

Rawls & Sustainable Development

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The concept of sustainable development is ubiquitous in environmental law and policy, but its meaning and objectives are often left unclear. This article applies Rawls' theory of justice to set out a possible framework for sustainable development that addresses both the economic development and intergenerational justice sides of the discussion. This framework has two main principles drawn from Rawls' theory of justice. First, Rawls' theory of justice points to an alternative to the current paradigm of continuous economic growth for its own sake by providing an end or goal for economic development, namely the establishment and maintenance of just institu-

tions. Second, an expanded understanding of Rawls' principle of fair equality of opportunity, understood as preserving the range of choices available to future generations to pursue their own conceptions of the good, can help to define the obligations of current generations to future ones and to provide an overarching principle from which rules and institutions can be derived and assessed. The article also discusses whether the principle of fair equality of opportunity for future generations might form the basis of an "overlapping consensus" on the importance of environmental protection among citizens with divergent views about the value of nature.

Le concept de développement durable est omniprésent dans le droit environnemental et les politiques environnementales mais sa signification et ses objectifs demeurent nébuleux. Cet article utilise la théorie de la justice de Rawls pour mettre en place une structure possible du développement durable, qui tient compte à la fois des impératifs du développement économique et de la justice intergénérationnelle. Cette structure se base sur deux principes tirés de la théorie de la justice de Rawls. En premier lieu, la théorie de la justice de Rawls suggère une alternative au paradigme actuel de la croissance économique continue en fournissant une fin ou un but au développement économique, soit l'établissement et le maintien d'institutions justes. En second

lieu, une compréhension large du principe de juste égalité des chances de Rawls, compris comme étant la préservation des opportunités pour les générations futures de développer leur propre conception du bien, peut aider à définir les obligations des générations présentes envers les générations futures et constitue un principe fondamental à partir duquel des règles et des institutions peuvent être conçues et évaluées. Enfin, cet article examine si le principe de juste égalité des chances pour les générations futures peut former la base d'un consensus large (« overlapping consensus ») sur l'importance de la protection de l'environnement parmi les citoyens ayant des opinions divergentes sur la valeur de la nature.

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The phrase “sustainable development” is found frequently in environmental legislation and international agreements¹ but the term’s underlying elements and its implications are seldom unpacked.² This article applies John Rawls’ theory of justice to set out a possible framework for sustainable development that addresses both the economic development and intergenerational justice sides of the discussion.³ This framework is composed of two main principles drawn from Rawls’ theory of justice.⁴ First, Rawls’ theory of justice provides

¹ See e.g. *Canadian Environmental Protection Act, 1999*, SC 1999, c 33, Preamble; *United Nations Framework Convention on Climate Change*, 19 June 1993, Can TS 1994 No 7, 31 ILM 849 (entered into force 21 March 1994) art 3.4 [UNFCCC]. See also Christopher D Stone, *Should Trees Have Standing?: Law, Morality and the Environment*, 3d ed (New York: Oxford University Press, 2010) (noting that in 2009 the term “future generations” appeared in 73 international agreements and 4 declarations at 103, n 2).

² See e.g. Malgosia Fitzmaurice, *Contemporary Issues in International Environmental Law* (Cheltenham, UK: Edward Elgar, 2009) (citing the element of intergenerational equity in particular at 67, 70).

³ For other applications of Rawls’ theory of justice to the problem of intergenerational justice, see e.g. Hendrik Ph Visser ‘t Hooft, *Justice to Future Generations and the Environment* (Dordrecht, NL: Kluwer Academic Publishers, 1999) (the author argues that future generations’ equal liberty depends on maintaining a certain level of environmental capital). See also Edith Brown Weiss, *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity* (Tokyo: The United Nations University, 1989) (she uses Rawls’ veil of ignorance to formulate her theory that current generations hold the earth’s “natural and cultural legacy” in trust for future generations at 2). Rawls puts aside the issue of humans’ relationship with nature. See e.g. John Rawls, *A Theory of Justice*, revised ed (Cambridge, MA: Harvard University Press, 1999) at 15 [Rawls, *Theory*].

⁴ Other principles would, of course, play a role in implementing such a framework. For instance, protecting the fair equality of opportunity of future generations would require applying the precautionary principle where there is uncertainty regarding the negative environmental impacts of a particular activity.

an alternative to the current unsustainable paradigm of economic growth for its own sake. Second, an expanded notion of Rawls' principle of fair equality of opportunity helps to define the obligations of current generations to future ones and to provide an overarching principle from which rules and institutions can be derived and assessed.

The first principle involves a shift away from the current paradigm of continuous economic growth as an end or good in itself—a paradigm which is both environmentally and economically unsustainable.⁵ Rawls' theory of justice points to an alternative to the current paradigm, one that views economic development as a means to an end or goal—that goal being the establishment and maintenance of “just institutions”.⁶ Just institutions are generally those institutions that influence an individual's life prospects in a system of social cooperation.⁷ Rawls suggests that once this goal has been achieved, economic growth may slow or even cease.⁸ As views on the requirements of political justice change over time, establishing and maintaining just institutions in practice is an ongoing process. This makes it unlikely that economic growth can ever cease entirely. Thinking about economic development as a means to an end rather than an end in itself, however, should help to move political debate about environmental protection away from a zero-sum game involving two competing goods; one that pits environmental protection against economic development, with the latter usually taking priority.⁹

Even economic development undertaken for the purpose of establishing and maintaining just institutions must be conducted in a manner that is just to future generations.¹⁰ The second principle, therefore, holds that a just distribution of natural resources and environmental

⁵ Vaclav Smil, *Global Catastrophes and Trends: The Next Fifty Years* (Cambridge, MA: The MIT Press, 2008) (“[t]he global economy is merely a subsystem of the biosphere, and it is easy to enumerate the natural services without which it would be impossible” at 212).

⁶ Rawls, *Theory*, *supra* note 3 at 257. See *infra* notes 52-54 and accompanying text.

⁷ Rawls, *Theory*, *supra* note 3 at 6-7; John Rawls, *Justice as Fairness: A Restatement* (Cambridge, MA: Harvard University Press, 2001) at 55-56 [Rawls, *Restatement*].

⁸ Rawls, *Theory*, *supra* note 3 at 256-57; Rawls, *Restatement*, *supra* note 7 at 159.

⁹ See e.g. The Honorable Jim Prentice, Address (delivered at the meeting of the Canadian Council of Chief Executives, Toronto, 20 January 2009), online: <<http://www.ec.gc.ca/default.asp?lang=En&n=6F2DE1CA-1&news=E110AAE9-B810-4F07-ADEC-2A4C245D67D9>> [Prentice, Address] (comments of former federal Minister of the Environment that any action taken on climate change would seek to “do no harm” to the economy). See The Honorable Jim Prentice, “Speaking Points” (delivered at the Edmonton Chamber of Commerce, Edmonton, 13 November 2009), online: Environment Canada <<http://www.ec.gc.ca/default.asp?lang=En&n=6F2DE1CA-1&news=757C0154-3353-4BB4-B2F3-9E095A0DA33E>>. See also Nathan Vanderklippe & Carrie Tait, “Producers set for oil sands fight”, *The Globe and Mail* (7 April 2011) online: The Globe and Mail <<http://theglobeandmail.com>> (the authors refers to Alberta's plan to set aside part of the oil sands region for conservation as “a battle between ecological and financial values”).

¹⁰ This is a question of distributive justice, rather than procedural or corrective justice. While procedural justice and corrective justice undoubtedly have a role to play in environmental justice more broadly (for example, in the distribution of environmental risks or hazards within the current generation), the issue of justice for future generations is a matter of distributive justice.

services¹¹ between current and future generations requires current generations to ensure that future generations' "fair equality of opportunity" to benefit from the natural environment and to pursue their own conceptions of the good life is not narrowed by present-day economic development.¹² I use Rawls' "fair equality of opportunity" to bring into play Rawls' liberal ideal of ensuring that free and equal citizens are not denied a chance to pursue their own reasonable goals or ambitions due to structural inequalities.¹³ Expanding on Rawls' principle of fair equality of opportunity as the guiding principle for distributing natural resources and environmental services across generations provides for more robust environmental protection than approaches to intergenerational justice that focus on maintaining a certain level of "capital" for future generations. The latter either erroneously assume the substitutability of natural assets for man-made assets or require the aggregation of environmental goods to determine whether the overall quantity of "natural capital" remains the same.¹⁴ Even if it were possible to aggregate the present value of environmental goods¹⁵ and to predict accurately the value of these goods to future generations, current generations would not be justified in limiting the choices of future generations on this basis.¹⁶ Rather, justice to future generations obligates current generations to avoid actions that would limit the ability of future generations to determine for themselves their own preferences and ideas of the good life. In sum, an approach to intergenerational environmental justice based on Rawls' principle of fair equality of opportunity is distinct from an approach based on utility or welfare that seeks only to ensure that future generations are as

¹¹ Forests, for example, provide important environmental services such as conserving biodiversity, storing carbon dioxide, purifying water and reducing the frequency of floods: see Nick Hanley, Jason F Shogren & Ben White, *Environmental Economics: In Theory and Practice*, 2nd ed (New York: Palgrave MacMillan, 2007) at 304; see also Smil, *supra* note 5 at 213-14.

¹² See e.g. Dinah Shelton, "Describing the Elephant: International Justice and Environmental Law" in Jonas Ebbesson & Phoebe Okowa, eds, *Environmental Law and Justice in Context* (Cambridge, UK: Cambridge University Press, 2009) 55 ("each generation is required to conserve the diversity of the natural and cultural resource base so that it does not unduly restrict the options available to future generations to satisfy their own needs and values" at 63). Jonas Ebbesson, "Introduction: Dimensions of Justice in Environmental Law" in Jonas Ebbesson & Phoebe Okowa, eds, *Environmental Law and Justice in Context* (Cambridge, UK: Cambridge University Press, 2009) 1 (Ebbesson refers to Rawls' "notion of equal opportunities", but applies it to decision-making processes in environmental law at 35). See also Bryan Norton, "Ecology and Opportunity: Intergenerational Equity and Sustainable Options" in Andrew Dobson, ed, *Fairness and Futurity: Essays on Environmental Sustainability and Social Justice* (Oxford: Oxford University Press, 1999) 118.

¹³ Rawls, *Restatement*, *supra* note 7 at 55.

¹⁴ See e.g. Robert Solow, "An almost practical step towards sustainability" (1993) 19 *Resources Policy* 162. Norton, *supra* note 12 (Norton describes this as the mainstream economics approach, also sometimes referred to as "weak sustainability" at 124). See also Hanley, Shogren & White, *supra* note 11 at 18-19.

¹⁵ Valuing environmental services in monetary terms is a difficult if not impossible exercise, since the majority of environmental services are public and not tradable: see Joerg Chet Tremmel, *A Theory of Intergenerational Justice* (London: Earthscan, 2009) at 70 [Tremmel, *Theory*].

¹⁶ For example, even if we were able to predict with certainty that future generations will prefer plastic trees to real ones, we would be wrong to ensure the prediction is fulfilled by failing to preserve any real trees. The plastic trees example is taken from Brian Barry, "Sustainability and Intergenerational Justice" in Andrew Dobson, ed, *Fairness and Futurity: Essays on Environmental Sustainability and Social Justice* (Oxford: Oxford University Press, 1999) 93 [Barry, "Sustainability"]. In any event, although we can make educated guesses, we cannot predict with certainty the value future generations will place on any given natural resource, environmental service or the environment in general.

well-off in terms of total capital, man-made and natural, as current generations.¹⁷ The second principle has a number of implications for the way in which current generations generate wealth. The present article explores only a few, including minimizing the long-term negative environmental impacts of non-renewable resource extraction.¹⁸

Applying these two principles requires political will that is currently lacking among voters and politicians alike. Rawls' theory of justice explains how a pluralistic society can agree on the basic structure and institutions of society by allowing individual citizens to appeal to their own comprehensive doctrines to form an "overlapping consensus".¹⁹ In a similar way, an overlapping consensus on the importance of environmental protection to future generations may be achieved by articulating an underlying principle on which most citizens can agree. The principle of fair equality of opportunity for future generations may be a principle that most citizens can connect to their own comprehensive doctrines or core beliefs with respect to the environment. In this way, the principle of fair equality of opportunity may form the basis of an overlapping consensus on the importance of environmental protection.

This is not to suggest that a Rawlsian approach to sustainable development is the only possible approach. Nor do I think that one must adopt Rawls' theory of justice wholesale in order to appreciate its useful application to the concept of sustainable development.²⁰ But I will argue in this article that Rawls' theory of justice is useful for developing a framework for sustainable development for at least two reasons, aside from his extensive influence on political theory in general and on theories of intergenerational equity in particular.²¹ First, Rawls holds that continual improvement in the material standard of living of the least-advantaged is not a requirement of justice, although justice does require a social minimum level of income or wealth.²² If justice required continual improvement in the material standard of living, then sustainable development would seem incompatible with this requirement of justice, since at some point the standard of living would bump up against the earth's "throughput" limits, that is, the limits on the earth's ability both to provide the raw materials and energy needed as inputs for production and to absorb the pollution and waste produced as outputs.²³ Second, using Rawls' theory of justice provides a common purpose for both economic development and environmental protection: ensuring that members of both current and future generations have the necessary means to develop and exercise their two moral powers, these powers being

¹⁷ Norton, *supra* note 12 at 119.

¹⁸ There are, of course, other compelling moral reasons to minimize these impacts, such as the health of the residents of surrounding communities. But an obligation to future generations would go beyond preventing immediate harm to human health or life to ensuring that the extraction does not alter the natural environment to such an extent that future generations will be unable to make use of it.

¹⁹ Rawls, *Restatement*, *supra* note 7 at 32.

²⁰ It is beyond the scope of this paper to offer a full explication of Rawls' theory of justice. For a more detailed explanation of Rawls' political philosophy, see Samuel Freeman, *Rawls* (New York: Routledge, 2007).

²¹ See e.g. Joerg Chet Tremmel, ed, *Handbook of Intergenerational Justice* (Cheltenham, UK: Edward Elgar, 2006); Alex Gosseries & Lukas H Meyer, eds, *Intergenerational Justice* (New York: Oxford University Press, 2009).

²² Rawls, *Restatement*, *supra* note 7 at 63.

²³ Nicholas A Ashford and Charles C Caldart, *Environmental Law, Policy, and Economics: Reclaiming the Environmental Agenda* (Cambridge, MA: The MIT Press, 2008) at 37.

a sense of justice and a capacity to form and pursue one's own ends or idea of the good life.²⁴ Since all free and equal persons are regarded as having these two moral powers,²⁵ a Rawlsian approach to intergenerational justice provides a definition of the "needs" of future generations that goes beyond mere survival, but avoids having to speculate as to future generations' values or preferences.

This article focuses on sustainable development in the Canadian context, although the analysis likely could apply to most developed countries. While environmental harm can cross international borders and, in the case of climate change, can be global in impact, much environmental harm is still local in nature.²⁶ In any event, the fact that some environmental harm is not contained by domestic borders does not absolve Canada of its obligation to manage its natural resources and environment in a manner that is just to future generations.²⁷ The issue of intergenerational environmental justice is particularly relevant to Canadian society given both its economic reliance on natural resource extraction²⁸ and the percentage of still-pristine wilderness contained within its borders.²⁹ I also focus on the Canadian context because the practical implications of this framework for developing or least-developed countries may be very different, especially in terms of articulating how trade-offs between economic development and environmental protection ought to be struck.

As a preliminary matter, I assume that future generations fall into the general category of people to whom we owe moral obligations.³⁰ That is, future generations are not precluded from the ambit of moral obligation just because they do not yet exist. The fact that the existence of particular human beings or, under worst-case scenarios, the existence of future generations at

²⁴ Rawls, *Restatement*, *supra* note 7 at 18-19.

²⁵ *Ibid.*

²⁶ André Nollkaemper, "Sovereignty and Environmental Justice in International Law" in Jonas Ebbesson & Phoebe Okowa, eds, *Environmental Law and Justice in Context* (Cambridge, UK: Cambridge University Press, 2009) 253 at 253.

²⁷ Canada's obligations to future generations of Canadians also imply certain international obligations, such as an obligation to cooperate with other states to take action on climate change.

²⁸ Natural Resources Canada, "Important Facts on Canada's Natural Resources", online: National Resources Canada <<http://www.nrcan-rncan.gc.ca/stat/miner-eng.php>> (in 2008, mining and mineral processing alone generated 3.3% of Canada's gross domestic product, contributing \$40.1 billion to the Canadian economy).

²⁹ Canadian Boreal Initiative, "Boreal Forest Conservation Framework", online: Canadian Boreal Initiative <<http://www.borealcanada.ca/framework-full-e.php>> (the Canadian Boreal Forest "contains one quarter of the world's remaining original forests" and is "[o]ne of the largest intact forest ecosystems left on Earth").

³⁰ Wilfred Beckerman, "The Impossibility of a Theory of Intergenerational Justice" in Tremmel, ed, *Handbook of Intergenerational Justice* (Cheltenham, UK: Edward Elgar, 2006) 53 (even if one argues, as Beckerman does, that future generations cannot have "rights", it does not follow that present generations "have no moral obligations towards them" at 53). For the view that future generations do have "rights", see Michael Wallack, "Justice Between Generations: The Limits of Procedural Justice" in Tremmel, ed, *Handbook of Intergenerational Justice* (Cheltenham, UK: Edward Elgar, 2006) 86. See also Brian Barry, "Justice Between Generations" in Brian Barry, ed, *Democracy, Power and Justice: Essays in Political Theory* (Oxford: Clarendon Press, 1989) 494 [Barry, "Justice Between Generations"] (discussing the difficulties in formulating a theory of obligations to future generations).

all, is contingent on the actions of present generations is not, I find, a persuasive reason for arguing that we owe them no obligations.

Part II briefly describes the problem of environmental impacts on future generations, the concept of sustainable development which is supposed to address this problem and some of the gaps in the concept that require further exploration. Part III introduces Rawls' theory of justice and the first principle of the framework. I argue here that sustainable development requires a shift in thinking about economic development from an end or goal in itself to a means of establishing and maintaining just institutions. Part IV explains the second principle of the framework, expanding on Rawls' principle of fair equality of opportunity to include the opportunity of future generations to benefit from the environment and to determine their own ideas of the good life. I argue that present-day economic development ought to be carried out in a manner that respects, to the greatest extent possible, this principle. A thorough examination of the practical implications of this framework for economic and environmental regulation in Canada is beyond the scope of this paper,³¹ but Part IV discusses a few possible implications, including an evaluation of existing federal environmental assessment legislation, in order to demonstrate how the principle might operate in practice. Part V briefly examines how Rawls' idea of an overlapping consensus in a pluralistic society can help us to imagine how we might achieve political consensus on the importance of environmental protection. This article is only a preliminary sketch of what a Rawlsian framework based on the two principles outlined above would look like. Further work is required to flesh out the contours of this approach more precisely, to examine further its practical implications and to compare it to other possible frameworks.

2. THE CONCEPT OF SUSTAINABLE DEVELOPMENT

As recently as a century ago, the possible impact that the economic activities of current generations might have on the environmental quality experienced by future generations was, generally speaking, not a concern.³² This is not to suggest that until recently humans were incapable of causing long-term environmental harm. Rather, recent advances in technology have greatly increased the scale and scope of the ability of state and privately-owned companies to extract and process natural resources³³ and, correspondingly, their ability to cause serious environmental harm many generations into the future, both by exhausting natural resources

³¹ I do not address here, for example, the implications for corporate law and corporate governance, which is the focus of my dissertation.

³² Brian Barry, "Justice as Reciprocity" in Eugene Kamenka & Alice Erh-Soon Tay, eds, *Justice* (London: Edward Arnold Publishers, 1979) 50 at 71 [Barry, "Justice"]; Tremmel, *Theory*, *supra* note 15 at 1-2.

³³ See e.g. Paul Collier, *The Plundered Planet* (New York: Oxford University Press, 2010) (the commercial fishing industry's impact on global fish stocks at 161); Richard J Lazarus, *The Making of Environmental Law* (Chicago: The University of Chicago Press, 2004) at 11-12. See also Stone, *supra* note 1 at 27. There are, of course, still many parts of the world where small-scale and inefficient resource extraction processes are used which may be detrimental for both the environment and economic development. See e.g. Brown Weiss, *supra* note 3 (states that impoverished communities may be "forced to overexploit the resources they do have in order to satisfy their own basic needs" at 27).

and by damaging the health of the natural environment.³⁴ Although technological advances also allow these companies to extract and process natural resources more efficiently, increases in personal consumption over the past two decades have overwhelmed any efficiency gains.³⁵ The long-term consequences of greenhouse gas emissions and decreased biodiversity have caused researchers to question the notion that economic development inevitably leads to improved environmental quality.³⁶ The effects of technological advances have been exacerbated by global trade, which “intensifies resource extraction”, increases air and water pollution and destroys wildlife habitats for commercial development of land.³⁷ Concurrently, developments in science now allow us to predict some of the environmental consequences of our actions, although the complexity of ecosystems means that we will never be able to make completely accurate predictions.³⁸ This ability to create serious and even irreversible environmental damage far into the future means we can no longer assume that the gains from present-day economic development will outweigh the environmental losses, thus ensuring that future generations are better off than preceding ones.³⁹ In other words, the main problem of justice between generations, especially in a society as economically wealthy as Canada, is no longer the potentially unfair burden on current generations to create benefits to be enjoyed primarily by future ones,⁴⁰ but the concern that current generations may be unfairly shifting the environmental costs of present-day economic prosperity onto future generations.⁴¹

³⁴ See e.g. Lazarus, *supra* note 33 (the “vast organic chemical industry” creates and releases new persistent chemical compounds that can be found virtually everywhere in the world. These compounds are persistent and so accumulate over time. At any point, this accumulation could cross the threshold of acceptable levels and cause serious to catastrophic harm at 10, 14). See also Visser ‘t Hooft, *supra* note 3 (citing the example of nuclear waste at 1-2).

³⁵ Lazarus, *supra* note 33 at 217. European Environment Agency, *Report No 9/2005: Sustainable Use and Management of Natural Resources* (Copenhagen: European Environment Agency, 2005) online: European Environment Agency <http://www.eea.europa.eu/publications/eea_report_2005_9> (the offsetting of gains in technical efficiency by increased consumption is the “rebound effect” at 7).

³⁶ See e.g. Nicholas Stern, *Stern Review on the Economics of Climate Change* (30 October 2006), online: National Archives of the United Kingdom <<http://webarchive.nationalarchives.gov.uk>> (the environmental “Kuznets curve” demonstrates that some emissions, such as sulphur dioxide, decrease as average income in a state increases, but it is not clear that this is the case for greenhouse gas emissions at Annex 7A “Climate Change and the Environmental Kuznets Curve” at 191-92). See also European Environment Agency, *supra* note 35 (noting that although in the European Union “fossil fuel-related emissions of air pollutants” have declined, carbon dioxide emissions have not at 41).

³⁷ Hanley, Shogren & White, *supra* note 11 at 421.

³⁸ See e.g. Smil, *supra* note 5 (“[n]ever before have we been in a situation where we can concurrently affect so many biospheric functions on such a grand scale and unleash a multitude of foreseeable as well as utterly unpredictable environmental consequences”, citing the case of chlorofluorocarbons at 214). See also Brian Barry, “Justice Between Generations”, *supra* note 30 at 494.

³⁹ Benjamin J Richardson, *Socially Responsible Investment Law: Regulating the Unseen Polluters* (New York: Oxford University Press, 2008) at 106; Brown Weiss, *supra* note 3 at 1; Tremmel, *Theory, supra* note 15 at 5.

⁴⁰ See e.g. Rawls, *Theory, supra* note 3 at 253.

⁴¹ Tremmel, *Theory, supra* note 15 at 4. It is, of course, still possible to argue that the immediately succeeding generations may experience greater economic prosperity, but distant future generations may suffer costs that outweigh any economic gains passed on to them: see Stone, *supra* note 1 at 106.

At the same time, economic growth has become the primary focus of most capitalist states and the basis from which they derive their legitimacy.⁴² As a result, any political actions to advance environmental protection or to reduce greenhouse gas emissions are seen as illegitimate to the extent that they could negatively affect the economy. This view is reflected in the statement of the former federal Minister of the Environment Jim Prentice that the primary goal of any action taken on climate change should be to “do no harm” to the economy.⁴³ Politicians also tend to equate quality of life with levels of consumption.⁴⁴ Consumerism and progress therefore are inextricably linked and the level of consumption enjoyed by a population is the criterion on which government ought to be judged.⁴⁵ This rhetoric reinforces individual behaviour that treats the accumulation of wealth as an end in itself. All of this makes it difficult to address the problem of future environmental harm discussed above.

The concept of sustainable development was intended to address these issues by integrating environmental concerns with economic decision-making.⁴⁶ Sustainable development is now widely referred to as the goal or purpose of both domestic legislation and international agreements on the environment.⁴⁷ The most frequently cited definition of sustainable development is “development that meets the needs of the present without compromising the ability of future generations to meet their own needs.”⁴⁸

Despite having been made a touchstone of environmental regulation domestically and internationally, there is little agreement on what sustainable development means in practice⁴⁹ and, therefore, no way of determining whether we are achieving it. Environmental sustainability

⁴² Richardson, *supra* note 39 at 293.

⁴³ Prentice, Address, *supra* note 9.

⁴⁴ See e.g. Press briefing of Ari Fleischer (former White House Press Secretary) to US President George W Bush (7 May 2001) in Anna Peterson, “Ordinary and Extraordinary Sacrifices: Religion, Everyday Life, and Environmental Practice” in Michael Maniates & John M Meyer, eds, *The Environmental Politics of Sacrifice* (Cambridge, MA: The MIT Press) 91 (“the President [...] believes that the American people’s use of energy is a reflection of the strength of our economy, of the way of life that the American people have come to enjoy. And he wants to make certain that a national energy policy...allow[s] the American people to continue to enjoy the way of life that has made the United States such a leading nation in the world” at 108).

⁴⁵ Karen Litfin, “The Sacred and the Profane in the Ecological Politics of Sacrifice” in Michael Maniates & John M Meyer, eds, *The Environmental Politics of Sacrifice* (Cambridge, MA: The MIT Press) 117 (the flip-side, of course, is that environmentalism and environmental regulation are seen as hindering “progress” at 117).

⁴⁶ Philippe Sands, *Principles of International Environmental Law*, 2d ed (New York: Cambridge University Press, 2003) at 253; Daniel Magraw and Lisa Hawke, “Sustainable Development” in Daniel Bodansky, Jutta Brunnée & Ellen Hey, eds, *The Oxford Handbook of International Environmental Law* (Oxford: Oxford University Press, 2007) at 615.

⁴⁷ See *supra* note 1 and accompanying text.

⁴⁸ The World Commission on Environment and Development, *Our Common Future* (New York: Oxford University Press, 1987) at 8; Magraw & Hawke, *supra* note 46 at 618; Brown Weiss, *supra* note 3 at 39. See also *Canadian Environmental Assessment Act*, SC 1992, c 37, s 2(1) [CEAA].

⁴⁹ See Sands, *supra* note 46 (“the difficulty in translating the concept of sustainable development into a practical conservation tool” at 259). See also Richardson, *supra* note 39 (stating that sustainable development is too vague to form the basis of a broader fiduciary duty of pension fund trustees at 25, 555-556).

does not fall into the category of “knowing it when we see it”. Articulating a clearer definition of sustainable development, particularly the “needs” of current and future generations, is, therefore, needed in order to evaluate current levels of environmental protection and to determine whether these are adequate to ensure that present-day economic development does not, in fact, potentially compromise the ability of future generations to meet their needs.

Part of the problem is that the above definition fails to address the conflict between economic development and environmental protection. The level of environmental degradation will not necessarily increase in exact proportion with increases in economic growth, especially as technology improves the efficiency with which natural resources are used and decreases the amount of pollution and waste produced. Nevertheless, “an expanding economic scale pushes increasingly against environmental constraints, threatening the operation of the joint economic-environment system”.⁵⁰ Lowering emissions or improving energy efficiency will make little difference to overall environmental quality so long as these gains are offset by increasing economic activity; it matters little if cars are more fuel-efficient if there are many more cars on the road.⁵¹ This conflict is made more acute by the current paradigm of continual or constant economic growth for its own sake. One potentially fruitful way of addressing this conflict is to view economic development as a means to an end, rather than continuing to view economic growth as an end or good in itself with which environmental protection must compete.

3. ECONOMIC DEVELOPMENT AS A MEANS TO AN END, NOT AN END IN ITSELF

Under Rawls’ theory of “justice as fairness”, the goal of economic development is to establish and maintain the just institutions necessary for society to operate “as a fair system of cooperation over time from one generation to the next”.⁵² In order for this system of cooperation to function, social institutions must not only guarantee equal liberties, but also ensure that individuals’ prospects in life are not dictated by the circumstances into which they are born or in which they find themselves due to misfortune.⁵³ In other words, just institutions are those that ensure fair equality of opportunity—an idea discussed further below—not just formally but substantively as well. These institutions would include, therefore, universal access to decent

⁵⁰ Hanley, Shogren & White, *supra* note 11 at 15. See also Richardson, *supra* note 39 (noting the coincidence in recent years of “stunning” financial growth and “massive depletion of natural capital” at 106).

⁵¹ Lazarus, *supra* note 33 at 219-20.

⁵² Rawls, *Restatement*, *supra* note 7 at 5. See also *ibid* at 7-8, 50, 57, 137-38 (for Rawls, only what he calls a “property-owning democracy” will realize the two principles of justice. Welfare-state capitalism fails to do so because, unlike Rawls’ idea of a property-owning democracy, “[i]t permits very large inequalities in the ownership of real property”, which undermines the fair value of the political liberties at 138). For the purposes of this article, it is not necessary to address this part of Rawls’ theory; it is necessary only to say that the goal or end of a society’s economic development should be the establishment and maintenance of those institutions necessary to create a fair system of cooperation among citizens.

⁵³ *Ibid* at 55. Rawls, *Theory*, *supra* note 3 (just institutions must also secure the equal liberties at 243). Rawls, *Restatement*, *supra* note 7 (the equal liberties are “freedom of thought and liberty of conscience; political liberties (for example, the right to vote and to participate in politics) and freedom of association, as well as the rights and liberties specified by the liberty and integrity (physical and psychological) of the person; and finally, the rights and liberties covered by the rule of law” at 44).

primary and secondary school education and some form of a social safety net.⁵⁴ The exact form of these institutions is for a democratic society to work out through its political processes in accordance with its constitutional framework. The specifics of these institutions may change over time, but the point is that society must establish and maintain institutions that ensure that individuals have a fair chance in life to attain the reasonable goals that they set for themselves. Although reasonable people might disagree and with the exception of some Aboriginal communities,⁵⁵ Canadian society arguably has succeeded in establishing the just institutions sufficient to ensure a system of fair cooperation over time, including sufficient redistribution of income through the tax system, universal access to education and healthcare, a participatory political process and an independent judicial system.

According to Rawls, the burden of the cost of establishing a fair system of cooperation is to be shared equally across generations through the just savings principle.⁵⁶ The just savings principle stipulates that each generation ought to save a percentage of economic output for the future in order to maintain just institutions over the long-term.⁵⁷ The rate is to be based on what any generation would wish the previous generation to have saved, not knowing their current level of economic development.⁵⁸ Rawls presumed that the rate would change based on the level of wealth, given the greater hardship that saving will impose on poorer generations.⁵⁹ The just savings principle is Rawls' answer to the question of intergenerational justice.

⁵⁴ Rawls, *Theory*, *supra* note 3 at 243. See e.g. Rawls, *Restatement*, *supra* note 7 (his discussion of the necessity of access to health care in order to ensure citizens' ability to exercise their two moral powers seems to indicate that public health care would be included in the list of just institutions at 173). Rawls is, however, generally vague about which institutions are included in the list of just institutions that form part of the basic structure and are necessary to establish a system of social cooperation: see e.g. Rawls, *Theory*, *supra* note 3 at 8.

⁵⁵ The question whether the economic needs of Aboriginal communities justifies proposed natural resource extraction projects in environmentally-sensitive locations, such as the Arctic, is a difficult one given both the urgency and extent of the need. The situation of Aboriginal communities in Canada illustrates the real difficulties that justice to future generations raises for present-day decision-makers, but this does not mean that current generations ought not to attempt to achieve economic goals without limiting the fair equality of opportunity of future generations.

⁵⁶ Rawls, *Theory*, *supra* note 3 at 257.

⁵⁷ Rawls, *Restatement*, *supra* note 7 at 159. Sovereign wealth funds can be understood as the practical implementation of the just savings principle.

⁵⁸ *Ibid* at 160; Rawls, *Theory*, *supra* note 3 at 254. The just savings principle is one of the issues to be decided by parties in the "original position" behind the "veil of ignorance". The original position is a thought experiment in which a society would agree on the terms by which it would establish itself as a fair system of cooperation: Rawls, *Restatement*, *supra* note 7 at 14, 17. Parties in the original position are behind a "veil of ignorance" as to their own particular position in the society: *ibid* at 15. Rawls does not see the original position as including representatives from other generations, since the parties must be contemporaries in order for them to care about establishing the fair terms of social cooperation: *ibid* at 80. Rawls claims, however, that "[a]ll generations are virtually represented in the original position, since the same principle [i.e., savings rate] would always be chosen": Rawls, *Theory*, *supra* note 3 at 256.

⁵⁹ *Ibid* at 255.

For Rawls, the purpose of capital investments in both the physical and mental means of production is not to ensure “that later ones are simply more wealthy”, but rather to “bring about the full realization of just institutions and the equal liberties.”⁶⁰ This purpose is distinguished from a utilitarian one of spreading the greatest happiness or utility across the greatest number of people, which would require a society to maximize wealth indefinitely.⁶¹ Under Rawls’ theory of justice, once just institutions are established, real savings may cease.⁶² In other words, once a state has succeeded in establishing the just institutions necessary for a fair system of cooperation, economic expansion may slow to a rate of growth required to maintain those institutions and to support increases in population.⁶³ Rawls therefore provides an alternative to the current paradigm of continual economic growth⁶⁴ for its own sake. Here, Rawls draws on Mill, who recognized that increases in production and accumulation of wealth were necessary, in his time, for national security, but were not important objects in themselves.⁶⁵ Applying this view of economic development, the question that representatives at the most recent international climate conference in Cancun, Mexico should have asked themselves was not “how will the proposed cuts to greenhouse gas emissions impact economic growth?” but rather “will the proposed cuts to greenhouse gas emissions permit sufficient growth to maintain (or to establish) just institutions?”⁶⁶

Some interpret Rawls’ difference principle⁶⁷ as requiring that the income of the least advantaged continually increase over time, but Rawls is clear that this is not the case.⁶⁸ Rather, any inequalities of wealth, that is, the gap in income and wealth between the more advantaged and less advantaged, “must contribute effectively to the benefit of the least advantaged.”⁶⁹ In other words, the difference principle is not aimed at increasing the absolute income level of the

⁶⁰ *Ibid* at 257. Norton, *supra* note 12 (noting that just institutions are necessary “to ensure equal access to decision making and, in turn, to resources”, but the role of political institutions is often overlooked in discussions of sustainability at 136).

⁶¹ Rawls, *Theory*, *supra* note 3 at 257.

⁶² *Ibid* at 256-57; Rawls, *Restatement*, *supra* note 7 at 159. Although Rawls allows for the possibility that society will choose to continue saving, this is not required by justice: Rawls, *Theory*, *supra* note 3 at 257.

⁶³ The moral obligation of current generations to control population growth is addressed by a number of philosophers, including Barry, “Sustainability”, *supra* note 16.

⁶⁴ Magraw & Hawke, *supra* note 46 at 621.

⁶⁵ John Stuart Mill, *Principles of Political Economy: With Some of Their Application to Social Philosophy*, vol 2, 2d ed, Book IV, ch VI (London: John W Parker, 1849) at §2.

⁶⁶ Of course, the negative effects of climate change may also undermine just institutions: see e.g. Ben Saul, “Climate Change, Resource Scarcity and Distributive Justice in International Law” in Rosemary Lyster, ed, *In the Wilds of Climate Change* (Bowen Hills: Australian Academic Press, 2010) 71 at 76.

⁶⁷ Rawls, *Restatement*, *supra* note 7 (the difference principle holds that “[s]ocial and economic inequalities... are to be to the greatest benefit of the least-advantaged members of society” at 43).

⁶⁸ *Ibid* at 63-64, 159, citing John Stuart Mill, *supra* note 65. See also Freeman, *supra* note 20 at 136-37. This also explains why, in Rawls’ theory of international justice, the duty of assistance to “burdened societies” is limited to “lay[ing] the foundation for a just basic structure of society”: Rawls, *The Law of Peoples* (Cambridge, MA: Harvard University Press, 1999) at 106-107, 118 [Rawls, *Law of Peoples*].

⁶⁹ Rawls, *Restatement*, *supra* note 7 at 64.

least advantaged, but at ensuring a generally equal level of life-prospects among all classes in society above the social minimum.⁷⁰

Rawls' rejection of continual economic growth is further evident in his endorsement of Mill's notion of the stationary state in which capital accumulation has ceased and the maximization of wealth and profits is no longer the goal of society.⁷¹ Although Adam Smith described the stationary state as "pinched and stinted",⁷² Mill saw it as an improvement on the "progressive" state in which individuals spend their time "struggling to get on" and "trampling, crushing, elbowing, and treading on each other's heels" in the pursuit of wealth – not the "most desirable lot of human kind".⁷³ Mill's stationary state is one in which everyone has sufficient means to pursue the "graces in life", rather than having to undertake "the coarser toils" in the hunt for wealth.⁷⁴ An end to continual economic growth, therefore, would not mean an end to human improvement, since less energy spent on the "art of getting on" would make more room for the "Art of Living".⁷⁵ Rawls expresses a similar sentiment in *A Theory of Justice* when he notes that after a certain point, wealth "is more likely to be a positive hindrance, a meaningless distraction at best".⁷⁶ Mill's idyllic stationary state is unrealistic in practice, since economic activity can never cease entirely if just institutions are to be established and maintained. We may discover, however, that slower economic growth is not a "sacrifice" by the present for the sake of the future, but rather reveals what current generations are sacrificing for the sake of increased wealth, such as a greater amount of leisure time and the health benefits of improved environmental quality – things that many people at least claim to value now.⁷⁷ Shedding more light on what members of current generations are sacrificing in order to drive more, fly more and buy more may help to change the behaviour of current generations in a way that is more consistent with intergenerational environmental justice.⁷⁸

⁷⁰ See e.g. Rawls, *Theory*, *supra* note 3 (discussing a social minimum income: "Once the difference principle is accepted...it follows that the minimum is to be set at that point which, taking wages into account, maximizes the expectations of the least advantaged group" at 252).

⁷¹ Rawls, *Restatement*, *supra* note 7 at 63-64, 159; Rawls, *Law of Peoples*, *supra* note 68 at 107.

⁷² Mill, *supra* note 65 at § 1. Smith himself was ambivalent toward unconstrained "material progress", particularly with respect to the effects of economic progress on man's "martial spirit and virtues." See Albert O Hirschman, *The Passions and the Interests: Political Arguments for Capitalism before Its Triumph*, 20th Anniversary ed (Princeton, New Jersey: Princeton University Press, 1997) at 105.

⁷³ Mill, *supra* note 65.

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

⁷⁶ Rawls, *Theory*, *supra* note 3 at 258.

⁷⁷ See e.g. Paul Wapner, "Sacrifice in an Age of Comfort" in Michael Maniates & John M Meyer, eds, *The Environmental Politics of Sacrifice* (Cambridge, MA: The MIT Press) 33 at 50. Litfin, *supra* note 45 (noting that "modern consumerism is based on the fantastic idea that there can be life without sacrifice. The innumerable gifts of nature are simply discounted, obfuscated or appropriated by the global economy" at 131). It may also turn out that the failure to mitigate environmental harm is in fact more costly economically in the long term than incurring the costs of mitigation: see Stern, *supra* note 36 at 35 with respect to climate change.

⁷⁸ Such a change in behaviour would, in Barry's words, "at the very least leave open to people in the future the possibility of living in a world in which nature is not utterly subordinated to the pursuit of consumer satisfaction": Barry, "Sustainability", *supra* note 16 at 105.

Applying a Rawlsian approach to economic development that limits the pursuit of economic growth to that which is necessary to establish and maintain just institutions is an important step towards reconciling economic development with environmental protection. So long as economic development is seen as an end or good in itself, it is difficult to argue in favour of more stringent environmental protections that are seen as hindering future growth or to argue against further exploitation of the environment for economic gain. After all, if economic development is a good in itself, why would we not want more of it? From this point of view, environmental protection and economic development are caught in a zero-sum game in which any increase in one good is seen as a limit on the other. If economic development is viewed as a means, however, it becomes easier to ask whether it is possible to achieve the growth necessary to establish and maintain just institutions in a less environmentally harmful manner and whether further exploitation of currently untouched natural resources is really necessary to achieve this goal.

Limiting economic growth to the level necessary to establish and maintain just institutions is essential to achieving intergenerational environmental justice given the nature of environmental harm, which often involves a lengthy delay between cause and effect.⁷⁹ This delay means that “the effects of current production and consumption are not apparent or recognized until a considerably later point in time; and by the time they are recognized, it may be impossible or prohibitively expensive to reverse or minimize these effects.”⁸⁰ In other words, by the time the effects on the environment of present-day economic activities are realized, it will be too late to do anything about them. For this reason, preventing serious reductions to the environmental quality that will be experienced by future generations may mean slowing down economic development in the present in order to avoid the unforeseeable harms of economic activity. Slowing the pace of economic development is also necessary in order for regulatory institutions to be able to keep up with and effectively prevent or mitigate the predicted environmental impacts of which we are presently aware.

In addition to providing an alternative to the current paradigm of continual economic growth as an end in itself, Rawls’ theory of justice can help to define the “needs” of current and future generations referred to in the definition of sustainable development.⁸¹ The appropriate understanding of “needs” is a significant, lingering question created by this definition.⁸² Are “needs” to be understood as limited to those things required for human survival? Or are needs measured by the current generations’ economic standard of living?⁸³

⁷⁹ Ashford & Caldart, *supra* note 23 at 35.

⁸⁰ *Ibid.*

⁸¹ The World Commission on Environment and Development, *supra* note 48 (sustainable development is most commonly defined as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs” at 8).

⁸² See Visser ‘t Hooft, *supra* note 3 at 15.

⁸³ See e.g. Robert Solow, *supra* note 14 (“a sustainable path for the national economy is one that allows every future generation the option of being as well off as its predecessors. The duty imposed by sustainability is to bequeath to posterity not any particular thing ... but rather to endow them with whatever it takes to achieve a standard of living at least as good as our own and to look after their next generation similarly” at 168).

Under Rawls' theory of justice, needs are understood as "primary goods". Primary goods are the "social conditions and all-purpose means" necessary for citizens as free and equal persons to develop their two moral powers:⁸⁴ a sense of justice and a capacity to form and pursue their own ends.⁸⁵ The primary goods include the equal basic liberties, such as the freedoms of thought and association and the rights to liberty and to vote,⁸⁶ as well as the "all purpose means" of income and wealth.⁸⁷ The idea of primary goods refers to citizens' reasonable expectations of these goods given their current social position, rather than actual share; the least-advantaged are those with the lowest expectations with respect to income.⁸⁸ The measure of a citizen's primary goods, therefore, is objective; it is independent of a person's subjective utility or happiness.⁸⁹ For this reason, the concept of primary goods provides a definition of "needs" that is not based on the satisfaction of individual preferences. It is a definition that goes beyond what is required for mere human survival, but nevertheless has a cut-off point, after which it is possible to verify—at least in theory—that an individual's "needs" have been satisfied.⁹⁰ Primary goods such as the equal basic liberties are to be provided by just institutions, the establishment and maintenance of which is the purpose of economic development. Rawls' concept of primary goods, therefore, further assists in shifting away from continual economic growth for the purpose of increasing individual wealth and towards a system that limits economic development to the level necessary to establish and maintain the just institutions needed to ensure individuals' equal basic liberties and the ability to exercise their moral powers.

While I argue below that intergenerational environmental justice means going beyond ensuring that future generations can satisfy their needs defined as the primary goods, an understanding of needs as the primary goods is an important counter-measure to the current concept of "standard of living", measured by gross domestic product per capita.⁹¹ Gross

⁸⁴ Rawls, *Restatement*, *supra* note 7 at 57 and 112. For a discussion of environmental quality as a primary good, see Visser 't Hooft, *supra* note 3 at 88-89.

⁸⁵ Rawls, *Restatement*, *supra* note 7 at 18-19 (individuals' sense of justice allows them to honour the terms of a fair system of cooperation for their own sake at 19). This moral power would allow individuals to act from a sense of justice for future generations.

⁸⁶ *Ibid* at 44.

⁸⁷ *Ibid* (this includes not just private wealth, but also the wealth of associations or groups, and public wealth disbursed by the government at 58). See also *ibid* at 172.

⁸⁸ *Ibid* at 59. Amartya Sen criticizes Rawls' idea of primary goods for failing to account for "the relevant personal characteristics that govern the *conversion* of primary goods into the person's ability to promote her ends [emphasis in original]": see *Development as Freedom* (New York: Random House, 1999) at 74. But see Brian Barry, "The Ethics of Resource Depletion" in Brian Barry, ed, *Democracy, Power and Justice: Essays in Political Theory* (Oxford: Clarendon Press, 1989) 511 at 513 (regarding the difficulties of taking into account for public policy purposes the "idiosyncratic differences in the way people convert the means of happiness into happiness itself") [Barry, "Ethics"].

⁸⁹ Rawls, *Restatement*, *supra* note 7 at 59-60.

⁹⁰ John Rawls, "Social Unity and Primary Goods" in Samuel Freeman, ed, *John Rawls: Collected Papers* (Cambridge, MA: Harvard University Press, 1999) 359 at 364 [Rawls, "Social Unity"].

⁹¹ See e.g. Human Resources and Skills Development Canada, "Indicators of Well-being in Canada: Definition – Standard of Living", online: Human Resources and Skills Development Canada <<http://www.hrsdc.gc.ca/eng/home.shtml>>. To its credit, HRSDC looks at indicators of well-being other than standard of living, including environmental factors.

domestic product refers to the overall size of the economy, based on the market value of all goods and services produced in Canada.⁹² Christopher D Stone criticizes gross domestic product for measuring “social gain (of a sort) without discounting for the social cost of that gain, e.g., the losses through depletion of resources, pollution, and so forth.”⁹³ While Rawls’ primary goods may be more difficult to quantify, using production as the sole determinant of standard of living without measuring the environmental costs of that production makes it difficult to impose limits on economic growth that may be necessary to protect the interests that future generations have in the environment.

But we cannot stop here. Although making economic development a means to an end rather than an end in itself may help to limit economic growth and thereby limit the environmental harm that results from it, even economic development undertaken for just purposes may be undertaken in an environmentally unsustainable manner. It is necessary, therefore, to turn to another aspect of Rawls’ theory to support the assertion that economic growth necessary to establish and maintain just institutions should be environmentally sustainable. I suggest that an expanded notion of Rawls’ principle of fair equality of opportunity can further help to define our obligations to future generations. The next section argues that in pursuing economic development for the purpose of establishing and maintaining just institutions, current generations have an obligation to manage the environment and natural resources so as not to limit the range of choices available to future generations to pursue their own conceptions of the good life.

4. FAIR EQUALITY OF OPPORTUNITY

The principle of fair equality of opportunity is found in Rawls’ second principle of justice, which states that social and economic inequalities are permitted only insofar as they “attac[h] to offices and positions open to all under conditions of fair equality of opportunity”, and that they are to the greatest benefit of the least advantaged (the difference principle).⁹⁴ The difference principle is subject to the principle of fair equality of opportunity. This means that society’s basic institutions must secure fair equality of opportunity notwithstanding that the least advantaged might be better off under some other arrangement.⁹⁵ Rawls understands fair equality of opportunity as more than a formal requirement: offices and positions must not merely be open to all, but “all should have a fair chance to attain them.”⁹⁶ This requires, in particular, providing adequate education and training to all citizens and regulating the free market “so as to prevent excessive concentrations of property and wealth” over the long-term.⁹⁷ In seeking

⁹² *Ibid.*

⁹³ Stone, *supra* note 1 at 25. Anand and Sen also criticize the focus on GDP as an opulence-oriented approach to standard of living. See Sudhir Anand & Amartya Sen, “Human Development and Economic Sustainability” (2000) 28:12 *World Development* 2029 at 2031 [Anand & Sen]. The authors also discuss preserving future generations’ opportunities to pursue their own idea of the good life, but see the capital approach to sustainability, which sees natural goods as substitutable as sufficient to preserve this interest at 2030. In addition, Solow, *supra* note 14 at 163 notes the work of William D Nordhaus and James Tobin in addressing this problem.

⁹⁴ Rawls, *Restatement*, *supra* note 7 at 42-43.

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

⁹⁷ *Ibid* at 44.

to prevent excessive concentrations of wealth over time, fair equality of opportunity is aimed primarily at preserving a fair system of cooperation, rather than at protecting an individual right of access to any particular office or position.

Given Rawls' concern with maintaining fairness from one generation to the next, it is not too great a leap to extend fair equality of opportunity to future generations' interest in the environment. This extension means ensuring fair equality of opportunity to everyone "regardless of their social class" or generation "into which they are born".⁹⁸ If justice demands that we avoid excessive concentrations of wealth in order to preserve fair equality of opportunity to obtain positions and offices, then it would seem also to demand that we avoid environmental harm that could limit future generations' access to opportunities that in turn could negatively affect their share of the primary goods. I use "fair equality of opportunity" in order to draw on Rawls' liberal ideal of ensuring that free and equal citizens are not denied a chance to pursue their own reasonable goals or ambitions due to structural inequalities.⁹⁹ It seems likely that existing economic institutions and regulation are creating structural inequalities between current and future generations with respect to natural resources and environmental services. These inequalities could limit the range of reasonable goals or ambitions that members of future generations could seek to achieve.¹⁰⁰ Maintaining a particular degree of environmental quality is necessary to preserve the range of choices available to future generations. For example, depleting resources can "narrow diversity", which in turn could limit future generations' options in addressing future problems.¹⁰¹ This expanded definition of fair equality of opportunity would require current generations to preserve, to the greatest extent possible and subject to the maintenance of just institutions, the general conditions necessary for future generations to be able to benefit from the environment and to develop their own ideas of the good life to the same extent as current generations are able to.¹⁰² The ability to benefit from the environment would include opportunities to fish, farm and hunt,¹⁰³ to breathe clean air and

⁹⁸ *Ibid.* See also Rawls, *Theory*, *supra* note 3 ("those who are at the same level of talent and ability, and have the same willingness to use them, should have the same prospects of success regardless of their initial place in the social system" at 63). I suggest that "place in the social system" ought to include place in *time*.

⁹⁹ Rawls, *Restatement*, *supra* note 7 at 55.

¹⁰⁰ See also Norton, *supra* note 12 (arguing that to narrow another person's life choices is to do them harm, even if one does so without making them economically worse off at 131-32).

¹⁰¹ Brown Weiss, *supra* note 3 (uses the example of limiting future crop developments by failing to prevent the extinction of plant species at 7-8).

¹⁰² I will leave aside, for now, the question of obligations to *restore* the environment for future generations.

¹⁰³ Protecting future generations' equal opportunity to farm, fish and hunt concerns not only their ability to pursue a livelihood, a traditional practice or a recreation, but also their ability to exercise their moral powers over nature through the rational pursuit of the good life, in its many guises, in a reasonable manner.

drink clean water, to have access to a variety of species and breeds of plants and animals¹⁰⁴ and to contemplate nature.¹⁰⁵

This principle may seem to place excessive demands on current generations in terms of foregoing economic development, but the requirement to preserve a level of environmental quality adequate to secure future opportunities is itself limited by the need to pursue a level of economic development necessary to establish and to maintain just institutions,¹⁰⁶ which benefit both current and future generations. Given that this level of economic development satisfies the needs of present generations, defined as the primary goods, the obligation to secure fair equality of opportunity for future generations cannot be seen as raising concerns about unfairness to present generations. Prioritizing the fair equality of opportunity of future generations over economic growth that might improve the position of the least-advantaged is consistent with Rawls' positioning of the just savings principle ahead of the difference principle.¹⁰⁷

The principle of fair equality of opportunity of future generations to benefit from the environment has different implications for the exploitation of non-renewable and renewable resources. It is impossible for current generations to exploit non-renewable natural resources, such as petroleum, without affecting the access of future generations to these resources. The need to establish and maintain just institutions justifies the exploitation of non-renewable resources at the rate required to satisfy this need, even though this exploitation will exhaust the resource eventually. It also may be easier to value non-renewable mineral and fossil fuel resources as "capital", for which future generations can be compensated with other types of capital, such as investments in education, health care and infrastructure. This does not mean that current generations can exploit non-renewable resources up to the point necessary to secure just institutions without any regard to environmental damage. The extraction of non-renewable resources without long-term environmental impacts is probably impossible, but if current generations are to benefit economically from these resources, it is their responsibility to extract them in a manner that minimizes the resulting environmental harm. Private industry, when given the right incentives, has proven its ability to innovatively extract and process natural

¹⁰⁴ Concerns have been expressed regarding the loss of genetic diversity in livestock. See Commission on Genetic Resources for Food and Agriculture, Food and Agriculture Organization of the United Nations, *The State of the World's Animal Genetic Resources for Food and Agriculture – In Brief* (2007), online: Food and Agriculture Organization <<http://www.fao.org>>.

¹⁰⁵ Mill, *supra* note 65 (eloquently stating that "solitude in the presence of natural beauty and grandeur, is the cradle of thoughts and aspirations which are not only good for the individual, but which society could ill do without" at §2).

¹⁰⁶ This limit also precludes governments from taking draconian or totalitarian measures to protect the environment for future generations: see Norton, *supra* note 12 at 134-35.

¹⁰⁷ Rawls, *Theory*, *supra* note 3 at 252, 258. This is not to suggest that inequalities of income within current generations ought to be ignored; after all, the proposed goal of economic development, that is, the establishment and maintenance of just institutions, is aimed at ensuring fair equality of opportunity within current generations. It suggests that fair equality of opportunity of future generations must come before economic development that has the potential only to make the least-advantaged richer than they would be otherwise. In any case, increasing economic growth does not necessarily result in better living conditions for the least-advantaged. See Anand & Sen, *supra* note 93 at 2032-33.

resources so as to better preserve the surrounding environment.¹⁰⁸ It also requires careful and ongoing monitoring of the environmental impacts of extraction, in order to prevent significant long-term or irreversible harm. As the serious flaws in the industry-funded Regional Aquatics Monitoring Program (RAMP) in Alberta's oil sands demonstrate, Canadian governments and industries currently are failing future (and current) generations in this regard.¹⁰⁹ In the case of RAMP, government and industry claimed that toxins in the Athabasca River were from natural sources, not oil sands developments, however, this claim was called into doubt by independent academic research.¹¹⁰ Reducing the environmental harm caused by natural resource extraction will likely decrease the profitability of this activity but this may, in turn, help to reallocate investment dollars and government resources to other, less environmentally-harmful industries that can generate similar levels of economic gains for current generations without imposing significant environmental costs on future ones.

Renewable resources, on the other hand, can be exploited by present generations without significantly affecting the access of future generations, if carefully managed. With respect to renewable resources, therefore, current generations have an obligation to extract resources at a level below the reproductive capacity of the natural resource.¹¹¹ In addition, as with the extraction of non-renewable resources, current generations have an obligation to extract these resources in a manner that minimizes the damage to the surrounding environment.

Brian Barry has similarly argued for a duty to preserve the current "range of opportunities" enjoyed by present generations:

What justice requires, I suggest, is that the range of opportunities open to successor generations should not be narrowed. If some openings are closed off by depletion or other irreversible damage to the environment, others should be created (if necessary at the cost of some sacrifice) to make up.¹¹²

¹⁰⁸ Suncor's Tailings Reduction Operations, for example, has reduced the company's need to create new tailings ponds, used to store waste from oil sands developments. See Nathan Vanderklippe, "Suncor Speeds Pace of Tailings Cleanup", *The Globe and Mail* (27 September 27 2010) (QL). A tailings pond was responsible for the deaths of 1,606 and 350 ducks in two separate incidents in 2008 and 2010. See also Patrick White, "Toxic Syncrude tailings pond kills hundreds of ducks", *The Globe and Mail* (27 October 2010) (QL).

¹⁰⁹ Canada, Oil Sands Advisory Panel, *A Foundation for the Future: Building An Environmental Monitoring System for the Oil Sands* (December 2010), online: Environment Canada <http://www.ec.gc.ca/pollution/E9ABC93B-A2F4-4D4B-A06D-BF5E0315C7A8/1359_Oilsands_Advisory_Panel_report_09.pdf> at 33. The federal government recently announced improvements to monitoring practices in response to the report. See Environment Canada, News Release, "Canada's Environment Minister Responds to Oil Sands Recommendations with Water Monitoring Plan" (24 March 2011) online: Environment Canada <<http://www.ec.gc.ca>>.

¹¹⁰ Canada, Oil Sands Advisory Panel, *supra* note 109 at 26 and 34. See *ibid* at 33 for the Panel's criticism of RAMP.

¹¹¹ European Environment Agency, *supra* note 35 at 23.

¹¹² Barry, "Justice", *supra* note 32 at 78. See also Brian Barry, "Circumstances of Justice and Future Generations" in RI Sikora & Brian Barry, eds, *Obligations to Future Generations* (Philadelphia: Temple University Press, 1978) 243 at 243. Barry, "Ethics", *supra* note 88 (arguing that the depletion of natural resources by current generations should be compensated for by ensuring that future generations are left no worse off in terms of their "productive capacity" at 519).

The problem with Barry's formulation of fair equality of opportunity is that it seems to place the options of preservation and substitution on equal footing, even though the latter requires making choices for future generations. Substitution is an option that should be exercised with great caution and only when the preservation of current levels of environmental quality and natural resources is not possible because their exploitation is required to establish or maintain just institutions. The reason for this cautious approach is the fact that "human and technological capital are not infinitely substitutable for natural capital".¹¹³ Technological progress is unlikely to find synthetic substitutes for all natural resources currently used as the "primary inputs" of production,¹¹⁴ on which future economic development depends.¹¹⁵ As Smil notes, "[e]ven if expense were no object," the environmental services provided by forests, wetlands and healthy soil could not "be performed at such scales and with such efficacy by any anthropogenic means."¹¹⁶ This is due in part to the multifunctionality of ecosystems. This means that ecosystems are able to supply materials for economic activities and a location for recreational ones, as well as sustain local wildlife and provide other environmental services, such as regulating the local climate.¹¹⁷ Substitutes also have environmental consequences. Loss of agricultural land, for example, could be made up for by increasing the productivity of the remaining land, but this would require increased use of water for irrigation and fertilizer.¹¹⁸ For the same reason, Rawls' just savings principle is inadequate on its own to fulfill current generations' obligations to future generations because it requires only that current generations save a percentage of economic output for future generations, implying that future generations can be compensated adequately for the destruction of natural capital used in production by saving man-made capital. The just savings principle is therefore subject to the same criticism as the "capital" approach to sustainable development in that it seems to place natural capital and man-made capital on equal footing, thereby failing to protect those environmental goods and services for which man-made substitutes are inadequate.

In the same way that natural resources are not infinitely substitutable for man-made capital, one natural resource cannot necessarily be substituted for another. Planting new trees, for example, does not supply the same environmental services as an old-growth forest.¹¹⁹ The fair equality of opportunity approach, therefore, focuses on the interests that future generations have in particular, existing natural resources, rather than the aggregation of natural resources on a local, regional or national scale. The advantage of this approach is that it avoids the

¹¹³ Magraw & Hawke, *supra* note 46 at 620. See also Brown Weiss, *supra* note 3 at 6; Stern, *supra* note 36 ("it seems quite clear that, at a basic level, the global environmental and ecological system, which provides us with life support functions such as stable and tolerable climatic conditions, cannot be substituted" at 42).

¹¹⁴ Hanley, Shogren & White, *supra* note 11 at 21.

¹¹⁵ See e.g. Smil, *supra* note 5 ("[t]he global economy is merely a subsystem of the biosphere, and it is easy to enumerate the natural services without which it would be impossible" at 212).

¹¹⁶ *Ibid* at 214.

¹¹⁷ Tremmel, *Theory*, *supra* note 15 at 70.

¹¹⁸ Smil, *supra* note 5 at 196. See also *ibid* ("[o]nly 25%-40% of all fertilizer nitrogen applied to crops is taken up by plants; the rest is lost to leaching, erosion, volatilisation, and denitrification". The excess nitrogen in bodies of water leads to an overgrowth of algae and phytoplankton, the decomposition of which deoxygenates the water, reducing or killing other aquatic species at 202).

¹¹⁹ See e.g. Hanley, Shogren & White, *supra* note 11 (old growth forests "support complex ecosystems which would be irreversibly changed by clear-felling" at 303).

problem of aggregating natural capital and thereby having to compare, for example, the value of an old growth forest to a rehabilitated lake. Trade-offs will have to be made, of course, but these will have to be justified by the need to establish and maintain just institutions.

The principle of fair equality of opportunity also requires managing the exploitation of natural resources to preserve future generations' ability to participate in traditional livelihoods.¹²⁰ Rawls recognizes as a "good" the opportunities "for individuals and associations to be attached to their particular culture and to take part in its common public and civic life".¹²¹ The consequences of failing in our obligation to preserve the equal opportunity of future generations to participate in a traditional livelihood is demonstrated vividly in Canada with the death of the cod fishery in Newfoundland, which has forced many Newfoundlanders to seek work elsewhere,¹²² and the loss of Aboriginal communities' abilities to hunt and fish on their traditional territories across the country.¹²³ In Aboriginal communities in particular, the ability to pass down to the next generation the skills associated with traditional hunting practices is an important good that can profoundly affect a young person's self-esteem and pride in their Aboriginal identity.¹²⁴ While communities and their cultures change over time, this does not justify precluding future generations from participating in traditional practices because of environmental mismanagement by previous generations.¹²⁵

Some might argue that we cannot assume future generations will endorse our traditions and values and we cannot predict future generations' preferences with respect to the environment. The argument that future generations might hold different values, or might prefer plastic trees

¹²⁰ This is not to suggest that fair equality of opportunity requires the preservation of all traditions or traditional livelihoods. Those that conflict with the free exercise of the equal basic liberties, for example, ought not to be protected. See e.g. Rawls, *Restatement, supra* note 7 (Rawls discusses religious beliefs that are incompatible with political liberalism at 183). Nor should practices, whether a community considers them to be traditional or not, that themselves conflict with the fair equality of opportunity of future generations to natural resources or environmental quality. The difference between modern and traditional methods of resource extraction, in most cases, is a difference in technological capacity to extract at an exponentially greater rate causing correspondingly greater harm. See Part II, above.

¹²¹ Rawls, *Law of Peoples, supra* note 68 at 111.

¹²² See e.g. John Gray, "Leaving the Rock no longer just a rite: With the cod gone, choice is missing too", *The Globe and Mail* (24 February 1996) (QL). Oil, mining and electricity development appears to be reversing Newfoundland's fortunes – another example of the difficult balance between economic development and environmental protection: Gordon Pitts, "The Rock's most precious resource" *The Globe and Mail* (8 August 2009) (QL).

¹²³ See generally Canada, *Report of the Royal Commission on Aboriginal Peoples*, vol 2 (Ottawa: Communication Group, 1996) at Part II.

¹²⁴ Linda Clarkson, Vern Morrisette & Gabriel Régallet, "Our Responsibility to the Seventh Generation: Indigenous Peoples and Sustainable Development" (1992), online: International Institute for Sustainable Development <http://www.iisd.org/pdf/seventh_gen.pdf> at 51. See also *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 SCR 103 ("[t]he [Fish and Wildlife Management Plan] also recognized the need to preserve the First Nation's ability to transfer its culture and traditions to its youth through opportunities to participate in traditional activities" at para 20).

¹²⁵ Some might object that this application of the principle of fair equality of opportunity would prevent economic development of natural resources by indigenous communities on their traditional territories, but under the first principle of the framework, some infringement of future generations' access to traditional practices may be justified in order to establish and maintain just institutions.

to real ones, does not let current generations off the hook morally.¹²⁶ Again, the obligation is to avoid, to the greatest possible extent, actions that would preclude future generations from endorsing our traditions and values or would foreclose their ability to prefer real trees to plastic ones.¹²⁷ Whether future generations accept or reject the values of current generations, the latter have an obligation to preserve the conditions necessary for future generations to make this choice.¹²⁸ In taking these steps, future generations may be more likely to share current generations' environmental values and to express preferences consistent with these shared values.

The notion of ensuring future generations' access to fair equality of opportunity to benefit from the environment may prove a more compelling moral principle for individual action by members of the present generation than the current emphasis on avoiding distant future catastrophes. Most individuals, at least those living in rural areas and urbanites with a minimum level of wealth to travel outside of urban centres, have personal experiences of interacting with nature. It seems likely that most people who have these personal experiences will agree that future generations ought to have equal access to the possibility of having similar experiences.¹²⁹ It may be harder for those same individuals to imagine a world ravaged by climate change, because it is beyond anything within their personal experience. Protecting future generations' ability to experience nature may nevertheless help to reduce greenhouse gas emissions,¹³⁰ since refusing to build highways through forests or other natural habitat, for example, not only preserves these for future generations, but ultimately may force individuals to find more sustainable means of transportation than automobiles.

Some may object that an approach to environmental protection focused on the fair equality of opportunity of future generations is too anthropocentric, as it focuses on the value of the natural environment to future humans. But the objection is based, at least in part, on the ways in which nature is seen as valuable to humans rather than the mere fact of viewing nature from the human point of view—a point of view that we, as human beings, cannot escape. If nature is seen as valuable solely in terms of its usefulness as an input of production, then this is indeed objectionable as insufficiently protective of nature. It is possible to take a much wider view, however, that incorporates the usefulness or value of nature to scientific study, human knowledge, recreation and quiet contemplation. Or simply the value of knowing that something exists and is protected, even if one never has the opportunity to enjoy or benefit from it. It also includes, as I argue, the potential value future generations will

¹²⁶ Visser 't Hooft, *supra* note 3 (arguing that the right of future generations to determine their own values does not get us off the hook morally at 129).

¹²⁷ It is equally necessary to leave future generations the option of holding different values: see Brown Weiss, *supra* note 3 at 7.

¹²⁸ Barry, "Sustainability", *supra* note 16 at 104.

¹²⁹ Rawls noted that "protect[ing] the beauties of nature for the purposes of public recreation and the pleasures of a deeper understanding of the world" is an argument based on political values for extending justice to cover animals and the rest of nature: *Political Liberalism* (New York: Columbia University Press, 1993) at 245 [Rawls, *Political Liberalism*].

¹³⁰ See Stern, *supra* note 36 (deforestation is one of the primary causes of post-industrial increases in greenhouse gas emissions in the atmosphere at 3).

place on particular environmental resources or the environment in general.¹³¹ For this reason, an anthropocentric approach is not necessarily inadequate to justify robust protection of a wide variety of species and their habitat, because it allows space to value even those species and habitats whose economic utility for human development is not immediately apparent. Furthermore, attempting to articulate a principle of sustainable development that is not based on nature's value to humanity may be counterproductive. As Gro Harlem Brundtland explained, "[t]he environment does not exist as a sphere separate from human actions, ambitions, and needs, and attempts to defend it in isolation from human concerns have given the very word 'environment' a connotation of naivety in some political circles."¹³² In other words, insisting that principles of environmental protection be articulated in terms completely divorced from human needs or desires may marginalize the environmental movement as a political force.

Focusing on the fair equality of opportunity of future generations may also help to overcome resistance to environmental protection from those who see it as call to sacrifice human needs for those of non-humans.¹³³ Although citizens hold a wide variety of views as to the "value" of nature, that is, whether they hold nature valuable for its own sake or primarily for its use to humanity, it seems likely that most citizens would agree on the importance of the interests of future generations in a healthy environment. Fair equality of opportunity of future generations, therefore, may be a moral basis for environmental protection on which most citizens can agree.¹³⁴

Some of the institutions needed to ensure fair equality of opportunity to future generations to benefit from the environment already exist, such as environmental assessment legislation.¹³⁵ The purpose of environmental assessments is to identify the potential negative environmental impacts of a proposed project and in cases where significant adverse effects are identified "that cannot be justified in the circumstances", to ensure that steps are taken to mitigate these effects or to deny the project the necessary approvals to proceed.¹³⁶ In conducting environmental assessments under the Canadian Environmental Assessment Act (CEAA), responsible authorities are empowered to consider the impact of development on future generations' access to natural

¹³¹ See Brown Weiss, *supra* note 3 ("unless we proceed cautiously, we will discard natural resources that future generations would have wanted to pay us handsomely to retain" at 7).

¹³² Gro Harlem Brundtland, "Foreward" in *The World Commission on Environment and Development*, *supra* note 48 at xi.

¹³³ John M Meyer, "A Democratic Politics of Sacrifice?" in Michael Maniates & John M Meyer, eds, *The Environmental Politics of Sacrifice* (Cambridge, MA: The MIT Press) 13 (quoting the Ayn Rand Institute at 15).

¹³⁴ See Part V, below.

¹³⁵ See e.g. *CEAA*, *supra* note 48.

¹³⁶ *CEAA*, *supra* note 48 at ss 20(1) and 37(1) (where it is uncertain whether a project will cause significant adverse effects, the responsible authority shall refer the project to the Minister for referral to a mediator or review panel at s 20(1)(c); see also s 25). The purpose of the *CEAA* is "to ensure that projects are considered in a careful and precautionary manner before federal authorities take action in connection with them, in order to ensure that such projects do not cause significant adverse environmental effects" and "to encourage responsible authorities to take actions that promote sustainable development" at s 4(1) (a) – (b)).

resources and potential cumulative effects.¹³⁷ In theory at least, environmental assessments should help to protect the fair equality of opportunity of future generations. The problem with this institution is that currently both industry and government attempt to narrow the scope of environmental assessments as much as possible and the conclusion of the assessment is almost invariably that the development project in question can proceed.¹³⁸ Under the CEAA, environmental assessment frequently is limited to that aspect of an economic development project that triggered federal jurisdiction.¹³⁹ By “scoping” the “project” that is to be subject to an environmental assessment as narrowly as possible,¹⁴⁰ thereby narrowing the investigation of environmental impacts of the proposed project, government agencies reinforce the currently-prevailing paradigm of economic growth as a good in itself and the corresponding attitude that economic development ought to take priority over environmental protection. This attitude was further reinforced when the federal government exempted from the CEAA all projects intended to stimulate the Canadian economy in the wake of the recent global recession.¹⁴¹ While it may be the case that certain projects, such as those in “previously disturbed municipal settings”,¹⁴² may reasonably be expected to have insignificant environmental impacts, exempting these projects from the environmental assessment process means that the question never even gets asked. The widespread use of exemptions therefore also undermines the potential educational effect of environmental assessments, namely an increase in individual and institutional awareness of the impacts that human activities have on the natural environment. This awareness could, in turn, help to strengthen a moral commitment to protect the environment for future generations.¹⁴³ Extending the application of environmental assessments and limiting the government’s ability to issue exemptions should help to ensure that today’s economic development is not infringing the fair equality of opportunity of future generations to benefit from the environment. Given the “serious delays” to projects caused by the existing environmental assessment process,

¹³⁷ See *CEAA*, *supra* note 48, ss 16(2)(d) and 19(7). See also the definition of “environmental effect” which includes changes that would affect future generations’ fair equality of opportunity, such as any change to an endangered species and its habitat and any change that could affect “the current uses of lands and resources for traditional purposes by aboriginal persons” at s 2(1). The *CEAA* also provides for the protection of the “ecological integrity” of national parks at s 48(1.1).

¹³⁸ In the 2008-09 fiscal year, none of the projects subject to environmental assessment were deemed likely to cause significant adverse effects. See Canadian Environmental Assessment Agency, “Statistical Summary 2008-2009”, online: Canadian Environmental Assessment Agency, <<http://www.ceaa.gc.ca>>. See generally Canada, *Fall 2009 Report of the Commissioner of the Environment and Sustainable Development to the House of Commons* (Ottawa: Office of the Auditor General of Canada, 2009) ch 1 at 11ff, online: Office of the Auditor General of Canada <http://www.oag-bvg.gc.ca/internet/docs/parl_cesd_200911_01_e.pdf> [*Fall 2009 Report*] (the Report describes recent court challenges to scoping decisions).

¹³⁹ *CEAA*, *supra* note 48 (“issues a permit or licence, grants an approval or takes any other action for the purpose of enabling the project to be carried out in whole or in part” at s 5(1)(d)). See also *Fisheries Act*, RSC 1985, c F-14, s 35(2).

¹⁴⁰ See *CEAA*, *supra* note 48, ss 15, 15.1.

¹⁴¹ *Regulations Amending the Exclusion List Regulations*, 2007, SOR/2009-131, s 5 [*Regulations Amending the Exclusion List*]. See also *CEAA*, *supra* note 48, s 7.1(2).

¹⁴² *Regulations Amending the Exclusion List Regulations, 2007: Regulatory Impact Analysis Statement*, online: Canada Gazette <<http://www.gazette.gc.ca/rp-pr/p2/2009/2009-05-13/html/sor-dors131-eng.html>>.

¹⁴³ Stone, *supra* note 1 (environmental assessments “may encourage the institution whose actions threaten the environment to really *think about* what it is doing [emphasis in original]” at 19).

making a more robust assessment process palatable to industry and, thereby, politically feasible will also require government innovation and resources to make the assessment process more efficient.¹⁴⁴ Fulfilling our obligations to future generations may therefore be as much a matter of improving existing institutions as it is about inventing new ones. Although this is itself a daunting task, it is not an unrealistic or unreasonable one. It is, however, incompatible with significant cuts to government resources in this area.¹⁴⁵

Existing institutions may also suffer from an institutional bias in favour of economic development over environmental protection. There currently exists a real concern that the government agencies tasked with weighing the environmental costs and economic benefits of development projects, such as the Canada-Newfoundland and Labrador Offshore Petroleum Board, are evaluating projects almost entirely on the basis of economic benefits and that environmental factors remain an afterthought.¹⁴⁶ This is unsurprising given the government's current stance that environmental protection not interfere with economic growth.¹⁴⁷ In contrast, adopting the two key principles of a Rawlsian framework for sustainable development would affect not only how the costs and benefits of development projects are assessed, but also the very cost-benefit analysis itself: preserving the fair equality of opportunity of future generations may mean foregoing certain projects regardless of the economic benefits where they are not necessary to establish and maintain just institutions. Viewing economic development as a means to an end rather than an end in itself may also help to prevent governments from dismantling environmental protection measures during economic downturns.¹⁴⁸ Thinking of economic development as an end in itself, on the other hand, implies that any slowdown in growth must be remedied, even at the expense of protecting the environment for future generations.

More generally, ensuring fair equality of opportunity will require integrating environmental considerations into all economic policy-making. Ashford and Caldart posit that “[a]t best, current policies affecting competitiveness, environment, and employment are coordinated but not integrated [emphasis in original].”¹⁴⁹ In some cases, policies in different areas may work at cross-purposes: provincial action to mitigate climate change is unlikely to succeed as long as federal subsidies and favourable tax treatments to greenhouse gas-intensive industries remain in place.

The Rawlsian approach to sustainable development outlined above goes well beyond the current approach to environmental protection in Canada. Such an approach would face heavy resistance from those, such as extraction companies, with an interest in continual economic

¹⁴⁴ See e.g. *Fall 2009 Report*, *supra* note 138 at 2, 12.

¹⁴⁵ Mike De Souza, “Harper Government to Cut Environmental Spending”, *National Post* (1 March 2011), online: National Post <<http://www.nationalpost.com>>.

¹⁴⁶ With respect to the Canada-Newfoundland and Labrador Offshore Petroleum Board, see Shawn McCarthy & Paul Waldie, “In Deep Water Drilling, a Delicate Dance”, *The Globe and Mail* (26 June 2010) (QL). See also Lila Barrera-Hernandez, “Recent Developments in Social Impact Management in Extractive Resource Development in Peru” (2009) 5 JSDLP 155 at 165 (discussion of Peru’s Ministry of Energy and Mines).

¹⁴⁷ Prentice, Address, *supra* note 9.

¹⁴⁸ *Regulations Amending the Exclusion List*, *supra* note 141.

¹⁴⁹ Ashford & Caldart, *supra* note 23 at 1047.

growth. Even more modest attempts to protect the interests of future generations, however, have been met with substantial resistance. The current failure to meet our obligations to future generations may be attributable to a lack of political will. The difficulty in achieving a broad political consensus on the importance of sustainable development may result from the fact that even assuming that we have recognized and acknowledged our obligations to future generations, the “limitations of our psychology” lead us to discount future interests in favour of present or proximate ones.¹⁵⁰ In other words, we may know that we have a moral duty to future generations, but this knowledge competes with the fact that, as Hendrik Ph Visser ’t Hooft notes, we live in the present and the anonymity of future generations “prohibits [our] emotional identification” with them.¹⁵¹ This issue resembles the “affinity” problem Rawls discusses in relation to international justice: “the affinity among peoples is naturally weaker (as a matter of human psychology) as society-wide institutions include a larger area and cultural distances increase”.¹⁵² The same argument applies to distances of time.¹⁵³ Environmental issues are subject to both affinity problems, being both global and long-term in nature. Consequently, any natural or inherent concern we have for our own descendents¹⁵⁴ may be insufficient to cover the “full temporal extent of” our current technological capacity to impact the environment.¹⁵⁵

The affinity problem raises a possible critique of my interpretation of fair equality of opportunity: does it demand too much? If implementation is made very difficult due to the facts of human psychology, then the principle is not “realistically utopian”.¹⁵⁶ But the fact of a psychological pull against respecting the principle is not determinative. According to Rawls, the problem of affinity is for the “statesman”, or, more broadly, participants in civil society, to overcome.¹⁵⁷ Far-reaching implications notwithstanding, the principle of fair equality of opportunity of future generations might prove an easier principle around which to garner support for environmental protection than dooms-day warnings or scientific data. This is because, like Rawls’ political conception of justice, it is possible for citizens with a wide variety of comprehensive doctrines and core beliefs regarding nature to support the principle. Rawls’

¹⁵⁰ Visser ’t Hooft, *supra* note 3 at 81-82 (making reference to Jonathan Glover, *Causing Death and Saving Lives* (New York: Penguin Books, 1977) at 294) and 111.

¹⁵¹ Visser ’t Hooft, *supra* note 3 at 9.

¹⁵² Rawls, *Law of Peoples*, *supra* note 68 at 112. See also Visser ’t Hooft, *supra* note 3 at 46.

¹⁵³ With respect to the problem of affinity for future generations, emphasizing “tradition” can go both ways. On the one hand, traditions allow us to see ourselves as part of something intended to continue beyond our own lifespan; on the other hand, our awareness of historical change undermines our confidence that future generations will not break with tradition, which in turn causes our “feelings of solidarity with future generations” to diminish: see *ibid* at 126, 135.

¹⁵⁴ Rawls, *Theory*, *supra* note 3 (Rawls argues that this would motivate the parties in the original position – who are all contemporaries – to institute a just savings principle at 255. Rawls later abandoned this in favour of the argument that the parties would adopt it on the basis that it is what they would want previous generations to have followed: Rawls, *Restatement*, *supra* note 7 at 160, n 39.

¹⁵⁵ Visser ’t Hooft, *supra* note 3 at 47. On the other hand, as Barry notes, concern for future generations has grown in an “unprecedented way” in the past fifty years, perhaps due to increased understanding of how our actions can affect them: Barry, “Sustainability”, *supra* note 16 at 100.

¹⁵⁶ The phrase refers to a state of affairs that while idealistic is not unachievable given human nature. Rawls was similarly concerned with this problem with respect to his theory of justice: see Rawls, *Theory*, *supra* note 3 (“Envy and Equality” at 468-74).

¹⁵⁷ Rawls, *Law of Peoples*, *supra* note 68 at 113.

idea of an overlapping consensus is helpful in explaining how a political consensus on the importance of environmental protection based on the principle of fair equality of opportunity could be achieved.

5. AN OVERLAPPING CONSENSUS ON INTERGENERATIONAL ENVIRONMENTAL JUSTICE

Rawls' theory of justice recognizes the "fact of reasonable pluralism" inherent in a liberal democracy that protects freedom of conscience and freedom of religion.¹⁵⁸ This is the fact that a permanent condition of liberal democracies is that citizens will hold a wide variety of religious and political views. Agreement on constitutional essentials, namely the structure of government, voting rights and basic equal liberties, must therefore be based on a political conception of justice that all citizens can support, regardless of their own "comprehensive doctrines" – that is, their own political ideologies or religious beliefs. This is the idea of public reason.¹⁵⁹ Insisting that the reasons for a state's constitutional essentials be limited to a political conception of justice should allow for an "overlapping consensus" on these issues to develop over time.¹⁶⁰ Justice as fairness is one such possible political conception. In other words, in a well-ordered society, all citizens will be able to support a state's constitutional structure based on justice as fairness notwithstanding their different core beliefs, although they may do so for different reasons, with some citizens drawing on their core beliefs as providing reasons to support justice as fairness.¹⁶¹

The idea of public reason has been criticized for excluding non-political values from political decision-making, but Rawls does not absolutely preclude these other values—religious or secular—from public policy debates. Rather, he allows for a full airing of all comprehensive doctrines in what he calls the "background culture", which encompasses all non-public fora of discussion, including the media and all the myriad associations that make up civil society, in accordance with the protected liberties of thought, speech and association.¹⁶² Rawls' restrictions on invoking comprehensive doctrines apply only to discussions of "fundamental questions" in the "public political forum", which is limited to "the discourse of judges in their decisions, ...; the discourse of government officials, especially chief executives and legislators; and ... the discourse of candidates for public office and their campaign managers".¹⁶³ Legislation enacted in accordance with the state's constitutional structure nevertheless must meet the criterion for the legitimate exercise of power: citizens must reasonably believe that the reasons behind the legislation might also be reasonably accepted by other citizens who may not share the same comprehensive doctrine.¹⁶⁴

¹⁵⁸ Rawls, *Restatement*, *supra* note 7 at 33.

¹⁵⁹ *Ibid* at 26; Rawls, "The Idea of Public Reason" in *Political Liberalism*, *supra* note 129 at 211; see also John Rawls, "The Idea of Public Reason Revisited" (1997) 64 U Chicago L Rev 765 [Rawls, "Public Reason"].

¹⁶⁰ Rawls, *Restatement*, *supra* note 7 at 37.

¹⁶¹ *Ibid* at 32.

¹⁶² Rawls, *Political Liberalism*, *supra* note 129 at 14; Rawls, "Public Reason", *supra* note 159 at 768.

¹⁶³ Rawls, "Public Reason", *ibid.* at 767 (when judges, executives and politicians actually abide by the idea of public reason, they are fulfilling "their duty of civility to one another and to other citizens"). See also *ibid* at 771.

¹⁶⁴ *Ibid.* at 771.

According to Rawls, “the status of the natural world and our proper relation to it is not a constitutional essential or a basic question of justice”, but a matter about which citizens “can vote their non-political values”.¹⁶⁵ This does not imply that these questions are unimportant, but rather that, unlike constitutional essentials such as the equal basic liberties, environmental policies are not about carving out space for individual freedom and therefore are less likely to be conducive to constitutional protections and blanket prohibitions.¹⁶⁶ Furthermore, environmental regulation is likely to involve greater use of scientific data and expertise than regulation of the equal basic liberties.¹⁶⁷ In other words, it is generally easier to gain agreement on the “main outlines” of the constitutional essentials and easier to tell whether they have been realized.¹⁶⁸ As Rawls recognized, “our proper relation” to the natural world is likely to depend on “complicated inferences and intuitive judgements that require us to assess complex [scientific] information”.¹⁶⁹ Environmental policy, therefore, is better left to the legislative stage,¹⁷⁰ where statutes, regulations and policies are subject, at least in theory, to ongoing political debate and technical evaluation and are easier to change than constitutional provisions.

Nevertheless, if Canadian society is to take the necessary steps towards sustainable development, then an overlapping consensus on the importance of environmental protection is practically necessary in order to gather the political will to take these steps. Rawls suggests that justice as fairness possesses three features “that should help it to gain the support of a reasonable overlapping consensus.”¹⁷¹ First, its application is limited to the basic structure;¹⁷² second, it presupposes no particular comprehensive view; and third, its fundamental ideas are familiar and drawn from the public political culture and common sense. The principle of fair equality of opportunity arguably shares the second and third features, although its application will need to extend beyond the basic structure to many more aspects of government regulation and social behaviour. A principle can form part of the basic structure and yet not be a constitutional essential. Rawls’ fair equality of opportunity is not a constitutional essential, even though it

¹⁶⁵ Rawls, *Political Liberalism*, *supra* note 129 at 244. There are states, such as South Africa, that have incorporated a right to a clean environment in their constitutions, but this might not prevent individuals in those states from invoking their comprehensive doctrines on environmental issues, since for Rawls, the constitutional essentials are limited to those provisions regarding the structure and powers of government and the protection of equal rights and liberties. That is, the provisions most in need of the highest level of constitutional protection given the fact of pluralism: see Rawls, *Restatement*, *supra* note 7 at paras 9.3 and 13.5.

¹⁶⁶ This is why making violations of environmental regulations “crimes” is not an easy fit. See Richard J Lazarus, “Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law” (1995) 83 *Geo LJ* 2407 at 2431. See also Brown Weiss, *supra* note 3 at 93.

¹⁶⁷ See e.g. Environment Canada, “Toxic Substances Management Policy”, online: Environment Canada, <<http://www.ec.gc.ca>>. The policy “provides a framework for making science-based decisions on the effective management of toxic substances.”

¹⁶⁸ Rawls, *Restatement*, *supra* note 7 at 49.

¹⁶⁹ Rawls, *Political Liberalism*, *supra* note 129 at 229; Rawls, *Restatement*, *supra* note 7 at 47-49.

¹⁷⁰ In contrast to the first two stages, the original position and the constitutional convention: *ibid* at 48.

¹⁷¹ *Ibid* at 33.

¹⁷² The basic structure is defined as “the main political and social institutions and the way they fit together as one scheme of cooperation”: *ibid* at 4.

is a principle of the basic structure.¹⁷³ Like justice as fairness, fair equality of opportunity of future generations is not grounded in any particular comprehensive doctrine. Citizens might support it out of reverence for God's creation, out of concern for their descendants, or out of a sheer love of nature.¹⁷⁴ In addition, most comprehensive doctrines are based on some notion of perpetuating their own idea of the good life into the future. For this reason, most citizens have a reason to support a principle that seeks to ensure that the choice is available to future generations to perpetuate their ideas of the good life.¹⁷⁵ That the principle of fair equality of opportunity of future generations to benefit from the environment is based in public political culture is evident in the wide, if shallow, public support for environmental protection.¹⁷⁶ The principle also draws on the common sense practice of leaving common areas or shared spaces in good condition for the next person. So, although the principle of fair equality of opportunity is an abstract and complex concept, it is one that citizens should be able to connect to their everyday morality. This is not meant to imply that current generations have an obligation to preserve the world "as is", even if this were physically possible.¹⁷⁷ But neither are we able to leave playground equipment—to use an analogy—exactly as we found it – every use will wear it out a little. The point is to leave the equipment in a condition that allows the next person to benefit from its use. Making connections between the desire that future generations be able to adopt our comprehensive doctrines if they so choose and principles of everyday morality on the one hand, and the fair equality of opportunity of future generations to benefit from the environment on the other, may help to bridge the moral distance between current and future generations.

Rawls' idea of a well-ordered society in which the basic structure and constitutional essentials are supported by an overlapping consensus of citizens, drawing on their own different comprehensive doctrines, demonstrates how an overlapping consensus on intergenerational environmental justice might be built. Building this consensus will require proponents of specific environmental protection measures to connect them to an underlying moral principle, such as fair equality of opportunity. Arguments in favour of particular environmental policies are seldom grounded in a particular principle of justice, let alone one that most citizens would be able to support from the perspective of their own comprehensive doctrines. I suggest that the principle of fair equality of opportunity of future generations to benefit from the environment is a principle from which specific environmental policies could be derived. More importantly, it could form the basis of an overlapping consensus on these policies, because it is a principle which citizens holding a wide diversity of political, religious and moral views could support.

¹⁷³ *Ibid* at 47; Rawls, *Political Liberalism*, *supra* note 129 at 228- 229 (Rawls notes that certain aspects of fair equality of opportunity, namely freedom of movement and free choice of occupation, might be constitutionally essential).

¹⁷⁴ See Rawls, "Social Unity", *supra* note 90 ("[o]ne part of society affirms certain aesthetic values and attitudes of contemplation toward nature, together with the virtues of gentleness and the beneficent stewardship of natural things" at 381). Most of the major religions include some notion of environmental stewardship: see Brown Weiss, *supra* note 3 (discussing Islamic and Judeo-Christian traditions at 19).

¹⁷⁵ Visser 't Hooft, *supra* note 3 at 100.

¹⁷⁶ Stone, *supra* note 1 at 156; Andrew Green, "You Can't Pay Them Enough: Subsidies, Environmental Law, and Social Norms" (2006) 30 *Harvard Env'tl L Rev* 407 at 415.

¹⁷⁷ Lazarus, *The Making of Environmental Law*, *supra* note 33 at 6 (even without human interference, the natural environment will not remain static).

6. CONCLUSION

Rawls stated that “one task of political philosophy...is to focus on deeply disputed questions and to see whether, despite appearances, some underlying basis of philosophical and moral agreement can be uncovered.”¹⁷⁸ The problems of environmental protection and justice to future generations are deeply disputed and this article does not claim to resolve them. Rather, I have put forward a preliminary sketch of one possible framework for sustainable development based on Rawls’ theory of justice. This framework has two main principles. First, a Rawlsian approach would view economic development as a means to establishing and maintaining just institutions, rather than as an end in itself. This approach offers an alternative to the current paradigm of continual economic growth for its own sake and may help to avoid pitting environmental protection against economic development in a zero-sum game in which increasing environmental protection is seen as decreasing economic wealth. Viewing economic development as a means may make it easier to ask whether the goals of economic development can be achieved in a less environmentally-damaging manner than natural resource extraction. Second, the principle of fair equality of opportunity of future generations to benefit from the environment provides a possible principle for defining our obligations to future generations from which specific rules and institutions of environmental protection could be derived and assessed. This principle also may be one on which citizens with a wide variety of religious and political beliefs may be able to agree.

¹⁷⁸ Rawls, *Restatement*, *supra* note 7 at 2.

