douglas Jehl, *Bush Sees Environmental Balance, Critics a Threat*, N.Y. TIMES, Feb. 23, 2003, at A1. See also Andrew C. Revkin, *Panel of Experts Faults Bush Plan to Study Climate*, N.Y. TIMES, Feb. 26, 2003, at A1; Editorial, *Abusing the Environment*, N.Y. TIMES, Jan. 26, 2003, at A12; Editorial, *Oceans in Trouble*, N.Y. TIMES, Jan. 19, 2003, at A12.

our genes, of theology, of fairness, and of society's long-term viability.

### I. AESTHETICS

Our sense of aesthetics, of beauty, seems to drive us to protect the environment. Is there a soul so dead as not to enjoy the pure waters of lakes and streams and oceans? Do our senses not sing in contemplating our fruited plains, our majestic mountains, our groves of redwoods?

Most of us are repelled to find our mountains cut down for coal, our forests denuded, our rivers polluted. The baneful sight of flattened hills, of groves of tree stumps, and of burning rivers are all shunned in our mind's eye. We prefer to visualize a fluttering butterfly in Brazil, the pristine forests depicted by the Hudson River school of painters, herds of reindeer in Alaska, or sounding whales in the Pacific.

Theodore Roosevelt may have summed up the matter best in a 1903 speech about conservation at Stanford University when he said, "There is nothing more practical in the end than the preservation of beauty."<sup>7</sup>

Modern environmental law began sixty years later, after World War II, when the adverse impact on the environment of explosive industrial and population growth became apparent, leading to complex statutes and increased controversy.<sup>8</sup> Perhaps the movement was given its impetus by Rachel Carson's warnings of global disaster in her 1962 book, *Silent Spring*. Vice President Albert Gore, in his introduction to a new edition, gives her that credit.<sup>9</sup> Others have argued that she failed to recognize the benefit of chemicals in limiting disease and increasing the food supply, particularly in less developed countries.<sup>10</sup>

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<sup>7</sup> 1 THEODORE ROOSEVELT, PRESIDENTIAL ADDRESSES AND STATE PAPERS 384 (Kraus Reprint Co. 1970) (1905).

<sup>8</sup> See, e.g., 1 FRANK P. GRAD, TREATISE ON ENVIRONMENTAL LAW § 1.01 (1998).

<sup>9</sup> Albert Gore, Jr., *Introduction* to RACHEL CARSON, *SILENT SPRING*, at xviii (1994 ed.).

<sup>10</sup> Hugo Gordon, *Commentary: West Nile Wakeup Bites*, THE WASHINGTON TIMES, Oct. 6, 2002, at B1 (stating that although scientific evidence demonstrates that DDT kills insects, *Silent Spring* has caused fear that it kills humans); see also Steven Milloy, *Rethinking DDT*, Fox News, (Jun. 20, 2002) (arguing that environmental activists who follow Carson "built their 'success' on junk science and the bodies of Third World children"), at <http://www.foxnews.com/story/0,2933,55843,00.html> (last visited Apr. 10, 2003).

Why is it not right for others to say, "Your sense of beauty be damned. Why should we not strip the forests of Sumatra if we can live better off the profits?"

We do need to balance our own aesthetic needs—and to allow the unblemished to be somewhat sullied—in order to allow residents of an area to use land or animals for their own preservation as a people. Local woodcutters in Oregon are said to favor more felling of trees to protect their current or prospective employment—an understandable, if perhaps short-sighted, position that may affect negatively their long-term interests in steady employment through the loss of sustainable forests and water, as well as sources of income derived from recreation.

There is also the problem of resource control and exploitation by those who—whether absentee or not—take the profits at the expense of others living on the land. Some natives may not oppose cutting forests or mining or drilling for oil if they can share in the income—as in the case of the southern Sudanese against the Northerners,<sup>11</sup> or Ghanaian locals against the national government and private oil companies<sup>12</sup> or Pygmies being employed to cut down the forests necessary for their viability as a people<sup>13</sup> or native Canadians abandoning their fur trade for employment in the oil industry.<sup>14</sup> Some locals may support overfishing in nearby waters for their own benefit but would strongly object to such fishing by strangers. Matters can become even more complicated—for instance, with grazing rights in our West, where ownership is by the nation but exploitation is by those raising cattle in the region.<sup>15</sup>

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<sup>11</sup> See Julie Flint, *Conflict of Interest*, THE GUARDIAN, Feb. 12, 2003, at 9 (stating that oil revenue sharing is a subject of peace negotiations in Sudan).

<sup>12</sup> See Neil Ford, *Is This Really the End of the Bakassi Wrangle?*, AFRICAN BUSINESS, Nov. 1, 2002, at 19 (reporting the Ghanaian government's signing of a contract with a British oil company).

<sup>13</sup> See *Logging Jobs Benefit Pygmies, but Imperil Their Forest Home*, N.Y. TIMES, Feb. 16, 2003, at A6. Cf. Freeman Dyson, *What a World! Review of VACLAV SMIL, THE EARTH'S BIOSPHERE: EVOLUTION, DYNAMICS, AND CHANGE* (2003), N.Y. REV. OF BOOKS, May 15, 2003, at 4.

<sup>14</sup> See Clifford Krauss, *The War Against the Fur Trade Backfires, Endangering a Way of Life*, N.Y. TIMES, Feb. 4, 2003, at A6; Dyson, *supra* note 13, at 6 ("If people do not have enough to eat, we cannot expect them to put much effort into protecting the biosphere.")

<sup>15</sup> Brad Knickerbocker, *Fight Over Changing How the West Is Run*, CHRISTIAN SCIENCE MONITOR, Aug. 10, 1995, at 1.

With respect to aesthetics and resource control, as in other aspects of conservation, balancing is necessary. It requires some kind of joint participation in decision making, however weighted towards those on the ground or away from it. The abstract concepts of socialism or capitalism as measuring scales do not, it seems to me, get us very far. Catchalls such as altruism and compassion are not much more helpful.

## II. UNKNOWN EFFECTS

One argument that smacks of self-interest is that of unknown effects. In matters such as global warming, ozone depletion, or the destruction of fishing stocks, nature might be suddenly so disrupted that the effects on *us* will be disastrous. The sudden drowning of our littoral zones, massive farming problems, and sharp decreases in biodiversity are now a palpable threat.

The unknown secondary and tertiary effects of environmental unbalance suggest that calls for the conservative protection of environments all over the world may be necessary for our own immediate protection. Conservation and self-interest are not necessarily antithetical.

## III. UTILITARIANISM AND THE BENTHAMITE CALCULUS

A Benthamite calculus—by which policymakers strive to act in a manner that increases the community's net happiness<sup>16</sup>—would seem by definition to substantially discount hedonism and a self-centered lifestyle. This has some utility in shedding light on the environmental impulse. But who, exactly, enters into the utilitarian calculation as part of the community? Is it ourselves? Our immediate family? Our clan? Our country? Our world?

The policymakers Bentham probably had in mind were those of the nation. The nation was expected to live on indefinitely, so his calculus would protect the welfare of future generations in that nation. Today, he might stretch his analysis to achieve a balance on a global scale.

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<sup>16</sup> See JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (1824), *reprinted in* UTILITARIANISM AND OTHER ESSAYS, 65, 65–67 (Alan Ryan ed., Penguin 1987).

#### IV. PROTECTION OF OUR PROGENY—OUR GENES

Built into our genes under Darwin's theory of evolution is an insistent desire, shared by all living things, not only to survive but also to ensure continued progeny.<sup>17</sup> We can best protect our posterity by protecting its environment as well as our own.

The intergenerational protective instinct conflates our immediate self-interest and our interest in future generations. In an interesting paper, Professor David Popp, relying on econometric data, wrote that environmental quality protections satisfy a "weak test" for an individual's "own self-interest and the welfare of future generations."<sup>18</sup> The "strong test" is for our own generation's self-interest.<sup>19</sup>

Sometimes economists' analyses do not denigrate the concerns of environmentalists. The need to balance the interest of future generations is acknowledged by at least some of them.

#### V. THEOLOGY

There is also a theological approach. God gave us this wonderful world. We have an obligation to our Creator to preserve it in order to continue to serve the needs of humanity.

The biblical injunctions favoring humankind's multiplication and the bending of nature to serve human needs runs counter to the preservation of the wilderness. Some societies and religions give greater respect than others to nature in its unimproved state.

Yet awe of the biblical Garden of Eden, it seems to me, reflects a Judeo-Christian concern for protecting nature—and therefore seems to favor the environment. The biblical requirement of leaving gleanings<sup>20</sup> also somewhat supports this view.<sup>21</sup>

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<sup>17</sup> CHARLES DARWIN, *THE ORIGIN OF SPECIES* 50 (Philip Appleman ed., W.W. Norton & Co. 1975).

<sup>18</sup> See generally David Popp, *Altruism and the Demand for Environmental Quality*, 77 *LAND ECONOMICS* 339 (2001).

<sup>19</sup> The intergenerational imperative applies socially, politically, and technologically as well as environmentally. Thomas Jefferson, noting in a letter to James Madison that "[t]he earth belongs in usufruct to the living," believed that each generation should hold a plebiscite in order to explicitly endorse the laws that ruled their lives. See JOYCE APPLEBY, *THOMAS JEFFERSON* 14 (2003) (quoting Jefferson's letter).

<sup>20</sup> "When you reap the harvest of your land, thou shalt not wholly reap the corners of thy field, neither shalt thou gather the gleanings of thy harvest."

There is also the central theme of Judeo-Christian teachings that, in various formulations, reduces to "Do unto others as you would have them do unto you."<sup>22</sup> It should lead us to refrain from destroying the land of others for marginal returns to ourselves.

#### VI. TASTE FOR FAIRNESS

*The Taste for Fairness* is the title of an essay by Professor Ward Farnsworth.<sup>24</sup> He rejects the view that we should rely solely upon welfare considerations in making public policy decisions.<sup>25</sup> Instead, he suggests that we give weight to the fact that people have an innate respect for the well being of others—"fairness."<sup>26</sup>

However fairness is defined, we do, I think, have some residual sense of what is fair. How much richer than the poor the rich should be is debatable. It is, however, generally conceded that there are limits that depend only in part on how we were brought up and upon our culture.

#### VII. EFFECTIVENESS OF SOCIETY

It is a point that can be debated, but whether for genetic or cultural or other reasons, complex societies seem to work better when people do not insist on maximizing their own welfare at the expense of others. The good of other members of the group and of future members cannot be ignored if the group is to survive and prosper.

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*Leviticus* 19:9.

<sup>21</sup> The Reverend Holmes Rolston III, a philosopher at Colorado State University, was recently awarded the Templeton Prize for Progress in Religion, partly for his research addressing biblical sources of ecological ethics. See *Colorado: Richest Prize for Spirituality*, N.Y. TIMES, Mar. 20, 2003, at A30.

<sup>22</sup> *Leviticus* 19:18. Both Hillel and Jesus quoted the rule. According to the Talmud, a man offered to become a proselyte of Hillel if he could be taught the whole Torah while standing on one foot. Hillel said to him, "What is hateful to you, do not do to your neighbor: that is the whole Torah; and all the rest is commentary. Go learn." TALMUD, *Shabbat* 31a. [UTL] Jesus, in the Sermon on the Mount, said, "Do to others whatever you would have them do to you." *Matthew* 7:12 (New American); see also *Luke* 6:31 (Sermon on the Plain). The rule also appears in the texts and traditions of many other religions and belief systems. See, e.g., ANALECTS 15:24 (Confucianism); DADISTAN-I-DINIK 94:5 (Zoroastrianism) [UTL]; KORAN, *Sunnah supplement* (Islam) [UTL]; UDANA-VARGA 5:18 (Buddhism). [UTL]

<sup>23</sup> 102 COLUM. L. REV. 1992 (2002).

<sup>24</sup> *Id.* at 1993.

<sup>25</sup> *Id.*



## VIII. BALANCING

Where to draw the line between what is appropriately in our own interest and in the interest of others is, and will be, the basis for much of our future political and policy discussions in today's and tomorrow's worlds. Environmentalists can make a strong and appealing case. It is essential that they continue to make powerful public arguments for preservation of natural resources and against the destruction of the environment in order to offset the arguments of their politically influential opponents.<sup>26</sup> There are appropriate limits to both venality and idealism; we seem to be slipping closer to the former than the latter.<sup>27</sup>

## CONCLUSION

We need, perhaps, to regain the empathetic mood that Walt Whitman captured in "Crossing Brooklyn Ferry," in which he metaphorically grasped the hands of future generations as he looked out over New York's waters:

A hundred years hence, or ever so many hundred years hence,  
others . . .

Will enjoy the sunset, the pouring in of the flood-tide, the  
falling-back to the sea of the ebb-tide. . . .

I am with you, you men and women of a generation, or ever so  
many generations hence,

Just as you feel when you look on the river and sky, so I felt, . . .

Just as you are refresh'd by the gladness of the river and the  
bright flow, I was refresh'd . . . .<sup>28</sup>

We depend upon lawyers to help us retain our natural empathy and to prevent the debauching of our beautiful planet, Earth.

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<sup>26</sup> We have ample substantive and procedural tools to protect the local environment. See generally GRAD, *supra* note 9, *passim*; Orit Marom-Albeck & Alon Tal, *Upgrading Citizen Suits as a Tool for Environmental Enforcement in Israel: A Comparative Evaluation*, 34 ISRAEL L. REV. 373 (2000) (providing an overview of environmental public litigation in the United States and Israel and advocating reforms in Israeli law based on United States practice, including class actions, to help foster citizen suits).

<sup>27</sup> See, e.g., Jennifer Lee, *A Call for Softer, Greener Language: G.O.P. Adviser Offers Linguistic Tactics for Environmental Edge*, N.Y. TIMES, Mar. 2, 2003.

<sup>28</sup> WALT WHITMAN, *Crossing Brooklyn Ferry*, in LEAVES OF GRASS 163, 164 (Aventine Press 1931).