

The Theoretical Foundations of Intergenerational Ecological Justice: An Overview

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ABSTRACT

While few would deny that present generations have a moral obligation to preserve the environment for future generations, some theorists reject the existence of a *legal* duty in this regard. This article takes the opposite view. It argues that ample juridical as well as ethical social justice theory—contractarian distributive and reciprocity-based theories prominent among them—establishes that future generations have a legal right to a clean and healthy environment. But most helpful in ensuring intergenerational ecological justice, the author contends, is a respect-based theory of social justice which at its core honors the values that underwrite human rights law and policy inclusively conceived and embraced.

I. INTRODUCTION

It is increasingly popular for environmental and human rights advocates to champion the ecological rights of future generations. This is due in no small measure to the pioneering work of environmental law scholar Edith Brown Weiss and her now famous study, *In Fairness to Future Generations*, first

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This article is dedicated to the memory of Richard Pierre Claude, my esteemed late colleague, co-author, and friend who, in the aftermath of the first US Earth Day in 1970, awakened me to the idea of human rights for future generations.

published in 1988.¹ But the mounting threats of irreversible climate change, rapidly dwindling biodiversity, and the exhaustion of vital resources, exacerbated by accelerating population growth, also have played a role, provoking “discomfiting images of a non-future.”² Somewhere deep inside, we know that this state of affairs cannot continue if the next and succeeding generations are to enjoy a global environment comparable to what we inherited from our predecessors;³ that life is a temporary gift we share with a long chain of past, present, and future humanity; that, whatever our ancestors’ failings, we therefore are bound to ensure, with fairness, that the Earth will sustain today’s children and those of the future. A claim on behalf of future generations might wrest from a neoliberal world order, responsible for much of our planet’s ecological damage, at least some respite from environmental degradation where others have failed. True, not everyone is moved to action by the ecological plight of others, least of all unborn others. But it is the rare parent, grandparent, or great-grandparent who denies this intergenerational obligation in principle; and it is the rare child, grandchild, or great-grandchild who will not feel resentful if this obligation is not met. It is a morality that speaks truth to power.

Yet when asked if future generations have a *legal* right to protection from major eco-harms and, if so, whether present generations have concomitant *legal* obligations relative to them, some theorists demur. Future generations, they argue, cannot have rights because they do not yet exist and therefore cannot *have* anything, including rights. Future human beings are indeterminate, contingent, lacking in identity. Indeed, we cannot be sure that “they” will exist at all. Thus, mindful that legal duties do not exist absent corresponding legal rights, skeptics say that current generations cannot incur legal obligations to future generations for the simple reason that future generations cannot have legal rights. Intergenerational justice is a conceptual impossibility; it precludes further discourse.⁴

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1. EDITH BROWN WEISS, *IN FAIRNESS TO FUTURE GENERATIONS: INTERNATIONAL LAW, COMMON PATRIMONY, AND INTERGENERATIONAL EQUITY* (1989).
 2. Burns H. Weston & Tracy Bach, *Recalibrating the Law of Humans with the Laws of Nature: Climate Change, Human Rights, and Intergenerational Justice* 60 (Vermont Law Sch. Climate Legacy Initiative Policy Paper, 2009), available at http://www.vermontlaw.edu/Documents/CLI%20Policy%20Paper/CLI_Policy_Paper.pdf.
 3. Indeed, noted environmentalist Bill McKibben has concluded that we already have passed that point. BILL MCKIBBEN, *EAARTH: MAKING A LIFE ON A TOUGH NEW PLANET* (2010).
 4. See, e.g., DAVID GAUTHIER, *MORALS BY AGREEMENT* (1986); ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974); Wilfred Beckerman, *The Impossibility of a Theory of Intergenerational Justice*, in *HANDBOOK OF INTERGENERATIONAL JUSTICE* 53 (Joerg Chet Tremmel ed., 2006); Wilfred Beckerman, *Sustainable Development and Our Obligations to Future Generations*, in *FAIRNESS AND FUTURITY: ESSAYS ON ENVIRONMENTAL SUSTAINABILITY AND SOCIAL JUSTICE* 71 (Andrew Dobson ed., 1999); Richard T. De George, *The Environment, Rights, and Future Generations*, in *RESPONSIBILITIES TO FUTURE GENERATIONS: ENVIRONMENTAL ETHICS* 157 (Ernest Partridge ed., 1981); Ruth Macklin, *Can Future Generations Correctly Be Said to Have Rights?*, in

This article takes an opposite view. Proceeding with the understanding that “the future” is a temporal space without outer limits (such matters as the storage of radioactive waste make it unwise, except for cognitive convenience, to define “the future” narrowly)⁵ and that “future generations” includes all persons under eighteen years⁶ (who are little better positioned than unborn children to determine their future), it relies upon leading theories of social justice to argue that future generations have a legal right to a clean, healthy, ecologically balanced, and sustainable environment, and that the living are legally obligated to provide it. Tracking Brown Weiss, this article argues that each generation receives a “natural and cultural legacy” in legal trust from previous generations; that this legacy, it holds in turn, in legal trust for generations in its future; and that this trust relationship therefore grants to future generations a legal right to at least three conditions of ecological and cultural well-being⁷—three principles of intergenerational ecological justice—which each living generation is legally obliged to fulfill:⁸

- *conservation of ecological options*—i.e., each living generation shall “conserve the diversity of the [planet’s] natural and cultural resource base” and thus “not unduly restrict the options available to future generations in solving their problems and satisfying their own values”;⁹
- *conservation of the quality the planet*—i.e., each living generation shall “maintain the . . . planet so that it is passed on in no worse condition than

RESPONSIBILITIES TO FUTURE GENERATIONS, *supra*, at 151; Thomas H. Thompson, *Are We Obligated to Future Others?*, 1 ALTERNATIVE FUTURES 29 (1978). For an insightful, extended critique of the demurring theorists, see JOERG CHET TREMMEL, A THEORY OF INTERGENERATIONAL JUSTICE 35–65 (2009).

5. In 2004, the United States Court of Appeals for the District of Columbia Circuit addressed, *inter alia*, the temporal standard to be applied to activate safely a federal repository for spent nuclear fuel and high-level radioactive waste at Yucca Mountain, Nevada. The time frame contested ranged from between 10,000 to “hundreds of thousands of years after disposal, ‘or even farther into the future.’” *Nuclear Energy Inst., Inc. v. Env’tl. Prot. Agency*, 373 F.3d 1251, 1258–67 (D.C. Cir. 2004). However, because it brings vague future persons into focus, and thereby helps mobilize needed political energies, this article recommends a notion of future generations defined by three and a half generations of persons in existence from this day forward, a notion that is derived from the “two-hundred year present” of the late sociologist Elise Boulding. Elise Boulding, *The Dynamics of Imaging Futures*, WORLD FUTURE SOC’Y BULL., Sept.-Oct. 1978, at 1, 7.
6. “Children” are so defined by the Convention on the Rights of the Child, *adopted* 20 Nov. 1989, G.A. Res. 44/25, U.N. GAOR, 44th Sess., 61st plen. mtg., Supp. No. 49, art. 1, at 166, U.N. Doc. A/44/49 (1990), 1577 U.N.T.S. 3 (*entered into force* 2 Sept. 1990).
7. BROWN WEISS, *supra* note 1, at 2, 17–46.
8. In the literature, the terms “intergenerational justice” and “intergenerational equity” may be understood as interchangeable. I prefer “intergenerational justice,” however, because “equity” has lost some of its resonance since equity was combined with law into one cause of action, but more importantly because it evokes the fundamentally relevant sensibility of “social justice.”
9. BROWN WEISS, *supra* note 1, at 38, 40–42.

the present generation received it," recognizing that future generations are "entitled to a quality of the planet comparable to the one enjoyed by previous generations";¹⁰ and

· *conservation of equitable resource* access—i.e., each living generation shall "provide its members with equitable rights of access to the legacy [of resources and benefits received] from past generations . . . and conserve this access for future generations."¹¹

These three conditions or obligations or principles of intergenerational ecological justice are widely endorsed in the scholarly and documentary literature (some of it predating Brown Weiss) and they appear now also to be increasingly accepted juridically.¹² This is so if for no other reason than

10. *Id.* at 42–43.

11. *Id.* at 43–45.

12. See, e.g., *Historical Responsibility of States for the Preservation of Nature for Present and Future Generations*, adopted 30 Oct. 1980, G.A. Res. 35/8, U.N. GAOR, 35th Sess., 49th plen. mtg., Supp. No. 48, at 15, U.N. Doc. A/35/48 (1981); Declaration of the United Nations Conference on the Human Environment, adopted 16 June 1972, at 3, U.N. Doc. A/CONF.48/14/Rev.1 (1973); Convention for the Protection of the World Cultural and Natural Heritage, adopted 23 Nov. 1972, UNESCO, 17th Sess., 1037 U.N.T.S. 151 (entered into force 17 Dec. 1975); Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, adopted 29 Dec. 1972, 1046 U.N.T.S. 120 (entered into force 30 Aug. 1975); Convention on International Trade in Endangered Species of Wild Fauna and Flora, adopted 3 Mar. 1973, 993 U.N.T.S. 243, (entered into force 1 July 1975); Charter of Economic Rights and Duties of States, adopted 12 Dec. 1974, G.A. Res. 3281 (XXIX), U.N. GAOR, 29th Sess., 2315th plen. mtg., Supp. No. 31, at 50, U.N. Doc. A/9631 (1975); World Charter for Nature, adopted 28 Oct. 1982, G.A. Res. 37/7, U.N. GAOR, 37th Sess., 48th plen. mtg., Supp. No. 51, at 17, U.N. Doc. A/37/51 (1983); Rio Declaration on Environment and Development, adopted 14 June 1992, 19th plen. mtg., U.N. Doc. A/CONF.151/26/Rev.1 (Vol. 1) (1993); Declaration of The Hague, adopted 11 Mar. 1989, U.N. GAOR, 44th Sess., U.N. Doc. A/44/340 (1989); U.N. Framework Convention on Climate Change, adopted 9 May 1992, 5th sess., U.N. Doc. A/AC.237/18(Part II)/Add.1, 1771 U.N.T.S. 107 (entered into force 21 Mar. 1994); Convention on Biological Diversity, adopted 5 June 1992, 1760 U.N.T.S. 79 (entered into force 29 Dec. 1993), reprinted in 31 I.L.M. 818 (1992); several regional seas conventions, such as the Amended Convention for the Protection of the Mediterranean Sea Against Pollution [Amended Barcelona Convention], adopted 10 June 1995, UNEP, U.N. Doc. UNEP(OCA)/MED IG.6 (Annex) (entered into force 9 Jul. 2004); Declaration on the Responsibilities of the Present Generations Towards Future Generations, adopted 12 Nov. 1997, UNESCO, 29th Sess., arts. 4–5; Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, adopted 25 June 1998, 2161 U.N.T.S. 447 (entered into force 30 Oct. 2001) [hereinafter Aarhus Convention]; Declaration of Bizkaia on the Right to the Environment, adopted 12 Feb. 1999, UNESCO, 30th Sess., U.N. Doc. 30 C/INF.11 (1999); *International Mother Earth Day*, adopted 22 Apr. 2009, G.A. Res. 63/278, U.N. GAOR, 63d Sess., 80th plen. mtg., Agenda Item 49(d), U.N. Doc. A/RES/63/278 (2009). Especially noteworthy is the 1998 Aarhus Convention, *supra*, which builds on the principle of conservation of access in considerable detail. For helpful insight, see Jeremy Wates, *The Aarhus Convention: Promoting Environmental Democracy*, in *SUSTAINABLE JUSTICE: RECONCILING ECONOMIC, SOCIAL AND ENVIRONMENTAL LAW* 393 (Marie-Claire Cordonier Segger & C.G. Weeramantry eds., 2005).

that the principles work well with the ethical and pragmatic rationales that give intergenerational justice moral purpose and the jurisprudential theories of social justice that give it legal standing.

II. ETHICAL AND PRAGMATIC RATIONALES FOR INTERGENERATIONAL ECOLOGICAL JUSTICE

Economists, jurists, philosophers, political scientists, theologians, and many others offer a variety of rationales for adhering to the three principles of intergenerational justice just noted:

- the earth is held by past, present, and future generations in common, as a species forming the community of humankind as a whole;¹³
- as living members of a community, human beings benefit from the sacrifices and investments made by prior generations;¹⁴
- succeeding generations cannot harm preceding ones, so current generations should not inflict harm on their successors;¹⁵
- future generations are underrepresented in legal and political processes, and thus the power of present generations to adversely affect their quality of life is imbalanced;¹⁶
- a social contract requires each generation to pass on to the next the gifts it has jointly inherited from the past;¹⁷
- no generation should be deliberately favored or disadvantaged over another;¹⁸
- no generation should have to envy the impersonal resources enjoyed by predecessor generations;¹⁹
- the impact of environmentally degrading policies in the present tends to be long-term and therefore threatens future generations disproportionately;²⁰
- present actions may not only inflict disadvantages on future generations but also deprive them of benefits;²¹

13. BROWN WEISS, *supra* note 1, at 17.

14. BRYAN G. NORTON, *SUSTAINABILITY: A PHILOSOPHY OF ADAPTIVE ECOSYSTEM MANAGEMENT* 305 (2005).

15. ONORA O'NEILL, *TOWARDS JUSTICE AND VIRTUE: A CONSTRUCTIVE ACCOUNT OF PRACTICAL REASONING* 113–21 (1996); Henry Shue, *Climate*, in *A COMPANION TO ENVIRONMENTAL PHILOSOPHY* 449 (Dale Jamieson ed., 2001).

16. Emmanuel Agius, *Intergenerational Justice*, in *HANDBOOK OF INTERGENERATIONAL JUSTICE*, *supra* note 4, at 317, 319.

17. PETER BARNES, *CAPITALISM 3.0: A GUIDE TO RECLAIMING THE COMMONS* 12 (2006).

18. Jörg Chet Tremmel, *Is a Theory of Intergenerational Justice Possible? A Response to Beckerman*, in *INTERGENERATIONAL JUSTICE REV.*, No.2, at 6 (2004).

19. EDWARD A. PAGE, *CLIMATE CHANGE, JUSTICE, AND FUTURE GENERATIONS* 64–65 (2006).

20. *Id.* at 38.

21. Clark Wolf, *Intergenerational Justice*, in *A COMPANION TO APPLIED ETHICS* 279, 280 (R.G. Frey & Christopher Heath Wellman eds., 2003).

- scientific and technological advances have expanded the sphere of human control and thus present generations have a greater capacity to offset future risks;²²
- future generations will have properties tomorrow, even if they do not have them now, and these will be shaped substantially by the values practiced by present generations;²³
- the policies of present generations will affect not only the interests of future generations, but also their rights and the obligations their affected rights will impose on their contemporaries;²⁴ and
- even if all individuals do not want offspring, all societies need and therefore have affection for their children, grandchildren, great-grandchildren, and thus care about their future well-being at a minimum.²⁵

Our interest in the sustainability of our planet and the survival of our species, it must be added, or of only our own societies or descendants, depends on our achieving ecological justice for future generations. Without explicitly accounting for the ecological interests of future generations, there is no guarantee that short-term solutions can or will safeguard the future.

Some will argue, predictably, that special attention need not be given to future generations because their protection, where not explicit, is implied in laws that protect present generations. In all legal systems that value custom, predictability, stability, and coherence, decision-making is as much about the future as it is about the past. Furthermore, in our pursuit of happiness, authenticity, and freedom, constitutional law scholar Jed Rubenfeld reminds us, modernity directs us to live in the present.²⁶ The future will take care of itself.

There is no question that the rights of living generations (ecological, economic, and otherwise) must be taken into account when calculating the rights of future generations. Some equitable balance is essential if genuine intergenerational justice is to be achieved—indeed, if living generations are even to be persuaded by the idea of intergenerational justice. This of course is no easy task. With a few notable exceptions—e.g., freedom from genocide and torture—no rights are absolute. In the “ordinary” case, it is no small matter to determine where the rights of one end and the rights of the other begin.²⁷

22. Hans Jonas, *Technology and Responsibility: The Ethics of an Endangered Future*, in RESPONSIBILITIES TO FUTURE GENERATIONS, *supra* note 4, at 23, 34–35.

23. Joel Feinberg, *The Rights of Animals and Unborn Generations*, in RIGHTS, JUSTICE, AND THE BOUNDS OF LIBERTY: ESSAYS IN SOCIAL PHILOSOPHY 159, 181 (1980).

24. Wilfred Beckerman, *Intergenerational Justice*, INTERGENERATIONAL JUSTICE REV., No. 2, at 1, 4–5 (2004).

25. JOHN RAWLS, A THEORY OF JUSTICE 284–98 (1971).

26. See JED RUBENFELD, FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT 3 (2001).

27. For more on Rawls’ “fair share” or “just saving” principles, see RAWLS, *supra* note 25, at 111–14, 284–94.

But Mother Nature has her limitations. Therefore, where ethical arguments do not persuade, pragmatic arguments may nevertheless prevail. Consider, for example, the following three reasons why it is pragmatically advantageous to be farsighted when responding to, say, climate change. *First*, future generations will suffer disproportionately from climate change relative to present generations (owing to the cumulative effect of carbon dioxide and other greenhouse gas concentrations, now mounting exponentially). *Second*, climate change solutions that account for the interests of future generations are better positioned to combat climate change than those that plan only for the well-being of present generations (because they are likely to combat not just the relatively minor effects of climate change felt in the present, but also its harsher effects that hold out the real possibility of planetary catastrophe in the future). *Third*, it is disregard of the interests of future generations that has contributed to the menace of global warming (accumulated nuclear waste, loss of biodiversity, ozone depletion, and so on).

There are, thus, many sound reasons, pragmatic as well as ethical, why present generations should take account of and defer to the interests and needs of future generations, even if doing so is costly in the present. Let us not forget that, in the near term, it is our children, grandchildren, and great-grandchildren of whom we speak.

III. SOCIAL JUSTICE THEORIES AND INTERGENERATIONAL JUSTICE

To be intellectually persuasive, legal rights and duties must be anchored in coherent theories of social justice. Ethical and pragmatic values are essential components of effective social justice, but they are not sufficient without a theory (or theories) of justice upon which intergenerational justice may be convincingly founded.

Theories of social justice tend to be labeled as “libertarian” or “liberal.” Libertarian theorists, wary of agendas that invite governmental intervention, understand that proxy representation of future interests can spell direct or indirect governmental participation, and thus generally contend that it is conceptually impossible for future generations to have rights. Their argument, previously noted,²⁸ is summarized by the following syllogism: (a) any coherent theory of social justice involves conferring rights on people; (b) future generations, being unborn, are not yet people; (c) therefore, the interests of future generations cannot be promoted or protected according to any theory of justice. As philosopher Annette Baier has observed, however, “The ontological precariousness of future generations that some see as a reason

28. See *supra* note 4 and accompanying text.

for not recognizing any rights of theirs is not significantly greater than that of the future states of present persons.”²⁹ The “ontological precariousness” of future generations, in other words, does not of itself excuse present generations from responsibility to them.

Within liberal theories of social justice, in contrast, are utilitarian and contractarian theories that do acknowledge a role for government in achieving the just society. However, because the utility principle (famously defined by Jeremy Bentham as “the greatest happiness of the greatest number”)³⁰ is generally conceived by utilitarians as the sole measure of right and wrong, it is not a favored approach to climate change ethics. Dominant, therefore, are the more popular contractarian theories of social justice pursuant to which people are seen as promoting and protecting societal well-being by entering into an “ideal contract”—a theoretical covenant of “free and rational agreement”—forged by all relevant parties, including government.³¹ Of course, unanimity of agreement is phenomenally impossible when it comes to unborn contractual parties. Accordingly, most contractarian theories, particularly those concerned with intergenerational justice, argue that just social arrangements “are those that *could be* the object of a free and rational agreement [to which people] could *hypothetically* consent, [and which are therefore] often called *hypothetical contractarian conceptions of justice*.”³²

A. Two Prominent Contractarian Theories of Social Justice

Two contractarian theories of social justice—distributive and reciprocity-based—provide different philosophical pathways that arrive at the same point: future generations have legal as well as moral rights to an environmental legacy that leaves them no worse off, more or less, than the generation preceding them.

1. Distributive Justice

Distributive theories of social justice are concerned with the allocation of social goods and are both substantive and procedural in kind.³³ Substantive theories of distributive justice are those that seek fair results for the rights-holders and the duty-bearers who are parties to the social contract. Whether fairness is measured by equality (to everyone the same welfare, resources, or

29. Annette Baier, *The Rights of Past and Future Persons*, in RESPONSIBILITIES TO FUTURE GENERATIONS, *supra* note 4, at 171, 174.

30. JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 5 n. 1 (Dover Philosophical Classics, 2007) (1823).

31. Wolf, *supra* note 21, at 284.

32. *Id.* (emphasis in original).

33. See RAWLS, *supra* note 25, at 7.

capabilities), by priority (to each according to one's contribution or need), or by sufficiency (to everyone enough to pursue one's aims and aspirations without major distress or dissatisfaction), substantive theories are result-oriented and speak to both sides of the contractual equation.³⁴ Procedural theories of distributive justice, in contrast, are process-oriented, focused on the administration of distributive justice, and thus are concerned with the fairness and transparency of resource allocation decisions.³⁵ In the intergenerational setting, given that legal duties do not exist absent corresponding legal rights, future generation rights-holders require authorized proxies to act on their behalf.

There are numerous variants of distributive justice. At their core, however, is a concern for fairness, both in the quantity and quality of resources distributed and in the access to those resources that one generation provides to the next. The central question is how to measure a fair distribution, what Rawls called the "fair share" or "just saving" question: what and how much should present generations save for the benefit of future generations?³⁶ The exact measure of a "fair share" is of course open to differing interpretation. On the other hand, Brown Weiss' three conservation principles, focusing on quantity (as measured by options), quality, and access provide a useful guide for allocating natural resources over time.

2. Reciprocity-Based Justice

Reciprocity-based theories of social justice likewise support the Brown Weiss definition of intergenerational ecological justice, their underlying premise being that those who contribute to the well being of others are entitled to the full sweep of rewards that society has to offer.³⁷ As Rawls put it, "We are not to gain from the cooperative labors of others without doing our fair share."³⁸

A self-interested interpretation of this contribution principle is that the good one gives to others must be good also for oneself, else norms of reciprocity will fail to generate consensus and cooperation among competing parties. Though not currently favored among Western theorists, it is nonetheless possible to see from this interpretation how the self-interest that resides in conserving resources, safeguarding ecological diversity, or curbing climate change for one's own sake or the sake of one's family, descendants, or country can generate consensus and cooperation. It also is possible to

34. *Id.* at 60–61.

35. *Id.*

36. See *id.* at 286–91; Wolf, *supra* note 21, at 286.

37. The idea is as old as the Bible at least: "Give, and it shall be given to you. . . . For whatever measure you deal out to others, it will be dealt to you in return." *Luke* 6:38.

38. RAWLS, *supra* note 25, at 112.

see how such environmentally defined self-interest can serve the interests of future generations at the same time.

It is, of course, impossible for unborn future generations to reciprocate backward in time, except possibly when they are represented by authorized proxies living in the present. However, invoking a “stewardship model” of intergenerational reciprocity, intergenerational rights and duties may be reciprocated by each generation giving to the next the fair share it received from the preceding generation.³⁹ Similarly, under the “chain of concern model” of intergenerational reciprocity made famous by Rawls in relation to familial consanguinity, intergenerational rights and duties may be held for one’s blood descendants.⁴⁰ As Jörg Tremmel writes, “it is possible to apply the principle of reciprocity indirectly. Most people would agree that it is ‘just’ to give back to future generations what we received from former generations (just like we owe back our children what we received from our parents).”⁴¹

B. A Preferred Contractarian Theory of Social Justice: Respect-Based Justice

While intergenerational ecological justice can be grounded on distributive and reciprocity-based social justice theories, another contractarian theory—*respect-based social justice*—provides an even better footing because it depends neither on identity nor reciprocity as preconditions of intergenerational justice. More open to creative legal approaches to preferred ecological futures, it embraces a transgenerational global community, partnership, or social contract founded on human solidarity to reach the same or similar intergenerational fairness policy goal—and thereby also supports Brown Weiss’ definition of intergenerational ecological justice. It builds on two distinct but conceptually related intellectual traditions: the relational metaphysics and “process philosophy” of British philosopher and mathematician Alfred North Whitehead;⁴² and the community policies underlying international human rights law, whose core value of respect honors difference, freedom of choice, equality of opportunity, and aggregate well-being in value processes.⁴³

39. See PAGE, *supra* note 19, at 119.

40. See *id.* at 115–19; see also RAWLS, *supra* note 25, at 288 (“as fathers say care for their sons”).

41. Tremmel, *supra* note 18, at 6.

42. See generally ALFRED NORTH WHITEHEAD, *PROCESS AND REALITY: AN ESSAY IN COSMOLOGY* (1929); ALFRED NORTH WHITEHEAD, *ADVENTURES OF IDEAS* 34 (1933). In contrast to traditional philosophies, Whitehead asserted the interrelationship of matter, space, and time. The end result is his conclusion that “nature is a structure of evolving processes. The reality is the process.” A.N. WHITEHEAD, *SCIENCE AND THE MODERN WORLD* 90 (1945).

43. See Burns H. Weston, *Human Rights*, in 20 *ENCYCLOPEDIA BRITANNICA* 656 (15th ed. 2005) (providing the history as well as the meaning and scope of human rights), available at <http://international.uiowa.edu/centers/human-rights/resources/publications/recurrent.asp>.

According to Whitehead, “every generation is related to all preceding and succeeding generations which collectively form the community of [human]kind as a whole”⁴⁴—a viewpoint that acknowledges inescapable interdependencies with commensurate rights and obligations, a perspective long held by many indigenous communities.⁴⁵ Moreover, the “common good” is not merely the sum of individual goods (as liberal and other individualistic theories of society would have it), but rather “a state of equilibrium in the interplay of individual goods” that resides in all of humankind—which may be understood as the good of humankind as a whole, including past, present, and future generations.⁴⁶ In this manner, the “common heritage” of Earth’s natural resources, fresh water systems, oceans, atmosphere, and outer space belongs to all generations in an intertemporal partnership.⁴⁷ No generation can properly exclude another from its fair share of that heritage. If personal identity is a factor, it is in an ethos of species identity; if reciprocity is at all pertinent, it is in the mutual caring that arises from species identity. And at the heart of it all, as in the case of distributive and reciprocity-based theories of social justice, is the fundamental ideal of “justice as fairness.”⁴⁸

The policies underlying international human rights law—the apotheosis of respect-based justice in the modern world—similarly provide a foundation for building intergenerational justice, the more so when they are internalized into national legal systems. The Universal Declaration of Human Rights proclaims its “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family [as] the foundation of freedom, justice and peace in the world.”⁴⁹ Multiple human rights instruments—from the International Covenant on Economic, Social and Cultural Rights and International Covenant on Civil and Political Rights⁵⁰ to the Convention on the Rights of the Child⁵¹—articulate “a fundamental belief in the dignity of all members of the human society and in [an] equality of rights, which extends in time as well as space.”⁵² At bottom, all rest upon

44. Agius, *supra* note 16, at 328 (summarizing Whitehead).

45. See, e.g., N. Bruce Duthu, *The Recognition of Intergenerational Ecological Rights and Duties in Native American Law*, a “background paper” in Appendix A of Weston & Bach, *supra* note 2. See generally, BRIAN EDWARD BROWN, *RELIGION, LAW AND THE LAND: NATIVE AMERICANS AND THE JUDICIAL INTERPRETATION OF SACRED LAND* (1999).

46. Agius, *supra* note 16, at 328 (summarizing Whitehead).

47. *Id.* at 329.

48. RAWLS, *supra* note 25, at 3.

49. Universal Declaration of Human Rights, *adopted* 10 Dec. 1948, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., Preamble, U.N. Doc. A/RES/3/217A (1948).

50. International Covenant on Economic, Social and Cultural Rights, *adopted* 16 Dec. 1966, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3 (*entered into force* 3 Jan. 1976).

51. Convention on the Rights of the Child, *adopted* 20 Nov. 1989, G.A. Res. 44/25, U.N. GAOR, 44th Sess., U.N. Doc. A/44/49 (1989), 1577 U.N.T.S. 3 (*entered into force* 2 Sept. 1990).

52. BROWN WEISS, *supra* note 1, at 25–26.

the pillar of respect, conceived as the reciprocal honoring of freedom of choice and equality of opportunity regarding participation in all the value processes of a public order of human dignity.⁵³

Inspired by the first Earth Day in March 1970 and NASA's "blue marble" photo of "spaceship earth" in December 1972, human rights came to embrace the human species as a whole across both space and time. Hence such contemporaneously claimed group rights as the right to self-determination and the right to a clean, healthy, ecologically balanced, and sustainable environment, supplementing earlier proclaimed civil and political rights on the one hand, and social, economic, and cultural rights on the other. Today, mindful that many if not most of these claimed rights are profoundly challenged by atmospheric pollution and consequent climate change, intergenerational rights are increasingly claimed and recognized, legally as well as morally.

Whitehead's relational worldview reverberates in this respect-based setting. His holistic "human solidarity" outlook is at the core of intergenerational human rights discourse, a dialectic about interpersonal and intergroup respect across space and time. As World Court Judge Cançado Trindade put it when President of the Inter-American Court of Human Rights: "Human solidarity manifests itself not only in a *spacial* [sic] dimension—that is, in the space shared by all the peoples of the world—but also in a temporal dimension—that is, among the generations who succeed each other *in the time*, taking the past, present and future altogether."⁵⁴

What is more, and further in keeping with Whitehead, grounding intergenerational justice in the fundamental policies underlying international human rights law dispenses with the identity and reciprocity issues that haunt, however unconvincingly, other theories of social justice in the intergenerational context. Respect for others—deceased, living, or unborn—is eminently possible without personal acquaintance or knowledge; and if genuine, it ordinarily is practiced free of charge, without reciprocal preconditions. Present generations may choose a legacy of respect for the ecological rights of future generations without detailed familiarity or expectation of return (save possibly the spiritual satisfaction of having so chosen). "It is the notion of human solidarity . . . in . . . wide dimension, and never that of State sovereignty," writes Judge Cançado Trindade, "which lies on [sic]

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53. See MYRES S. McDOUGAL, HAROLD D. LASSWELL & LUNG-CHU CHEN, *HUMAN RIGHTS AND WORLD PUBLIC ORDER: THE BASIC POLICIES OF AN INTERNATIONAL LAW OF HUMAN DIGNITY* 7, 451–52 (1980). A public order of human dignity—local to global—is defined by these authors as "the greatest production and widest possible distribution of all important values, with a high priority accorded persuasion rather than coercion in such production and distribution." *Id.* at 90.
54. *Bámaca-Velásquez v. Guatemala Case*, 2000 Inter-Am. Ct. H.R. (ser. C) No. 70 ¶ 23 (25 Nov. 2000) (Separate Opinion of Judge A.A. Cançado Trindade)(emphasis in original), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_70_ing.pdf.

the basis of the whole contemporary thinking on the rights inherent to the human being."⁵⁵

But appeals to human solidarity, however inspiring, do not alone persuade that the values underlying human rights law and policy afford convincing justification of the ecological rights of future generations. Not all states—certainly not the United States—have ratified even some of the core international human rights instruments. Much of human rights discourse is Western inspired, fueling a debate over the universality of human rights that has surfaced between cultures in recent years.⁵⁶ All human rights instruments require interpretation to inform the content of universalism, even when the concept itself has been accepted. And, when committing to human rights obligations, states commonly hedge their bets with reservations and qualifications to give themselves freedom of maneuver.

These and like issues are not, however, about merely supposed deficiencies of a respect-based theory of intergenerational ecological justice or of the human rights values that inform it. They concern, rather, the shortcomings of human rights practice, and while they do reflect a certain disrespect of the application of intergenerational human rights, or disagreement with their content, they do not challenge the *existence* of those rights as such. Indeed, the very fact of resistance to the application or content of human rights, intergenerational and otherwise, is strongly suggestive, if not proof, of both their existence and the validity of the distributive theories of social justice that support them.

Nevertheless, to be convincing, proponents of intergenerational ecological justice must ground their argument on a theory of human rights that avoids fundamental controversy; and to this end is ventured the idea of *necessity driven by enlightened self-interest*. A just society, whether operating across space or time or both, requires rights as a matter of necessity to guarantee its possibility. And to ensure its probability (or “compliance pull”⁵⁷), it must be defined by values freely and equally chosen by its members in rational contemplation of the self-interest—*their* self-interest—that inheres in mutually tolerant and reciprocally forbearing attitudes and behaviors. Of course, enlightened altruism can, does, and should contribute to the building of just societies as well, and therefore should be encouraged always. But in the “nasty, brutish, and short” Hobbesian world in which many if not most humans live, enlightened self-interest can greatly motivate respect for oth-

55. *Id.*

56. For extensive treatment of the universalism-cultural relativism debate, see Burns H. Weston, *The Universality of Human Rights in a Multicultural World: Toward Respectful Decision-Making*, in *THE FUTURE OF INTERNATIONAL HUMAN RIGHTS* 65 (Burns H. Weston & Stephen P. Marks eds., 1999); Burns H. Weston, *Human Rights and Nation-Building in Cross-Cultural Settings*, 60 *Me. L. Rev.* 317 (2008).

57. See THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 26 (1990)

ers. This is, indeed, the lesson that many evolutionary scientists are coming to embrace. As Martin Nowak puts it, “our ability to cooperate goes hand in hand with succeeding in the struggle to survive.”⁵⁸ Darwinian competition notwithstanding, individually and as a species we are more likely to survive and thrive if we honor the values that underwrite human rights law and policy in its most inclusive aspect.⁵⁹ What goes around comes around, as they say, with the prospect of a society in waiting—local, global, present, future—that honors a public order of human dignity—the essence of human rights—marked by the widest possible shaping and sharing of all basic values among all human beings.⁶⁰

A further justificatory note. Such a society can be validated by intellectual constructs in an imagined Lockean “initial position.”⁶¹ Consider, for example, the following Rawlsian “veil of ignorance”⁶² construct, set in an intergenerational context and proceeding from an egalitarian and procedurally just starting point: a generation not knowing where along the continuum of time it is situated, but acting rationally in its own self-interest in search of a just ecological inheritance. Self-interest in mind, such a generation would likely choose a bequest of accumulated social capital from its predecessor that would guarantee the fairest distribution of basic wants (rights) and needs (capabilities) among all people to ensure that everyone would benefit as much as possible and, by the same token, suffer as little as possible. But a preferable, more straightforward approach is simply to acknowledge and accept that a just society can be thoughtfully postulated as an empirically measurable, verifiable preference in the here and now—*sans* contrivance—when it is inclusively determined in the inclusive interest.

But however enunciated or substantiated, the necessity idea comes down to a kind of share-and-share-alike Golden Rule, anchored in respect and driven by self-interest as well as empathetic altruism by all generations to satisfy the fundamental requirements of socioeconomic and political justice, the minimum conditions for a life of human dignity in a clean, healthy, ecologically balanced, and sustainable environment. Coupled with the three basic principles of intergenerational ecological justice previously delineated,

58. MARTIN A. NOWAK WITH ROGER HIGHFIELD, *SUPER COOPERATORS: ALTRUISM, EVOLUTION AND WHY WE NEED EACH OTHER TO SUCCEED* xvi (2011).

59. To amend President John F. Kennedy only slightly, “is not peace [and justice], in the last analysis, a matter of human rights—the right to live out our lives without fear of devastation—the right to breathe air as nature provided it—the right of future generations to a healthy existence?” John F. Kennedy, President of the United States, Commencement Address at American University in Washington, (10 June 1963), available at <http://www.jfklibrary.org/Research/Ready-Reference/JFK-Speeches/Commencement-Address-at-American-University-June-10-1963.aspx>.

60. See Weston, *Human Rights*, *supra* note 43.

61. RAWLS, *supra* note 25, at 11.

62. *Id.* at 12.

herein lies the theoretical foundation for human rights upon which claims to intergenerational—and, indeed, intratemporal—ecological justice can build.

Brown Weiss affirms this line of reasoning from the Rawlsian perspective, and in so doing also confirms the universality of her three principles of intergenerational ecological justice.⁶³ Formulated in a respect-based justice perspective, her argument leads to the following two-part proposition:

- each generation has from the previous one the right to respect for its ecological right to (1) conserved options, (2) conserved quality, and (3) conserved access relative to nature's resources; and
- each generation has the obligation to honor respectfully the next generation's right to (1) conserved options, (2) conserved quality, and (3) conserved access to nature's resources.

This proposition bespeaks respectful intergenerational partnership and thus aligns itself not only with Whitehead, but with the classic eighteenth century political thinker Edmund Burke. Describing the state as a "partnership . . . the ends [of which] cannot be obtained in many generations," Burke observed that it becomes a partnership not only between those who are living but between those who are living, those who are dead, and those who are to be born."⁶⁴ Adds Brown Weiss, appropriately: "The purpose of human society must be to realize and protect the welfare and well-being of every generation."⁶⁵

Of course, no matter how persuasively justified in theory, the actualization of intergenerational ecological justice in present-day national and international law depends upon the acuity, talent, and goodwill of those who do battle in the lists of official legal policy-making and decision-making. It is true that, as I have written elsewhere, "[l]aw does not live by executives, legislators, and judges alone," that it emanates as well from the everyday perspectives and interactions of ordinary human beings "pushing and pulling through reciprocal claim and mutual tolerance in [their] daily competition for power, wealth, respect, and other cherished values"⁶⁶—what Michael

63. See BROWN WEISS, *supra* note 1, at 24:

[A]ssume the perspective of a generation that is placed somewhere along the spectrum of time, but does not know in advance where it will be located. Such a generation would want to inherit the common patrimony of the planet in as good condition as it has been for any previous generation and to have as good access to it as previous generations. This requires that each generation pass the planet on in no worse condition than it received and provide equitable access to its resources and benefits.

64. EDMUND BURKE, REFLECTIONS ON THE FRENCH REVOLUTION 139–40 (1790), in 2 WORKS OF EDMUND BURKE 368 (1905).

65. BROWN WEISS, *supra* note 1, at 23.

66. Burns H. Weston, *The Role of Law in Promoting Peace and Violence: A Matter of Definition, Social Values, and Individual Responsibility*, in TOWARD WORLD ORDER AND HUMAN DIGNITY: ESSAYS IN HONOR OF MYRES S. McDOUGAL 114, 117 (W. Michael Reisman & Burns H. Weston eds., 1976).

Reisman calls “microlaw.”⁶⁷ It also is true, as Reisman observes, that “[w]hen . . . assessments [of formally organized legal systems] yield discrepancies between what people want and what they can expect to achieve, . . . [m]icrolegal adjustments may be the necessary instrument of change.”⁶⁸ It is, however a paramount truth at this point in the post-Cold War globalization of capital that in most legal systems today the walls of economic and political resistance to anything deemed even mildly threatening to present-day state/market property interests are very high. Climate change could change all that, but current attitudes and behaviors offer scant encouragement in the near term.

IV. CONCLUSION

Ample social justice theory—distributive, reciprocity-based, and respect-based—establishes that future generations have legal as well as moral rights to protection from environmental threats and harms, especially such as are embodied in climate change. A haunting question remains, however: whether the present world order will attend to the important work of enacting and enforcing laws to build a fair ecological legacy and, if so, whether the theory of intergenerational justice chosen will honor the core value of a world public order of human dignity: respect. Writes environmental science philosopher Bryan Norton at base:

The question at issue is a question about the present; it is a question of whether the community will, or will not, take responsibility for the long-term impacts of its actions . . . [and in so doing] rationally choose and implement a [respectful] bequest package—a trust or legacy—that they will pass on to future generations.⁶⁹

This is a challenge that requires intellectual and political daring—nay, intellectual and political heroism, “[n]ot occasional heroism, a remarkable instance of it here and there, but constant heroism, systematic heroism, heroism as governing principle.”⁷⁰ We have reached the point where our children, grandchildren, great-grandchildren, and other future generations now call upon us, the living, to act with “the fierce urgency of now.”⁷¹

67. See W. MICHAEL REISMAN, *LAW IN BRIEF ENCOUNTERS* 2 (1999).

68. *Id.* at 4.

69. NORTON, *supra* note 14, at 334–35.

70. RUSSELL BANKS, *CONTINENTAL DRIFT* 40 (1985).

71. Martin Luther King, Jr., Speech delivered at the March on Washington for Jobs and Freedom: “I Have a Dream” (28 Aug. 1963), available at http://avalon.law.yale.edu/20th_century/mlk01.asp.