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INVITED ARTICLE

Global Environmental Constitutionalism: Getting There from Here

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Abstract
Dominant analytical approaches to environmental law exhibit a similar, problematic form: they treat that which should be outcome determining as, instead, outcome determined. This form is most evident and influential in the welfare economic technique of regulatory cost–benefit analysis, which treats all resources – including the monetary value of human lives – as potential means towards seemingly higher yielding ends. In contrast, an environmental constitutionalism, in which certain needs and interests of present and future generations, the global community, and other forms of life are given foundational legal importance, would help to restore conceptual coherence and normative priority to the subjects of environmental law.

Keywords: Environmental Constitutionalism, Precautionary Principle, Cost–benefit Analysis

1. INTRODUCTION

The United States (US) Constitution is one of the few such texts in the world that fails to explicitly address environmental protection.[1] Quite to the contrary, the US Constitution contains a variety of features – including limited enumeration of national legislative powers, strong protection of private property rights, judicial scrutiny of interstate commerce regulation, and imposition of standing and other justiciability requirements – that arguably restrict the country's ability to address the environmental

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[1] In the majority of the world's constitutions the environment is given express constitutional significance through various formulations of a right to a healthy and sustainable environment or through a governmental obligation to protect the environment. Although exact accounting differs by commentator, according to Tim Hayward, 'around fifty' nations' constitutions contain environmental rights, and 'more than a hundred countries have constitutional environmental provisions of some kind': T. Hayward, *Constitutional Environmental Rights* (Oxford University Press, 2005), at pp. 3–4.

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needs of present and future citizens. And, while it is true that many US state constitutions specifically address concerns of pollution and resource conservation, courts typically refuse to give such provisions self-executing force; instead, citizens are directed back to the same political institutions whose amenability to capture and presentism may well have provided the impetus for enshrining environmental protection within the state constitution in the first place.[2]

In light of this situation, US scholars and activists have for years advocated the constitutionalization of environmental protection at the national level, whether via judicial interpretation of existing constitutional provisions or via formal amendment. They recognize the challenges facing this project: expanding the reach of constitutional protection to encompass future generations or non-human life-forms – not to mention the environment as such – would require significant adjustment to the anthropocentric, individualistic, and instrumentalist outlook upon which liberal ordering strongly depends. Many environmental law scholars seek such adjustments immediately, for they see the Enlightenment ethos as an impediment not only to the ultimate achievement of cosmopolitan, intergenerational, and interspecies justice, but also to the successful resolution of more immediate environmental problems. Accordingly, they urge scholars to regain the spirit of intellectual chutzpah that once led the field to promote legal standing for trees, revival and expansion of the ancient public trust doctrine, guardianship obligations on behalf of future generations, and other such bold devices.[3] They also advocate tempering the heavy reliance within environmental policy-making on science, economics, and means-ends rationality, for they believe that such an approach forces environmentalists to couch their goals within a framework that inevitably understates the case for sustainability.[4] Instead, they would restore the romantic, even illiberal spirit that once animated environmentalism, before it seemed to evolve into a technically oriented advocacy movement.

Other commentators, however, view with scepticism the effort to craft a post-Enlightenment environmentalism out of the existing legal order, believing that

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[2] See B.H. Thompson Jr., 'Environmental Policy and State Constitutions: The Potential Role of Substantive Guidance' (1996) 27 *Rutgers Law Journal*, pp. 863–925, at 897 (noting that '[c]ourts actively have sought out legal justifications for avoiding environmental policymaking even in those states with strong environmental policy provisions that appear on their face to impose mandates or obligations on the legislature or directly on the regulated community').

[3] For examples of this earlier scholarship, see, respectively, C.D. Stone, 'Should Trees Have Standing? Toward Legal Rights for Natural Objects' (1972) 45 *Southern California Law Review*, pp. 450–87; J.L. Sax, 'The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention' (1970) 68 *Michigan Law Review*, pp. 471–566; E. Brown Weiss, *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity* (Transnational, 1989); L. Kutner, 'The Control and Prevention of Transnational Pollution: A Case for World Habeas Ecologicus' (1977) 9 *Lawyer of the Americas*, pp. 257–81

[4] Cf. D.A. Westbrook, 'Liberal Environmental Jurisprudence' (1994) 27 *UC Davis Law Review*, pp. 619–712, at 711 ('To date, contemporary liberal ideology has tried to appropriate the essentially religious implications of the concept of nature as either personal preference, and hence of highly limited importance for politics, or as objective truth, certified by the new science, and hence profoundly alienated from individual experience').

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environmentalists instead should continue to assert a conventional liberal welfarist agenda.[5] In their view, it may well be that the final goal for environmentalism *is* to become diffused within the generative grammar of society, so that sustainability simply emerges from the constitutional system as a matter of course, rather than being ever-contingent on political choice and circumstance. Presently, however, sceptics of environmental constitutionalism contend that the aim to guarantee 'certain basic, absolute levels of environmental protection' reflects a 'combination of political idealism and scientific naivety'.[6] As support for this claim, they note that several key environmental statutes in the US already purport to impose absolute standards of protection, but the country has lacked the resolve necessary to fulfil the statutes' literal terms. In their view, the central insistence of modern welfare economic approaches to environmental law – that is, the insistence that trade-offs are inevitable – dooms to failure any effort to reliably and stably identify safe minimum standards, absolute rights of environmental protection, or other such constitutional notions. At the least, they believe that 'constitutional enshrinement of any particular environmental policies seems premature', given the substantial 'disagreement [that] remains over the socially appropriate levels and types of environmental protection'.[7]

Perhaps this unresolved disagreement also explains why, for those countries that *do* have express environmental provisions in their constitutions, the provisions tend to be vaguely specified and weakly enforced, much like their counterparts within US state constitutions. To be sure, there exist rare moments of constitutional specificity, such as the requirement of the constitution of the Kingdom of Bhutan that 'a minimum of sixty percent of Bhutan's total land shall be maintained under forest cover for all time',[8] just as there are occasional instances of serious legislative commitment to the incremental realization of environmentally based human rights, such as the program in South Africa to give concrete expression to the right to water for subsistence needs.[9] On the whole, however, efforts to constitutionalize environmental law remain largely

[5] See C.M. Rose, 'Environmental Law Grows Up (More or Less), and What Science Can Do to Help' (2005) 9 *Lewis & Clark Law Review*, pp. 273–94 (advocating continued reliance on science as the fundamental basis of environmental law); A.D. Tarlock, 'Environmental Law: Ethics or Science?' (1996) 7 *Duke Environmental Law & Policy Forum*, pp. 193–223 (concluding that environmental law must remain science based); P. Wapner, 'Environmental Ethics and Global Governance: Engaging the International Liberal Tradition' (1997) 3 *Global Governance*, pp. 213–31 (suggesting the reframing of international environmental concerns in the nationalist and individualist terms liberalism cognizes).

[6] B.H. Thompson Jr., 'Constitutionalizing the Environment: The History and Future of Montana's Environmental Provisions' (2003) 64(1) *Montana Law Review*, pp. 57–98, at 187.

[7] Ibid., at 198; see also A.D. Tarlock, 'Is There a There There in Environmental Law?' (2004) 19 *Journal of Land Use & Environmental Law*, pp. 213–53, at 223 (noting that 'there is no longstanding social consensus about the central question of modern environmentalism – the 'correct' human stewardship relationship to the natural world') (footnote omitted).

[8] The Constitution of the Kingdom of Bhutan, Art. 5(3), available at: http://www.constitution.bt/TsaThrim%20Eng%20(A5).pdf.

[9] See R. Stein, 'Water Law in a Democratic South Africa: A Country Case Study Examining the Introduction of a Public Rights System' (2005) 83 *Texas Law Review*, pp. 2167–83.

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symbolic exercises even under the socially and environmentally progressive constitutions that have been adopted during the last half century.[10]

This essay seeks to reframe the question of environmental constitutionalism – and, ultimately, *global* environmental constitutionalism – in light of this pessimistic backdrop. It argues that our failure to achieve consensus on how society should 'trade off' economic and environmental interests is, in substantial part, an artefact of the framework itself for identifying trade-offs. Because the problem of trade-offs is posed in a formal welfare economic language that tends to constrain and prefigure our potential responses to it, the problem is never broached with the sense of solemnity, humility, and possibility that it deserves. Features of environmental law that are maligned as suboptimal from the perspective of welfare economics can, in fact, be understood as efforts to alter the underlying market substrate against which welfare economics seeks to optimize. That is, environmental efforts appear to be economically 'inefficient' or otherwise misguided largely because their aim has been misapprehended: when we evaluate efforts to achieve a constitutional reordering through a lens that presumes constitutional inalterability, we confuse first- and second-order subjects. Recognizing environmental law as a first-order subject – as a constitutional aspirant – sweeps away the basis for much of the confusion and divisiveness that today plagues the field.

On the other hand, environmental law's constitutional ambition need not be seen as radical or discontinuous with the Enlightenment ethos. At its core, environmental constitutionalism seeks to accomplish two improvements to liberal thinking. First, it aims to substitute a conservative assumption of finitude and non-substitutability for the hope that 'enough, and as good' resources exist to justify largely unregulated privatization and use of real property and natural resources.[11] This ecological assumption need not be considered anti-market or value-coercive: as Herman Daly has emphasized, sustainability constraints on the use of renewable and non-renewable resources, including the pollution-absorptive capacity of the atmosphere and other natural sinks, can be implemented through tradable permit schemes in a manner that continues to promote allocative efficiency through decentralized private decision-making.[12] Optimization simply occurs under a more ecologically astute set of constraints.

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[10] The situation is comparably dim at the supranational level: 'While there appears to be a growing trend favoring a human right to a clean and healthy environment – involving the balancing of social, economic, health, and environmental factors – international bodies, nations, and states have yet to articulate a sufficiently clear legal test or framework so as to ensure consistent, protective application and enforcement of such a right': B.E. Hill, S. Wolfson & N. Targ, 'Human Rights and the Environment: A Synopsis and Some Predictions' (2004) 16 *Georgetown International Environmental Law Review*, pp. 359–402, at 361.

[11] J. Locke, *Two Treatises of Government* (1690) (reprint, P. Laslett (ed.), Cambridge University Press, 1988), p. 291 (stating that private ownership of land tends to the overall good so long as 'there is enough, and as good left in common for others'). But see J. Waldron, 'Enough and as Good Left for Others' (1979) 29 *The Philosophical Quarterly*, pp. 319–28 (offering a powerful argument that Locke intended the 'enough, and as good' proviso to establish a sufficient, but not a necessary, condition for legitimate appropriation of resources).

[12] See H.E. Daly, *Beyond Growth: The Economics of Sustainable Development* (Beacon Press, 1996), at p. 82.

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Second, environmental constitutionalism aims to force liberalism to become more self-conscious of its membership decisions. Historically the push beyond anthropocentricism has been the most noted membership challenge issued by environmentalism; indeed, it is this eco-centric feature that has caused many observers to be sceptical of the movement's ability to effect constitutional change. But environmentalism – with its ceaseless attention to spatial, temporal, and biological interconnection – simply poses the kinds of membership question that liberalism already faces and that it no longer can tenably avoid. Environmental constitutionalism would not force us to abandon cherished notions of human dignity; it simply would force us to abandon complacency about whether we have drawn the circle of dignity as widely as possible. In short, rather than viewing environmental constitutionalism as a vague or hortatory extension of individual rights into the realm of affirmative entitlements, it instead can be seen to rest comfortably beside more firmly established structural and representative aspects of constitutionalism.

2. CONSTITUTING THE ECONOMY

The Enlightenment values of humanism, reason, and empiricism reach an apotheosis in the welfare economic technique of cost–benefit analysis, which offers the promise that the social contract can be finalized, written once and for all into a self-executing programme of welfare maximization in which all value resides within individuals whose preferences – though supposedly autonomously chosen – nevertheless can be objectively discerned through scientific observation. As generally practised, cost–benefit analysis offers a semblance of comprehensiveness and evenhandedness by arbitrarily normalizing the status quo distribution of rights and resources; in this way, the scope of environmental law becomes limited to consideration of merely incremental changes to a socio-legal system that is otherwise unquestioned.[13] In the welfare-economic sense, optimization comes to mean ever more refined tinkering within a given liberal market system, the unexamined rules of which help to form the set of constraints under which optimization occurs. The transformative potential of law is thus curtailed: just as economics experienced a marginalist revolution in the nineteenth century, promoters of cost–benefit analysis hope to subject law to a marginalist revolution in the twenty-first. They face an insurmountable problem, however, in that the subject matter of law cannot be cabined in a way that would make cost–benefit analysis appear adequate to our needs. Law cannot self-negate in the way that economics has: much of law is marginal or incremental in nature, to be sure, but unless potential moments of upheaval – of foundationalist reordering – are always latent within it, law ceases to be responsive to its subjects. Indeed, it ceases to be *law*, in that it

[13] To be sure, there are diverse and sophisticated versions of welfare economics that do not take the status quo baseline as normatively sacrosanct in this manner. Cf. A. Sen, *Collective Choice and Social Welfare* (Holden-Day, 1970), at p. 22 (famously arguing that a society or an economy can be considered optimal from a narrow efficiency perspective yet 'still be perfectly disgusting'). The critique in the text focuses on applications of welfare economics in US environmental law and policy debates, which almost exclusively rely on welfare assessment baselines and valuation techniques measurement techniques that do privilege the status quo.

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no longer represents the self-expressed commitments of an integrated political community. To commit to law is to have the power to remake it.

For welfare economics safely to serve the kind of role for which it has been promoted, the constitutional framework against which it operates must first be reformed to better reflect the lessons of ecology and the natural sciences and to better accommodate the need for continuing ethical conversation regarding the status of marginalized or unreachable interest holders. The promise of environmental law is that certain needs and interests of present and future generations, the global community, and other forms of life can be given foundational legal importance, in such a way that the ensuing costs and benefits that are observed by economists will reflect a *prior* determination by the political community to pursue environmental sustainability. Proponents of regulatory cost–benefit analysis instead try to force sustainability and intergenerational justice into a language of pre-existing cost and benefit schedules that, currently, are simply 'read' from an unsustainable and arbitrarily privileged status quo. However, only if the market were *first* subjected to foundational constraints of ecological sustainability would its ensuing operations – its apparently 'natural' cost and benefit schedules – begin to have the kind of empirical and normative standing that welfare economists presently afford them.

Constitutional constraints placed upon resource use – such as a requirement that renewable resources only be used at their replacement rate and that non-renewable resources only be exploited at the rate of development of renewable alternatives[14] – would provide much of the foundationalist reordering necessary for welfare economics to become less misleading in the environmental law and policy context. Such constraints could be seen as serving the largely anthropocentric and welfarist purpose of ensuring an ecologically sustainable path of development, one that no longer depends on optimistic suppositions that 'enough, and as good' resources will always remain available for future generations,[15] that all resources are substitutable even if particular scarcities do arise,[16] or that societies inevitably 'grow' their way to a 'preference' for environmental conservation.[17] Understood in this way, the seemingly dramatic alteration worked by sustainability constraints would not actually constitute a breach with the Enlightenment traditions of humanism, reason, and empiricism. Instead, it would simply reflect a different pre-analytic orientation towards science (that is, more precautionary) and an expanded horizon of moral and political concern (that is, one that includes future individuals). Nor would environmental protection be so easily dismissed as inefficient or irrational according to cost–benefit analysis, since we would be unable to ignore the ambition of environmental constitutionalism to alter the underlying systems that give rise to cost–benefit values, rather than to simply

14 See Daly, n. 12 above, at p. 82.

15 See n. 11 above.

16 See D.A. Kysar, 'Sustainable Development and Private Global Governance' (2005) 83 *Texas Law Review*, pp. 2109–66, at 2123–5.

17 Ibid., at pp. 2136–45.

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respond to those values. Environmental law would neither operate, nor be evaluated, at the margins. It would instead live within our constitutional conversation.

3. CONSTITUTING THE ENVIRONMENT

An alternative conceptualization of sustainability constraints – one that refuses to see the constraints as serving the needs of *particular* rights-bearing individuals, even future individuals – would pose a more direct challenge to the Enlightenment tradition. From this perspective, sustainability constraints would be seen as absolute limitations on public and private power: the limits they impose would concern the exploitation of resources that sustain life and that are held in trust for all life.[18] Many of environmental law's subjects are not politically represented in the usual liberal fashion. Instead, they are glimpsed through a conjunction of science and ethics that places both knowledge schemes under tremendous strain. Indeed, environmentalism often appears as unscientific and illiberal precisely because the true subjects of its scientific and ethical inquiry are unrecognized by sceptical observers.[19] In light of this dilemma, commentators frequently contend that environmental law's ultimate ambitions – those that go beyond protection of the environment for anthropocentric reasons – are likely to fail, given that they 'do not draw upon the philosophical, religious, and jurisprudential bases of the constitution, all of which are rooted in the enhancement of human dignity'.[20]

Even in its more theoretically bold formulation, however, the attempt by environmental law to include members of other nations, generations, and species should not be seen as a breach of the liberal tradition, but as a strengthening of it. In an ideal discourse community that extends across boundaries of space, time, and speciation, environmental law's others would themselves be present, not merely represented. Their faces would be visible, and their needs unmistakable. In the absence of such an idealized situation, we must pursue practical methods of expanding environmental impact assessment and natural resource planning in order to begin a process of recognition. Would-be interest holders might be better recognized as such, and might eventually be invited into the political community as members, if we were constitutionally required to assess our biological inventory and natural resources, to monitor the deleterious impacts of our activities on life forms outside our territorial borders, to imagine our future population and the state of their environment, and to consider thoughtfully our domesticated and engineered life forms and the quality of their existence. Forcing confrontation with such matters helps to avoid moral complacency.

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18 Cf. J.L. Sax, 'The Unfinished Agenda of Environmental Law' (2008) 14 *Hastings West-Northwest Journal of Environmental Law & Policy*, pp. 1–11 ('It is a sobering thought that while virtually every other interest that we consider vital has been made the subject of enforceable legal rights, our heritage of biodiversity stands largely outside the framework of established jurisprudential theory').

19 J. O'Neill, 'Representing People, Representing Nature, Representing the World' (2001) 19(4) *Environment and Planning C: Government and Policy*, pp. 483–500, at 497 ('Given the necessary absence of authorisation, accountability, and presence, claims to speak on behalf of non-humans and future generations relies on epistemic claims, coupled with care').

20 Tarlock, n. 7 above, at p. 224.

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It is not enough to simply assert that 'nations lack faces'[21] as a justification for arguing that we are incapable of regarding international relations with moral sentiment. Instead, we must try to *give nations faces*, just as we must seek to better recognize and respect non-human life forms.[22] Likewise, if a constitution is, as Bruce Ackerman describes, a conversation between generations,[23] then we must seek to better hear the diachronic expressions of future generations.

4. CONSTITUTING COMMUNITIES

This understanding of environmental constitutionalism – partly as a structural endeavour and partly as a device of recognition – is preferable to the focus on individual human rights that has dominated discussions of environmental constitutionalism. At present, courts and commentators view environmental constitutionalism as a precarious effort because they do not see it as being of the same order as established features of constitutional law. For instance, as Barton Thompson notes, US state courts have tended to shy away from adjudicating environmental constitutional provisions because, unlike rights such as freedom of speech and due process, courts do not see environmental provisions as being 'cornerstones for an effective representative democracy'.[24] Viewed through the appropriate lens, however, environmental provisions would also be recognized as prerequisites to efficacious government: they would reflect the fact that no liberal political community should ever view itself as completed, that the community instead should always question whether its vision of harmonious self-ordering could be made to be more inclusive. To be sure, identifying the proper contours of a fair framework of social cooperation is a grand challenge even for a single generation of acknowledged co-citizens. Nevertheless, any comprehensive political theory – and any actually existing political community – must also seek to establish a fair framework for cooperating with members of *other* communities, including the possibility of embracing them wholly as equal subjects.[25]

Because of its relentless attention to interrelation, environmental law can be of great use in this project: environmental law raises issues of dependency and membership that haunt the liberal vision in just the right way. Too often in the liberal tradition, environmental law's others are simply taken to reside outside the conditions of justice; as a result, we see only meagre substantive provision for their needs, even in powerful manifestations of liberal theory, let alone in lived experience. Similarly, members of other nations, generations, and species express no willingness-to-pay of

21 C.R. Sunstein, *Worst-Case Scenarios* (Harvard University Press, 2007), at p. 65.

22 Cf. P. Slovic, "If I Look at the Mass I Will Never Act': Psychic Numbing and Genocide' (2007) 2(2) *Judgment & Decision Making*, pp. 79–95 (describing psychological studies in which both positive affective sentiment and willingness to make donations to humanitarian causes were shown to decline when analytical thinking was primed through statistical information and through increasing the number of individuals benefitted).

23 B. Ackerman, 'The Living Constitution (2006 Oliver Wendell Holmes Lectures)' (2007) 120 *Harvard Law Review*, pp. 1737–812, at 1793.

24 Thompson, n. 2 above, at p. 898.

25 See B.A. Ackerman, *Social Justice in the Liberal State* (Yale University Press, 1980), at pp. 93–5.

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their own within economic cost–benefit analysis, but instead must always be *paid for* by a life that has already somehow been granted standing in the cost–benefit community. These exclusions tend to rest on historical accident and practical concession rather than on persuasive moral reasoning. Indeed, much like the early welfare economists who regarded discounting as a morally regrettable necessity,[26] those who conclude that the conditions of socio-economic justice do not prevail between nations tend do so sheepishly, acknowledging that the cosmopolitan alternative has obvious normative appeal. In both cases, theorists provide an ethically compromised final response to a problem that is neither finally resolvable nor ethically negotiable. We cannot, as yet or ever, determine the substantive content of global justice, just as we cannot predict the needs and preferences of future generations or adequately describe the awesomeness of species extinction. But neither can we ignore these calls.

Accordingly, liberal constitutionalism should not seek final answers to questions of recognition and membership. Instead, it should seek to reinforce collective self-consciousness regarding the need to confront those questions and to remain always dissatisfied with their instant resolution. When individuals bind together to form a political community, they create more than a set of institutions and procedures to maximize individual interests. They also create a collective agent that holds an inevitable relationality with *other* collective agents.[27] What justice requires between those collectivities cannot simply be fixed according to a global welfare calculus, reduced to an algorithm of recognition, or excluded as outside the scope of justice theory. Just as the individual cannot sublimate agency either to a consequentialist-utilitarian programme or to a set of reflexive and inviolable deontological maxims, but instead must always and in every context imperfectly *decide*, so too must collective agents always bear a burden of unavoidable, yet unsatisfiable responsibility. Liberal constitutionalism should therefore view itself always as a work in progress, asymptotically striving towards an unattainable but undeniable goal of universal recognition and respect.

5. CONSTITUTING LIFE

Environmental law concerns most basically life and the conditions that support it. Yet, despite its deep connections with romantic and transcendentalist traditions – and despite its modern beginnings as a transformative, even quasi-constitutional field – environmental law in recent years has shifted toward a technical orientation in which life is treated instrumentally, as a resource to be deployed in service of overall well-being. Rather than protect life proper, environmental law has reduced its focus to what Giorgio Agamben calls 'bare life' – those aspects of life that can be apprehended from a scientific, instrumentalist, and bureaucratic perspective. Not only wetlands, whales,

[26] See Kysar, n. 16 above, at p. 2128.

[27] Cf. J. Habermas, *Between Naturalism and Religion* (Polity Press, 2008), at p. 273 (describing Rousseauean tradition in which 'sovereignty branches internally into a communitarian understanding of the political freedom of the members of a national community and toward the outside into a collectivist understanding of the freedom of a nation that asserts its existence against other nations').

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and oil wells, but human beings are treated as resources to be managed. All lives and all values become objects of study and manipulation. From this perspective, 'natural life itself and its well-being seem to appear as humanity's last historical task'.[28] The careful distinction that Amartya Sen insists upon – of viewing humans as 'agents whose freedoms matter' rather than as 'patients who are no more than their living standards'[29] – vanishes, as does any hope of expanding the class of freedom-seeking agents beyond the instant, acknowledged group of individual humans.

Repeatedly, we are told that this instrumentalization of life is necessary for our own good and that we will be 'better off' for having sublimated our agency to managerial expertise. But, as Agamben writes, it is far from 'clear whether the well-being of a life that can no longer be recognized as either human or animal can be felt as fulfilling'.[30] As an example that only seems frivolous, consider the fact that consumers in the US spend more per year on their household pets than the gross domestic product of most countries.[31] Consider also the fact that pharmaceutical companies in the US have successfully opened a market for behavioural modification aids for those pets, including formulations of Prozac and other psychotropic drugs for cats and dogs believed by their owners to be too energetic.[32] Are these signs that the prejudicial distinctions between 'man' and 'animal' are eroding in response to the ethical call of the other? Or, are they signs that the instrumentalization of all life is one step closer to completion? If so, will it be fulfilling for them? For us?

Present and future genetic engineering technologies will reveal the folly – and danger – of the approach to life as bare life. Our dominant moral and political traditions lack adequate means to guide the use of such technologies, since they depend on the very kinds of categorical distinction that will be brought into question by our powers of design and control. How will we respond when the foundational tools of those traditions are set against each other? Will our confidence in reason and empiricism, articulated through science and technology, lead us further down the path of life's instrumentalization, or will our commitment to dignity reignite upon seeing too much of life reduced to the status of a patient? Will the vacant gaze of our medicated cat appear to us as a mirror? What will be our test for moral and political recognition when we no longer have recourse to any notion of a naturalistic order but instead must measure directly the ethical ambition within us? These tensions have always been with us – we have, in that sense, never been modern[33] – but the genetic age will bring them to the fore with undeniable clarity.

Clear also will be the point of precaution. The precautionary principle and associated regulatory approaches embody a variety of wisdoms that have become

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28 G. Agamben, *The Open: Man and Animal* (Kevin Attell, 2004), at pp. 76–7.

29 Ibid.

30 Ibid.

31 See D. Brady & C. Palmeri, 'The Pet Economy', *Business Week*, 6 Aug. 2007, available at: http://www.businessweek.com/magazine/content/07_32/b4045001.htm?chan=search.

32 See J. Vlahos, 'Pill-Popping Pets', *New York Times Magazine*, 13 July 2008, available at: http://www.nytimes.com/2008/07/13/magazine/13pets-t.html?pagewanted=all.

33 See generally B. Latour, *We Have Never Been Modern* (Catherine Porter, 1993).

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endangered amidst the dominance of the welfare-economic programme. The most basic of wisdoms remains the implicit reminder that how a society enacts its causal capacity – in geopolitical, intertemporal, and interspecial terms – will determine the content of its identity. Today, the precautionary principle is harshly criticized as an asymmetric device that ignores the opportunity costs of safety. But this critique misunderstands the domain in which the precautionary principle operates. Just as no physician would unthinkingly and universally follow the precautionary mandate of the Hippocratic adage – putting down injection needles and refusing to reset broken bones out of literalist adherence to the 'first, do no harm' injunction – no political community adheres to the precautionary principle without paying attention to forgone benefits. What appears in both cases to be an emphasis on the dangers of acting (or doing) to the disregard of 'opportunity costs' actually represents a much more subtle acknowledgement of the irreducibly distinctive nature of human agency, of the unique relationship of authorship that the doer bears to the done.

At bottom, the precautionary principle does not command political communities to do this or that thing on behalf of the environment any more than the time-honoured words of Hippocrates issue specific behavioural directives to physicians on behalf of patients. Rather, the precautionary principle asks political communities to remain mindful of the special position from which they choose and act. It asks them to remember that they stand in a relationship of responsibility not only to their own citizens but also to other nations, other generations, and other forms of life, all of which – like the physician's patient – reside in a condition of at least partial dependency on the decisions and actions of the regulating body. The precautionary principle asks the political community to maintain such ethical self-awareness through the principle's subtle reminder that doing harm, even in service of a greater benefit, is something that the community must always own as part of its identity.

6. CONCLUSION

Understandably, such self-consciously collective political conceptions tend to be regarded with distrust. Environmental law becomes guilty by association: in 2007, for instance, with the world's attention focused on the challenge of climate change, the president of the Czech Republic, Václav Klaus, claimed to 'see the biggest threat to freedom, democracy, the market economy and prosperity now in ambitious environmentalism, not in communism'.[34] The mistake of commentators like Klaus, however, is to believe that polities must choose exclusively between liberal individualist and collectivist self-conceptions. The liberal individualist framework might be most needed to govern relations internal to a polity, where minority groups and other marginalized denizens might easily be ignored or abused by a majoritarian political culture that becomes too accustomed to declaring what 'we the people' embody in thick, personified terms. But to extend this framework outward to govern also the polity's relations with missing interest holders, like foreign nations and future

[34] V. Klaus, 'What is at Risk is not the Climate but Freedom', *Financial Times*, 14 June 2007, at p. 9.

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generations, is a mistake: the same individualism that works to protect pre-existing members of a community from being dismissed or maligned as other *works an othering* when applied to those who are not already self-present members of the political community. 'We the people' must therefore admit of a more collective self-consciousness when structuring relations with others, or else we will fail to appreciate the historical scale in which those relations unfold.

Perhaps sharing some of Klaus's views, promoters of welfare economics defend their framework on the ground that it promises to reduce discretion, judgment, and other trappings of robust collective agency. They hope to eliminate such agency because they believe that the view of regulation from nowhere – the objective view that attaches no special significance to the identity of the political community that is engaged in policy-making – best avoids oppressive, paternalistic, corrupt, or otherwise misguided government action. Whatever its success at achieving those aims, the economic framework has taken us too far in the direction of nowhere, causing us to lose sight of ourselves and our challenges by promising that the normativity of environmental law can be determined through empirical assessment of welfare consequences alone. Problems at the frontiers of justice demand more in the way of humility, striving, and unflagging self-awareness than they do in scientistic or rationalist rigour. They require awe at the sheer power of being within history, of being able to influence history by connecting thought to action in a world that is already otherwise connected and that, accordingly, will react in ways we cannot foresee and often will not desire. Taken to an extreme, such awe would lead us, like Jainists, to gingerly step behind broomed surfaces, lest we make moves that cause death even to the lives that lie beneath the reach of our vision. But the basic wisdom – the essential wisdom – is that causing death must always be done with solemnity and with the hope of greater precaution tomorrow.

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