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The Role of ‘Previous Generations’ in the Just Savings

Principle of John Rawls

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Abstract

This paper explores the shift in Rawls just savings principle away from an initial iteration that was indifferent to previous generational savings, to one in which past historical savings are the cornerstone of the motivation to save for future generations. Attention is given to the practical application of the revised principle in the field of the environment. The revised principle is argued to be an improvement on the initial one, because previous generations have an existence and identity that is more tangible than yet to be future ones.

Keywords: just savings principle, previous generations, Rawls, intergenerational justice, futurity

1. Introduction

This article considers a neglected aspect of Rawls’s just savings principle, namely, the significance of the savings of ‘previous generations’ in the context of the later formulation of his contribution to intergenerational justice. Neither previous generations, nor history more broadly, figure prominently in the intergenerational justice literature. In both the academic literature, and policy discourse, the focus has tended to be on relations between present and future generations or, as it is sometimes known, ‘futurity.’¹ Rawls himself encouraged this in the first edition of *A Theory of Justice*, which treated the savings of past generations with

indifference: 'either past generations have saved or they have not saved; there is nothing parties [of the present generation] can do to affect it'.² However, this changed with a revision which elevated the savings of previous generations to the heart of the motivation to save for the future. As Rawls put it: 'parties...agree to a just savings principle subject to the...condition that they must want *all previous* generations to have followed it.'³ What prompted this revision? Is the revised theory an improvement?

I begin by setting out the 'original' formulation of the just savings principle, with particular reference to its indifference to previous generational savings, and its departure from Kantian rationality as a basis for just relations intergenerationally. In regards to Kant, and as is well known, Rawls aimed to construct a general theory of justice around an egalitarian conception of justice as reciprocity, but he did not (initially) consider that possible in the context of intergenerational justice. He felt constrained by Kant's observation that future generations depend on current ones, but that is not reciprocated (current generations do not clearly benefit from, or in any other obvious sense depend on, yet to be future ones). In light of this, Rawls conceived that we are motivated to save for the future out of a sentiment of care for our children's children.

Attention is then given to the 'shift backwards' in Rawls' formulation, by which the motivation to save for future generations is recast around the reliance on ancestral savings. This represents a re-engagement with Kantian rationality, in that the just savings principle is now understood as a principle which can be universally willed within Kant's idea of the 'permanent state'. Another attraction of the revised principle beyond its fit with the Kantian social contract tradition is that it holds out the prospect of avoiding problems of application associated with futurity. These problems centre on the uncertain identity and even existence

of ‘future persons’. Past persons, and their generations, are inherently more tangible than those of the not-yet future.

The article then considers the practical application of the revised just savings principle in the field of the environment, where the early iteration of the principle has attracted greatest interest. Difficulties with identifying the quality and quantity of the goods which the present generation must save for unborn future generations – i.e. difficulties associated with futurity - have held back the ‘take up’ of this principle, as it found expression in Rawls’ initial work. The revised starting point, grounded in previous generations, opens up a rich and promising field of inquiry. It’s chief attraction, I argue, is that it provides a normative principle that allows us to stand in judgement on the current generation not in terms of its impact on contingent goods of contingent future generations, but its respect for the ‘actual’ goods handed down by ‘actual’ previous generations, to be saved for posterity.

2. The Original Just Savings Principle

Rawls’s original articulation of the just savings principle is set out only briefly, in two sections of *A Theory of Justice* concerned with articulating a ‘path over time which treats all generations justly over the whole course of society’s history’.⁴ It is, to elaborate on the remarks above, part of a more general theory of justice, the bulk of which is concerned with just distribution of goods *among contemporaries*. It is unclear why Rawls only touched on, rather than more fully covering, ‘whole history’ justice. One possible explanation is that he confined his remarks in this setting to ideal theory. In contrast, his treatment of justice among contemporaries covers both ideal and nonideal theory.⁵

Another possible explanation for the brevity of Rawls’s remarks is that he treated the very concept of justice between generations as paradoxical.⁶ Viewed from the vantage (as Rawls seeks) of Kantian rationality, and in particular the idea of justice as reciprocity,⁷ the paradox

is that the dead, the living and the unborn cannot by their very nature engage reciprocally, as can contemporaries. That is to say, 'in the course of history no generation gives to predecessor generations, the benefits whose saving it has received'.⁸ Rawls drew inspiration in this respect from Kant's understanding of society through the metaphor of a giant construction project, the ultimate benefits of which are not enjoyed by the 'labouring generations'. Kant considered it significant 'that earlier generations should carry their burdens only for the sake of later ones and that only the last should have the good fortune to dwell in the completed building'.⁹ On this reasoning, the relationship between generations is necessarily instrumental: preceding generations are the means to succeeding generations' ends.

Rawls' sparse remarks thus contemplate a non-reciprocal motivation to save across generations. Parties will choose to save for the future, Rawls suggested, not because they rely on or somehow share in the welfare of their descents, but because they *care* for their descendants' welfare. More specifically, parties deliberating (in the 'original position') on their obligations towards future generations are, in Rawls' words, 'regarded as representing family lines, say, with ties of sentiment between successive generations'.¹⁰ This filial logic echoes without acknowledgement Burke, who wrote of 'fundamental laws' originating in 'the bosom of our family affections'.¹¹

The reliance on care, and the associated departure from a narrowly rationalist paradigm, received a mixed reaction in the commentary. Some considered it advantageous for justice to be based on sentiment rather than self-interest.¹² Others argued that Rawls should have tried harder to find a grounding for just savings in reciprocity.

Rawls agreed with his critics. In particular, he credited his willingness to revise the motivation for the just savings principle to the criticism expressed in private conversations

with Tom Nagel and Derek Parfit, as given public form, independently, in the critique by Jane English.¹³ English argued that members of a given generation will agree to adopt the just savings principle out of self-interest, because it is something that can be universally willed. Every generation within a society can want previous generations to have saved for their benefit, and on that basis will agree to save for the benefit of future generations.

An alternative way of grounding the motivation to save for the future in Kant's work, which has received little if any attention in the commentary, is through the idea of the permanence of the state, contained in Kant's treatment of the 'perpetual state'.¹⁴ We owe an obligation to future others, on this account, by virtue of being part of society that exists across time. Kant addresses his remarks to children born into poverty, but the point is more general: we cannot rationally endanger society by present day actions whose adverse consequences lie in the future. A further attraction of the permanent state idea is that it links with Rawls' notion of an effectively permanent original position, comprising every present generation who are charged with making decisions about saving for the future behind a veil of ignorance as to the position in society's whole history.

3. The Revised Just Savings Principle

Rawls responded to criticism by a backwards re-orientation of the concept of justice between generations around the present generation's dependence on *previous* generational savings. To quote more fully from the passage cited in the introduction:

the parties [in the original position] can be required to agree to a just savings principle subject to the...condition that they must want *all previous* generations to have followed it. Thus the correct principle is one which the members of any generation (and thus all generations) would adopt as the one their generation is to follow as the

principle they would want preceding generations to have followed (and later generations to follow) no matter how far back (or forward) in time.¹⁵

This is a profound transformation, in which past history has gone from a matter of complete indifference to the very condition of the principle of just savings.

Thus it is surprising that little attention has been given to the revised thesis. An exception is Brian Barry, who is not impressed.¹⁶ Barry considers that Rawls was right to treat intergenerational justice as having its justification outside of a social contract tradition, with motivations in sentiment rather than contract. Crucially, Barry also disagreed with Rawls' new emphasis on the past.

Because of time's arrow, we cannot do anything to make people in the past better off than they actually were, so it is absurd to say that our relations with them could be just or unjust.¹⁷

Barry considered that intergenerational justice was fundamentally a concern with futurity: 'intergenerational justice is sort of short for "justice between present and future generations"'.¹⁸

However, 'time's arrow' is also a problem for futurity, because it points in the direction of 'beings' that do not yet exist except in the sense of a potential, and this entails debilitating uncertainty. How can we imagine justice in a situation where the beneficiary does not (yet) exist and may never do so? Derek Parfit captures the ontological aspect of this issue in the 'future person problem'.¹⁹ Furthermore, there is also an epistemological conundrum. If we assert or assume or imagine a given future generation, what qualities (needs etc) do we bestow on it? Ted Benton captures this problem well in his challenge to justice as futurity: 'It may be that future technology may make future generations independent of resources which

are currently indispensable...Future technologies may render essential features of the natural world that seem to us quite useless'.²⁰

Given these problems, Rawls revised theory can be considered an improvement. Not only is it now consistent with the central idea of 'justice as reciprocity' (the present generation is saving for the future so as to reciprocate its reliance on previous generations), it has an ease of practical application insofar as previous generations are ontologically and epistemologically determinate relative to future ones. As worded by philosopher Arthur Price in his book *Past, Present, Future*:

Things that *have* existed do seem to be individually identifiable and discussable in a way in which things that don't yet exist are not...the dead are metaphysically less frightening than the unborn.²¹

This is an advantage not mentioned by Barry, nor indeed by Rawls. But whilst past persons are identifiable and discussable with reference to historical evidence of contemporary needs and contemporary savings, there are added difficulties in the field of practical application, as explained below.

4. 'Previous Generations' in an Environmental Setting

The setting of the environment would seem to provide a suitable starting point in exploring the implications of Rawls' revised thesis. This is partly because intergenerational justice is among the core principles of environmental policy and law, articulated (above all) in United Nations documents such as the Rio Declaration.²² An added attraction of this setting is that discussion of intergenerational environmental justice has remained grounded in Rawls' initial formulation. That is to say, little or no attention is given in environmental justice literature to the possibility that we save for our children because our parents' saved for us (in keeping

with Rawls' revised principle). Intergenerational environmental justice is shaped overwhelming by the narrative of futurity.

What, then, are the implications of intergenerational environmental justice being re-orientated backwards in time, towards ancestry? One immediate issue which arises is how such a development can be reconciled with the dominant idea that 'business as usual' is a recipe for disaster in terms of climate, biodiversity and other areas (e.g. pollution). The idea of continuity with the past implicit in reliance on the benefits accrued from past savings would appear anathema to many commentators and policy makers in an environmental field, because the dominant (though not unchallenged) historical narrative in environmental circles is that previous generations have squandered not saved. For example, Judge Weeramantry, in his judgment in the *Danube Dam* case, had this to say about the savings of previous generations in relation to the environment:

Europe...*had* a deep-seated tradition of love for the environment, a prominent feature of European culture, until the industrial revolution pushed these concerns into the background. Wordsworth in England, Thoreau in the United States, Rousseau in France, Tolstoy and Chekhov in Russia, Goethe in Germany spoke not only for themselves, but represented a deep-seated love of nature that was instinct in the ancient traditions of Europe - traditions whose gradual disappearance these writers lamented in their various ways.²³

However, Weeramantry need not be understood as dismissing the possibility that previous generations can or have saved for the future. He expressly mentions that deep within the West's past are previous generations who were 'lovers' (savers) of the environment.

Intriguingly, even within more recent, industrial societies of the nineteenth century, there are, on Weeramantry's account, influential savers (Wordsworth, Thoreau etc).²⁴ There is then, on

this influential analysis, the beginning of a body of evidence of historic environmental ‘savings attitudes’ on which to base a revised Rawlsian principle of intergenerational environmental justice.

It may be objected that Rawls’ revised account does not require previous generations to have actually saved. His is a theory of the *morality* of intergenerational relations, rather than a history of the practice. A demonstrable failure of the previous generation to save does not falsify the just savings principle; rather it engages it. We can extrapolate from a squandering of environmental goods in the past an obligation on the part of the current generation to save ‘more’ than would otherwise have been obliged to, had predecessors saved as they ought.

What, then, does backwards-orientated justice between generations look like in the environmental settings covered in the broadest brush terms by Weeramantry? How can it apply to climate change, biodiversity, environmental pollution, and other pressing modern challenges (such as environment governance post-Brexit)?

Climate Change

Climate change policy and law is the topic where intergenerational environmental justice has exerted most influence.²⁵ Futurity dominates, as in the wording of Article 2 of the UN Framework Climate Change Convention 1992 (UNFCCC), providing that ‘Parties should protect the climate system for the benefit of present and future generations’. Futurity also dominates the campaigns of ‘children’s groupings’, such as that which found expression at the Young and Future Generations Day at the Katowice Conference of Parties to the UNFCCC, or the ‘influencer’ Greta Thunberg. An important slant on this is are the legal claims brought by children who accuse governments of abusing their rights to a safe climate, notably the case brought Kelsey Juliana and others, against the Federal US Executive (the *Juliana Case*).²⁶

Intriguingly, the plaintiffs partly articulate the claim in backwards looking terms, which implicitly invokes Rawls' revised principle of just savings: 'defendants have violated plaintiffs' equal protection rights embedded in the Fifth Amendment by denying them protections afforded to previous generations'.²⁷ The logic here is that generations prior to that to which the plaintiffs belong enjoyed lower anthropogenic greenhouse gas emissions, and with them a safer climate. The decline in environmental quality in this field, the plaintiffs reason, counts to constitutionally proscribed discrimination across time, with the present generations disadvantaged relative to previous generations.

If this case is unusual in bringing to the fore the nexus in justice terms of present and previous generations, with previous generations comparing, as it were, favourably, there are nevertheless other legal contexts in which the past history plays a pivotal role as a norm against which today's generation can be held to account. In particular, the Paris Agreement 2016 has as its core objective the keeping of anthropogenic greenhouse gas emissions and their impact on climate within limits defined by a safe period *in the past*, which is called (very loosely) 'pre-industrial'. When exactly the 'pre-industrial' period gave way to an industrial one is unclear, and this is something that would need to be resolved for purposes of interpretation of the law. On this point, the so-called formative industrial revolution in Britain during the mid to late eighteenth century was a largely national affair, and it was not until well into the nineteenth or even twentieth centuries that the industrial revolution became global. However, the deeper point is that intergenerational justice in this setting is being framed in relation to a 'positive' past with which a substantial degree of continuity is sought in the future, rather than imagined future need(s) of an imagined future generation(s).

The reference to a pre-industrial 'good' in the Paris Agreement accords with Weeramantry's historical claim that respect for the environment went from being part of a green hegemony

prior to industrialisation to a counter-current during industrialisation. Divergence of opinion among contemporaries in a given generation reminds us that the term 'generation' is both complex and abstract, and it is contestable. In particular, is it historically accurate to portray romantic poets in Britain as marginal (rather than dominant) figures? Martin Wiener offers a different and opposing account to Weeramantry (Wiener 1981). He considers that Coleridge, Wordsworth, and Tennyson and so on were used by (and in some cases were part of) a resurgent landed elite whose battles with capitalists were won by successfully occupying a (green) moral high ground. Tellingly in regards to anthropogenic greenhouse gas emissions, coalfields were owned by chiefs of aristocratic families and held on trust for future generations (the eldest sons and occasionally daughters who would inherit the land) (Pontin 2014). They were leased to capitalists for short periods of time, subject to minimum and maximum quotas relating to the quantity of coal lawfully extractable, as well as aftercare requirements (intended to restore mined landscapes to the status quo ante). That provides interesting legal and political context to recent reports that domestic greenhouse gas emissions are now on course for being as 'safe' as they once were, in late Victorian Britain.²⁸

However, treating the past as authoritative in this way raises a number of questions about the relationship between history and justice. Returning to the *Juliana* claim, it is unclear that the *current* risks associated with greenhouse gas emissions can be divorced from the *historic* and current benefits of mining and consumption of coal. When the US carbon footprint was modest, so was its economy. As a consequence of the US becoming over a past century and a half a 'coal country' (as the saying goes), Juliana and friends have the benefits of being citizens of the nation with the world's largest economy, including high per capita monetary wealth. How can one argue with confidence that a relatively comfortable stratum of twenty first century America, represented by these litigants, is discriminated against in the round, historically?

Keeping with this issue, the plaintiffs will argue that it is enough for them to establish that rises in greenhouse gas emissions has made the climate less safe for them compared to predecessors. The defendants will argue that the material (or monetary) benefits of coal consumption must be taken into account in measuring (or comparing) intergenerational welfare. Which is the correct position? That is a difficult question to answer. The point, however, is that it is a very different question to ask than one directed (per futurity) at the needs of future generations. Here we are addressing the practical implications of the needs (etc) of previous generations, and we can conduct this inquiry with reference to tangible evidence. The same cannot be said of an inquiry into not-yet future generations.

Biodiversity

Like climate change, biodiversity is now the subject of a relatively mature international legal regime whose objectives are to protect the environment for the benefit of future generations by, pertinently, keeping as close as possible to a broad baseline in the past. Specifically, the Convention on Biological Diversity 1992 aims for the *conservation*, as well as the enhancement, of biological diversity.²⁹ This to be achieved through contracting parties adopting and implementing National Biodiversity Strategies and Action Plans (NBSAPs).³⁰ The examples of NBSAPs reported to the Convention's Secretariat make for interesting reading in terms of the degree of emphasis placed on the value of preserving previous generational legacies or, for our purposes, savings. For example, the NBSAP for England (each of the home nations of the United Kingdom has its own strategy and action plan), makes principal reference to biodiversity being 'maintained' and, where degraded, 'restored'.³¹ The Scots draft contains a more colourful, culturally explicit engagement with the past. It begins with the assertion that 'Scotland is defined very much by its nature and this is reflected in a wealth of references to nature in our literature and rich cultural heritage'.³²

However, regardless of the specific rhetoric being used in these documents, in each case the legal regime and its practice bestows authority on the past. As with climate change, this provides material on which to offer a late Rawlsian view of justice between generations, in which we save for the future what our ancestors saved for us. We save biodiversity for the future in a reciprocal relationship with the past. Yet the ‘past’ in this setting is a little different from that of climate change, in terms of periodization. Whilst harmful greenhouse gas emissions are largely associated with the industrial revolution (say the emergence of steam powered industrialisation in the late eighteenth and early to mid nineteenth century), this does not appear to have been a period of significant loss of flora and fauna. On the contrary, it was a period of growth in ‘native’ tree cover, growth in parklands, and statutory laws and common laws aimed at maintaining the purity of the water environment. Most of the causes of the loss of biodiversity appear modern, and more to do with mid or even late twentieth century industrial agricultural practices.

Pollution

The issue raised above in connection with climate change was whether a saving of the ‘environment’ can be sensibly divorced from savings in respect of other goods. A further illustration of this in the setting of environmental pollution is the case law and the literature covering rivers pollution law in Victorian Britain. In the case of *AG v Birmingham Corporation*,³³ which Lord Carnwath calls ‘Great Birmingham Sewage Case’,³⁴ Sir Charles Adderley (later Lord Norton) brought a nuisance action against the municipal sewage authority of Birmingham. Adderley was a poetry-appreciating member of the British landed establishment that dominated society and economy at this time, further questioning Weeramantry’s depiction of romantic authors and their readership as part of a rear-guard counter-culture. The injunction awarded in Adderley’s favour had a dramatic effect of channelling local government investment into sewage effluent purification, which

substantially clean up the watercourse (the river Tame). Many other authorities followed suit in similar circumstances, under this precedent.³⁵ The lesson Carnwath draws is that of an ‘uncompromising’, ‘strong’ and ‘independent’ judiciary ‘willing to put the interests of the environment above arguments of convenience or cost’.³⁶

Conversely, a more critical interpretation of the Adderley litigation is provided by Leslie Rosenthal, and this highlights an important area of debate regarding the application of the revised principle of just savings. Rosenthal focuses on the costs of the litigation for some sectors of society. He sees the court (and plaintiff) *squandering* resources on purifying a river better deployed elsewhere:³⁷

If the author might speak for himself: rather than claiming his welfare has been overly and unfairly harmed by the effects on the environment of the Victorian industrialisation project, he would say (along with, no doubt, many of his fellow ‘future generation’) that he would willingly have allowed his level of welfare to have been reduced if by so doing the fearful conditions of the urban poor of Victorian Britain could have been relieved.³⁸

Rosenthal effectively regrets that money was spent on conserving fish and keeping the environment fragrant to the senses of country folk, some very wealthy. His view of justice would have supported investment (savings) in roads, houses, higher wages for workers and better working conditions.

Which interpretation is best? That, again, is a difficult question to answer, and again the key point is that the answer will in part be informed by evidence – historical evidence – and values in relation to that evidence. By contrast, the needs etc of future generations cannot easily be debated in any factual terms whatsoever, and any values would seem to be entirely

one dimensional temporally (they are *our* values). Rawls' revised thesis is multidimensional in this respect.

Environmental Governance and Brexit

Brexit is currently one of the most pressing issues in the environmental field, particular in Britain. The subject is highly controversial, but in such a way, I shall argue, that invites the application of Rawls' revised just savings principle. In rather simplistic terms, on the one hand is a domestic Government (Her Majesty's Government) whose policies and proposal for law reform portray Brexit in a positive light. A particularly salient rhetoric in this respect is that of the 'unfrozen moment', in which Britain can once again make its own policy and law and no longer be bound by that originating in the EU.³⁹ Britain, on this narrative (and in keeping with some of the material above) has a proud heritage of environmental protection independent of the EU.⁴⁰ In contrast, much of the academic and activist literature is critical of Brexit, and particular talk of a 'hard' one. Many commentators fear that a clean break from the European Union will weaken environmental protection.

Intergenerational justice enters this debate because a pertinent part of the criticism of the decision to withdraw from the EU is that it may adversely affect future generations. Some of the concern is directed at the risk to *substantive* environmental law in the many areas where some of the law in force in Britain originates in the EU acquis. (The reference to 'some' here is necessary, because membership of the EU has had little or no impact on private law, common law protection of the environment, which is an important part of relevant domestic law, and much statute law in force today stems from the nineteenth and early twentieth centuries.) A different and possibly deeper concern centres on the institutional dimension, or so-called environmental governance. Who will enforce substantive environmental law when the European Commission and European Court of Justice cease to have jurisdiction?⁴¹ Who

will require reports into compliance which will be scrutinised independent of government, and initiate action in instances of non-compliance?

Rawls' final published writing on the just savings principle would appear of considerable relevance to this 'debate'. In *The Law of Peoples*⁴² and *Justice as Fairness*,⁴³ Rawls fleshed out a little his revised principle of just savings in non-ideal settings. In the book focusing on international politics and law, Rawls wrote that different countries will have different ideas of intergenerational justice, because of differences in 'society's particular history'.⁴⁴ That is to say, each country will have saved different amounts, of different things, for different reasons, underpinned by a unique culture. In *Justice as Fairness*, Rawls emphasised the centrality of cultural continuity, such that what is fair will depend on inherited ideas of fairness in the jurisdiction at hand. A society which justly saves for the future will enjoy 'a steady-state equilibrium in which a just basic structure is supported and reproduced over time'.⁴⁵

What does this mean for the debate about whether Brexit is good or bad or, rather, just or unjust looked at intergenerationally? Once again, applying this in practice is complex and contestable. As with the examples of climate change and others above, the complexity largely centres on the choice of historical baseline. In the simplest terms, leaving the EU can be understood to represent a 'discontinuity' (and in turn injustice) when viewed in terms of the most *recent past* generations. Future generations are being denied the benefits of continuity with the 'savings' of the institutions of Britain as an EU member over the course of almost half a century. It is a denial of the expectation that EU governance will be reproduced and enhanced. Conversely, the unfrozen moment motif speaks to the opposite interpretation. Leaving the EU reproduces long established domestic governance.

There seems little doubt that Rawls, though he wrote sparingly about the EU, lent towards a Eurosceptic position.⁴⁶ My concern is with the environment. In this regard what is most

telling is that Rawls considered that the EU (both its substantive law and institutions) was structured around a mistaken idea of economic growth, which ignored what he called ‘the problem’ of the ‘capacity of the natural world to sustain its human population’.⁴⁷ In *Law of Peoples* Rawls adopted J S Mill’s notion of the stationary state, in which market driven material advancement was tempered and tamed by a national constitutionalism which emphasised reproduction of permanent basic institutions. Advocates of EU membership may point to the extent to which, after Rawls’ death, the EU shifted to embrace a ‘circular economy’ in which economic growth is ‘decoupled’ from natural resource exploitation (say through more re-use of finite materials). But the EU is still driven by the ‘ideal’ of indefinite economic growth, and a mode of governance that does not sit comfortably with British ways.

Coming back to Rawls’ relationship with Kant’s political theory, and to reinforce the argument above, it seems that the revised just savings principle, especially in its final formulation, echoes Kant’s notion of ‘the patriot’, and does so with important implications for environmental protection within the paradigm of the nation state. Consider Howard Williams’ translation of the following passage from volume 9 of Kant’s collected works:

A patriotic attribute is one where everyone in the state, not excepting its head, regards the commonwealth as the maternal womb, or the country as the paternal ground from which he himself sprang and which he must leave for his descendants as a treasured pledge.⁴⁸

One thing to note here is that, clearly, Kant was not averse to filial sentiment in thinking about justice and other aspects of political theory, and thus Rawls’ initial references to care for the child do not need (as his critics argued) to be understood as a departure from Kantian reasoning. However, unlike early Rawls, Kant’s filial thought has both a backward as well as

forward trajectory. In that respect Rawls' revised just savings principle, orientated around ancestry rather than futurity, chimes well with Kant's thought.

This is not, however, to defend Rawls' Euroscepticism. No one pretended it would be easy to achieve integration through new, supranational European political institutions. Legitimacy can and must grow over time. Moreover, the patriotism that Kant was thinking about, which seemed emancipatory in its then historical context, now – after two world wars - has some darker undertones.⁴⁹ It is these, of course, that are part of the existential core of the EU. But this does not detract from Rawls' point that the EU must work with the grain of national culture, and that for some member states the integration project has an existential chime that is lacking in others. Britain's narrative on this matter does seem rather more Rawlsian (or Kantian) than others, in its emphasis on patriotism as benign, reflected in its common law constitution.

5. Conclusions

Each of Rawls' articulations of the just savings principle is broadly equally attractive, insofar as they both move beyond the narrow 'presentism' which was common in justice scholarship at the time. It is welcome to have general theory of justice among contemporaries situated in the context of a society's 'whole history', and that is true whether the nexus is present/future or past/present/future. However, this essay is concerned with the intellectual merits and the practical application of the later (past-calibrated) iteration relative to the earlier one (futurity). I have argued that the revised concept is an improvement. Previous generations have a being and identity that is clearer than future ones, even if (as illustrated in the environmental examples given above), we can argue about whether a given saving was just or unjust, or on which of the past's many previous generations we should be focusing.

Applied to the environment, the revised thesis is commendable above all because it addresses the problem that it is perverse to ignore historic savings, or reject a business as usual model, as so much environmental justice literature tends to do. No matter how confidently it is fitted within a progressive, or even emancipatory narrative, environmental or ecological conservation is a substantially business as usual paradigm. It is about maintaining the (ecological) system as we understand it. Early Rawls acknowledged this in his recognition that the goods to be saved include 'cultural' as well as 'material' ones, but he did not touch on the environment explicitly. As illustrated above, environmental protection makes for a rich application, because it straddles cultural and material goods. Indeed, the question of what is a 'saving' is as much cultural, as economic or 'environmental'. The advantage of the revised just savings principle is that it offers members of a society pondering what aspects of the material environment to save for the benefit of future generations an alternative starting point to that which asks us to imagine what future generations to want or need,

Notes

¹ See in particular Brown Weiss (1989); Dobson (1999); Birnie et al (2009: 86-95); Weston and Bollier (2013: 51-55). For an interesting recent contribution, advocating a study of ‘futures past’, referring to the present decisions and acts whose impact materialise later, see Stokes (2019: 175).

² (Rawls 1971: 292).

³ (Rawls 1978: 47, 58-59). The passage is repeated in later work, including *Political Liberalism* (Rawls 1993: 274).

⁴ (Rawls 1971: 289). See further §44-45.

⁵ (Rawls 1971: 245). See e.g. chapter VI, which contains a nonideal theoretical defence of civil disobedience. For a helpful commentary, see John Simmonds (2010: 5)

⁶ See Rawls (1971:251).

⁷ On the importance of reciprocity to Rawls’ thesis, see Rawls (1990: 190). For a defence of Rawls’ reading of Kant in the area of justice in the face of recent criticism, see Kaufmann (2012: 227).

⁸ (Rawls 1971: 290)

⁹ (Rawls 1971: 291) (quoting Kant (1790: 44)).

¹⁰ (Rawls 1971: 288). Rawls writes: As ‘it is assumed that a generation cares for its immediate descendants, as fathers say care for their sons, a just savings principle... would be acknowledged’.

¹¹ (Burke 1965: 119-120). Burke considered ancestors powerful a motivating force as progeny. He wrote of liberty as an inheritance, or in property law terms an ‘entailed inheritance’ (Burke 1965: 119-20).

¹² E.g. Brown Weiss (1989).

¹³ (English 1977: 160).

¹⁴ Kant (1991: 468). I am grateful to Howard Williams for this point.

¹⁵ Rawls (1971: 292).

¹⁶ (Barry 1999: 104).

¹⁷ (Barry 1999: 107).

¹⁸ (Barry 1999: 107).

¹⁹ (Parfit 1984).

²⁰ (Benton 1999: 212).

²¹ (Prior 1967: 171).

²² Rio Declaration 1992, Principle 3 (‘The right to development must be fulfilled so as to equitably meet the needs of present and future generations’). This echoes the Stockholm Declaration 1972, Principles 2 and 5.

²³ *Gabčíkovo-Nagymaros Project, Hungary v Slovakia* (1998) 37 ILM 162 [emphasis added]

²⁴ See further the notion that ‘indigenous people’ in industrialized nations may consistently practice inter-generational savings, as in the comment of the Report of the Brundtland Commission that ‘Indigenous people [have]...traditional life-styles that can offer modern societies many lessons in the management of resources’ (para 46 World Commission for Environment and Development (1987). The Brundtland Report (para 69) depicts indigenous peoples as ‘the gatekeepers of the success and failure to manage natural resources’.

²⁵ See for example its prominence in Brown Weiss (1989).

²⁶ *Juliana and others v United States of America* (2016) Case No. 6:15-cv-01517-TC, US District Court for Oregon, Eugene Division). The US Federal Executive has unsuccessfully challenged the claim on grounds, inter alia, that it raises fundamentally political questions which are non-justiciable.

²⁷ *Ibid.*

²⁸ Ogden (2019).

²⁹ Art 1, United Nations Convention on Biological Diversity 1992.

³⁰ *Ibid* Art 6.

³¹ Department of Environment, Food and Rural Affairs (2011:1).

³² Scottish Government (2013: 2).

³³ (1858) 4 K and J 528.

³⁴ (Carnwath 2014: 177).

³⁵ (Carnwath 2014: 178).

³⁶ (Carnwath 2014: 178).

³⁷ (Rosenthal 2014).

³⁸ (Rosenthal 2014).

³⁹ Michael Gove, ‘The Unfrozen Moment – Delivering a Green Brexit’, Government Speeches, 21 July 2017 <https://www.gov.uk/government/speeches/the-unfrozen-moment-delivering-a-green-brexite> <accessed 7 June 2019>

⁴⁰ For an introduction to the ‘British way’ of environmental protection independent of the EU, see Pontin (2019).

⁴¹ (Lee 2017).

⁴² Rawls (1999: 107-08).

⁴³ Rawls (2001: 159-61)

⁴⁴ Rawls (1999: 107).

⁴⁵ Rawls (2001: 160)

⁴⁶ (Kamminga 2014: 425).

⁴⁷ Rawls (1999b).

⁴⁸ (Williams 1983: 131)

⁴⁹ See in an environmental setting MacDonald (2017).

References

Barry, Brian (1999) 'Sustainability and Intergenerational Justice'. In Andrew Dobson (ed.), *Fairness and Futurity: Essays on Environmental Sustainability and Social Justice* (Oxford: Oxford University Press), pp. 93-117.

Benton, Ted (1999) 'Sustainable Development and the Accumulation of Capital: Reconciling the Irreconcilable?'. In Andrew Dobson (ed.), *Fairness and Futurity: Essays on Environmental Justice and Sustainability* (Oxford: Oxford University Press), pp. 199-229.

Birnie, Patricia, Alan Boyle and Catherine Redgwell (2009) *International Law and the Environment*, 3rd ed. Oxford: Oxford University Press.

Brown Weiss, Edith (1989) *In Fairness to Future Generations*. New York: Dobbs Ferry.

Burke, Edmund (1965) *Reflections on the Revolution in France*. New York: Arlington Press.

Carnwath, Robert (2014) 'Judges and the Common Laws of the Environment – At Home and Abroad'. *Journal of Environmental Law*, 26, 177-187.

Department of Environment, Food and Rural Affairs (2011) *Biodiversity 2020: A Strategy for England's Wildlife and Ecosystem Services*. London: Department of Environment, Food and Rural Affairs.

- Dobson, Andrew (ed.) (1999) *Fairness and Futurity: Essays on Environmental Justice and Sustainability*. Oxford: Oxford University Press 1999.
- English, Jane (1977) 'Justice Between Generations'. *Philosophical Studies*, 31, 91-104.
- Kamminga, Menno (2014) 'Rawls and the European Union'. *Philica*, 425-437.
- Kant, Immanuel (1970) 'Idea for a Universal History with a Cosmopolitan Purpose'. *Political Writings*. Ed. H. Reiss. Cambridge: Cambridge University Press.
- (1991) *Metaphysics of Morals*. Cambridge: Cambridge University Press.
- Kaufmann, Alexander (2012) 'Rawls and Kantian Constructivism'. *Kantian Review*, 17, 227-256.
- Lee, Maria (2017) *Environmental Accountability After Brexit*. London: UCL Press.
- MacDonald, Helen (2017) 'In Search of post-Brexit England and Swans', *New York Times*, January 5.
- Ogden, Chris (2019). 'UK Greenhouse Gas Emissions at Lower Levels Since 1890s', *Air Quality News*, 28 March 2019, 1-2.
- Parfit, Derek (1984) *Reasons and Persons*. Oxford: Oxford University Press.
- Pontin, Ben (2014) 'Environmental Law Making Public Opinion in Victorian Britain: The Cross-Currents of Bentham's and Coleridge's Ideas'. *Oxford Journal of Legal Studies*, 34, 759-790
- (2019) *The Environmental Case for Brexit: A Socio-Legal Perspective*. Oxford: Hart Publishing.

- Prior, Arthur (1967) *Past, Present Future*. Oxford: Clarendon Press.
- Rawls, John (1971) *A Theory of Justice*. Cambridge, Mass: Harvard University Press.
- (1978) ‘The Basic Structure as Subject’. In Goldman, Alvin and Jaegwan, Kim (eds), *Values and Morals*. Dordrecht: Springer, pp 45-71.
- (1990) ‘Justice as Reciprocity’. In Samuel Freeman (ed), *Collected Papers – John Rawls* (Cambridge, Mass: Harvard University Press), pp 47-72
- (1993) *Political Liberalism*. Columbia: Columbia University Press.
- (1999) *Law of Peoples*. Cambridge, Mass: Harvard University Press.
- (2001) *Justice as Fairness: A Restatement*. Cambridge, Mass: Harvard University Press.
- Rosenthal, Leslie (2014) *Rivers Pollution Dilemma in Victorian England*. Farnham: Ashgate.
- Scottish Government (2013) *2020 Challenge for Scotland’s Biodiversity: A Strategy for the Conservation and Enhancement of Biodiversity in Scotland*. Edinburgh: Scottish Government.
- Simmonds, John (2010) ‘Ideal and Nonideal Theory’. *Philosophy and Public Affairs*, 38, 5-36.
- Stokes, Elen (2019) ‘Wanted: Professors of Foresight in Environmental Law’. *Journal of Environmental Law*, 31, 175-186.
- Weston, Burns H and David Bollier (2013) *Green Governance: Ecological Survival, Human Rights and the Law of the Commons*. Cambridge: Cambridge University Press.

Wiener, Martin (1981), *English Culture and the Decline of the Industrial Spirit 1850-1980*.

Cambridge: Cambridge University Press.

Williams, Howard (1983) *Kant's Political Theory*. Oxford: Blackwell.

World Commission for Environment and Development (1987), *Our Common Future* .

Oxford: Oxford University Press.