



Volume 20

Issue 1 Symposium *The Business of Climate Change:  
Challenges and Opportunities for Multinational  
Business Enterprises*

Article 2

1-1-2007

# Rawls' Theory of Justice and International Environmental Law: A Philosophical Perspective

Todd B. Adams

*Michigan State University College of Law*

Follow this and additional works at: <https://scholarlycommons.pacific.edu/globe>



Part of the [International Law Commons](#)

### Recommended Citation

Todd B. Adams, *Rawls' Theory of Justice and International Environmental Law: A Philosophical Perspective*, 20 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 1 (2007).

Available at: <https://scholarlycommons.pacific.edu/globe/vol20/iss1/2>

This Symposium is brought to you for free and open access by the Journals and Law Reviews at Scholarly Commons. It has been accepted for inclusion in Global Business & Development Law Journal by an authorized editor of Scholarly Commons. For more information, please contact [mgibney@pacific.edu](mailto:mgibney@pacific.edu).

## *Symposium—The Business of Climate Change: Challenges and Opportunities for Multinational Business Enterprises*

### **Rawls' Theory of Justice and International Environmental Law: A Philosophical Perspective**

*Todd B. Adams\**

#### I. INTRODUCTION

John Rawls undertook the task of supporting the dominant liberal ideas of social justice during the U.S. civil rights era.<sup>1</sup> He wanted to show that certain political ideas such as free speech, the right to vote, and anti-discrimination laws could be justified universally by political philosophy.<sup>2</sup> He also wanted to show that social justice required a minimum of economic justice: those who had little could justly demand of those who had more to share.<sup>3</sup> To do this, he drew on modern psychology and economic theory, as well as social contract theory.

Applying Rawls' theory of justice to environmental issues is difficult, however, because the risk-aversion built into Rawls' theory means that people will overuse natural resources. When applied to international environmental issues, Rawlsian ideas of justice turn out to be based on theories of reason that are particular to Western democracies. When applied to intergenerational environmental issues, Rawls' theory of justice requires too many assumptions to produce reliable principles.

Nevertheless, the power of Rawls' theory is that even failure is not fruitless. Risk-aversion will not work to solve many environmental problems, but its failure causes embracing risk more fully. Ideas of reason cannot support universal principles for all nations, but they can help define acceptable principles. One can question and reformulate the assumptions used in deciding intergenerational justice in order to better understand the environmental challenges we face. This makes applying Rawls' theory of justice to environmental issues well worth the effort because it suggests that one must accept more risk to combat global warming and continue to develop multiple approaches to reducing greenhouse gas emissions. It also supports requiring all nations to agree to a cap on greenhouse emissions, not just those who did so in the Kyoto Protocol.

---

\* Adjunct Professor, Michigan State University College of Law.

1. ROBERTO ALEJANDRO, *THE LIMITS OF RAWLSIAN JUSTICE* 1 (1998).

2. Rawls described his theory of justice as the "best approximation to our considered convictions of justice." JOHN RAWLS, *A THEORY OF JUSTICE*, Introduction, xvii (1998).

3. See JOHN RAWLS, PREFERENCE FOR THE REVISED EDITION, IN *A THEORY OF JUSTICE* XV (1999) ("Basic institutions must from the outset put in the hands of citizens generally, and not only of a few, the productive means to be fully cooperating members of a society.").

## II. THE ORIGINAL POSITION IN RESOLVING ENVIRONMENTAL ISSUES

The social contract theory is familiar: individuals give up some liberty to government in return for security and other social goods they cannot get otherwise. Rawls' contribution to this venerable political theory was to imagine what contract people would form before they knew who they would be in the society. They would be in what Rawls called the "original position."<sup>4</sup> People in the original position would be behind a "veil of ignorance." The veil of ignorance prevents anyone in the original position from knowing their race, sex, or other characteristics in the world-to-be.<sup>5</sup> Therefore, they would be better able to ignore irrational prejudices and unanimously agree upon the fundamental rules that would govern society.

Rawls sets himself the task of determining these rules in a very general, or what the author calls a "thin" way.<sup>6</sup> He asks what social contract a rich or poor person would agree to, a member of the majority or minority would agree to, and so on. The representatives must agree on a social contract that protects a variety of competing values, forcing a balance. But, Rawls adds another assumption to ensure that the representative individuals do not hold out for one value: that a rational person impartially values all aspects of life. Reason is the main tool for finding agreement, whereas most emotional, cultural, and spiritual values count for little.

What is left to guide those in the original position other than reason? First, there is a sense of justice.<sup>7</sup> But justice is "weak" because it contains no definite content.<sup>8</sup> The specifics of justice are what the representative people in the original position decide they are to be.<sup>9</sup> Nonetheless, Rawls must make still more assumptions to develop more specific contractual provisions governing fairness. To discuss intergenerational justice at all, he must assume that parents care for their offspring,<sup>10</sup> and that an improvement of the least-favored class will improve all classes above it.<sup>11</sup> Finally, he assumes that a just society need only be fairly well-off materially.<sup>12</sup>

The individuals reaching unanimous agreement behind the veil of ignorance represent economic classes.<sup>13</sup> One individual represents the very rich, others represent various levels of the middle classes, and still others represent the working and poorer classes down to the poorest class in the society. This

---

4. *Id.* at 15-19.

5. *Id.* at 118.

6. *Id.* at 349.

7. *Id.* at 11.

8. *Id.*

9. *Id.* at 5-8.

10. *Id.* at 254-55.

11. *Id.* at 70-72.

12. *Id.* at 252.

13. *See, e.g., id.* at 81-85.

approach enabled Rawls to argue that individuals in the original position would not agree to a social contract that allowed others to gain wealth unless the least-favored class benefited from the gain.<sup>14</sup> This idea, which Rawls called the “difference principle,” that those who gain wealth because of the social contract must share it with the least-favored class, seems reasonable in the United States. Since Franklin Roosevelt, most Americans have agreed that society should ensure a basic living level and economic opportunity for everyone.<sup>15</sup>

The attractions of the original position and Rawls’ theory of justice in deciding intergenerational and international environmental issues are obvious. In the original position, representative individuals will not know when they will be born. They might be born early in the history of the world when environmental conditions are good and natural resources are plenty, or they might live when environmental conditions have deteriorated and natural resources are scarce. They might live in an industrialized, economically developed country or in a developing one. Their standard of living might be very high or impoverished. Those in the original position must decide, therefore, the minimum access to natural resources and environmental conditions necessary for every generation to agree to a social contract. Rational individuals may prefer a pristine environment and abundant natural resources, but they also understand some pollution inevitably occurs from human activities.

These problems weaken any claims of universal environmental principles based on Rawls’ theory of justice and the original position, but they do not make worthless the exercise of considering how individuals would decide international and intergenerational environmental issues. The idea of the original position remains an effective way to identify and eliminate preconceptions and prejudices about people and nations. In discussing and trying to solve problems inherent in using the original position to address international environmental issues, one may confirm the fundamental ideas about what is just, as well as develop new insights into how to fairly address international environmental issues.

Social contract theories are only as good as the assumptions used to develop them. Assumptions never perfectly match the world, but this does not make social contract theories, such as Rawls’ theory of justice, worthless. They must be used cautiously. Their assumptions must be carefully justified. When the social contract theory is applied to concrete problems, the assumptions must be refined as much as possible to give more useful answers.

---

14. *Id.* at 65-68.

15. The extensive social welfare programs in the United States show the broad agreement.

### III. RISK AND THE ORIGINAL POSITION

Rawls abandoned the idea that individuals in the original position are risk-averse as too problematic of an idea on which to base his theory.<sup>16</sup> Instead, he restated his theory of justice as a political theory rather than a moral one.<sup>17</sup> Nevertheless, the question of how representative individuals in the original position should approach risk is crucial to thinking about justice and environmental issues. After probing how individuals in the original position should decide environmental issues, it is clear that the world needs to take more risks and to rethink what it means to be risk-averse.

Rawls defined "risk-averse" to mean that individuals in the original position would rather ensure that they have a little of something and forgo the chance of being rich than face the possibility that they might be born in a world with nothing.<sup>18</sup> This classic definition of "risk-averse" invites the tragedy of the commons. The tragedy of the commons occurs when individuals use a common, essentially free, resource. Every individual has a strong incentive to use the resource as much as possible for their own benefit. But there comes a point at which individuals begin to overuse the common resource. As a group, this behavior is irrational because everyone loses when the resource is destroyed. For each individual, however, continuing to exploit the resource intensively ensures that they have a little of something rather than nothing at all.

Risk-averse behavior of individuals will cause disasters. For many years, scholars and policymakers have advocated coordinating the behavior of individuals to ensure that the results for individuals match those for society as a whole. Market forces, command-and-control regulatory schemes, and moral persuasion all have a role in matching individual results with overall societal good.

The tragedy of the commons is also a problem of long-term versus short-term benefit. In the short term, risk-averse individuals ensure their prosperity. In the long term, they ensure the opposite. This means that no absolute, or objective, definition of "risk-averse" exists. Risk-averse behavior, as defined by Rawls, is risk-averse in the short term. In the long run, such behavior is highly risky because it must assume that enough natural resources exist to avoid the tragedy of the commons.

In the very long run, the assumption that there are enough natural resources for everyone is surely wrong. The world will end someday. Even in the relative short run, say several hundred years, this assumption is difficult to make. The world is warming. Energy use continues to increase. Energy use and pollution in developing countries such as India<sup>19</sup> and China<sup>20</sup> are rapidly increasing. If per-

---

16. JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT*, PREFACE, xvii (2001).

17. *Id.*

18. RAWLS, *supra* note 2, at 132-134.

19. Energy Information Administration, Country Analysis Briefs: India: Oil and Coal, *available at*

capita greenhouse gas emissions in those two countries reach the levels of U.S. per-capita greenhouse gas emissions, then global warming will greatly increase.

Reconsidering risk in environmental issues leads to the conclusion that individuals in the original position must accept more risk than Rawls assumes if they want to ensure their economic well-being. This might mean privatizing the commons, governmental control of human reproduction, or mandatory weekly political indoctrination on the importance of conservation. None of these will likely draw applause in the mainstream American press, but representative individuals in the original position might well agree on a social contract that allows these results rather than risk the danger of a tragedy of the commons because too few natural resources exist.

Reconsidering risk requires us to question our assumptions about natural resources, but it does not require us to abandon the original position and the veil of ignorance. Rawls has put the wrong question to the representative individuals in the original position if the goal is to address environmental issues. One should not ask what would risk-averse individuals in the original position agree to, but what attitude would risk individuals in the original position adopt if they wanted the best chance to live in a reasonably fair, sustainable world.

The answer to this question would differ depending on the state of the world. If there were enough natural resources for the human race to exist in a near-utopian state for eons, then a Rawlsian approach toward risk might well be chosen. If few natural resources exist, then the representative individuals might choose the approach of emphasizing economic development at any cost in an effort to assure the greatest opportunity that they would be born into a world where they would have some chance of happiness. But a person does not know the type of world that he or she lives in. Will global warming cause a new Ice Age? Will the earth become another Venus, incapable of supporting life? By the time the likely answers to these questions are known, it may be too late, and new problems will need to be addressed.

If the goal is to give everybody the best chance to live in a reasonably fair, sustainable world, then the individuals in the original position must take into account uncertainty about the world's natural resources. This means that individuals in the original position could not commit to one approach to risk.

Financial models applied to the stock market provide a useful analogy. In these models, economists have shown that buying safe stocks is not the most likely method for producing the desired minimum return. The danger of inflation makes this strategy less likely to assure a minimum return. Similarly, choosing to buy the most risky stocks would be less likely to assure a minimum return because of the danger of a stock market crash. Instead, diversification is most likely to assure a minimum return because it covers more alternatives.

---

<http://www.eia.doe.gov/emeu/cabs/contents.html>

20. *Id.*

Similarly, individuals in the original position would choose institutions that develop numerous, different responses in order to assure the best chance to live in a reasonably fair, sustainable world. If, as Rawls originally reasoned, people are risk-averse, then representative individuals in the original position would want to agree on institutions that encourage individuals to take risks. The tendency of institutions to suppress individuality and risk-taking would also support emphasizing risk-taking. While it is beyond the scope of this paper, it is worth noting that this approach could justify freedom of speech, individual control of economic decisions, and limited government.

Representative individuals in the original position would want some people to undertake activities that expand the available common natural resource pool by economic development. They would design society to allow, and in some cases, encourage risk takers. The original position has shown that a world run by faceless, nameless, risk-averse bureaucrats accomplishes nothing great and contributes nothing to the future. Only risk-taking can avoid the tragedy of the commons by encouraging cooperation or by expanding the pie so that the tragedy of the commons does not happen for at least a few years later.

#### IV. INTERNATIONAL ENVIRONMENTAL ISSUES

Rawls then applied his theory of justice to the "law of peoples" to distinguish it from the law of nation-states. Individuals representing each people, or nation, would gather together to agree on a social contract among nations from behind a veil of ignorance that prevents them from knowing the exact conditions of the nation they represent. From this he developed a set of reasonable principles on which to base the law of nations. Several problems prevent the easy extension of Rawls' theory of justice into international issues. First, Rawlsian ideas about reason are associated with Western thought, specifically the Enlightenment. Second, individuals representing nations lack the necessary incentives to reach agreement on any principle. Third, environmental issues require us to confront the problem of valuing environmental goods that Rawls avoided. As with the previous difficulties with risk-averse behavior, these problems force a fruitful reconsideration of the original position.

First, Rawls' theory of justice has deep roots in Western philosophy. He relies on Kant, who more than anyone else, founded modern philosophy in Europe.<sup>21</sup> This tradition established the primacy of reason over revelation in philosophy. Rawls relies on Locke,<sup>22</sup> who epitomizes the popular understanding of the Scottish enlightenment and used reason to speculate on how and why governments first formed in order to identify natural rights. Rawls sees himself as defending this tradition against another Western philosophy—that of

---

21. RAWLS, *supra* note 2 at 10.

22. *Id.*

utilitarianism, according to which governments should pursue the greater societal good in all cases.<sup>23</sup>

Many individuals and cultures lack this faith in reason, especially in developing countries. Some nations base their culture on deeply held religious beliefs or ethical norms. For example, some American-Indians differentiate themselves from the dominant American culture by rejecting materialism, consumerism, and resource development.<sup>24</sup> Some claim a deep spirituality based on reverence for nature and the earth.<sup>25</sup>

The Western bias of Rawls' theory of justice is inherent in his work. In the end, all that can be said is that if one wants to use Rawls, then one must accept the role of reason in his work. It is not an irrational choice. Reason, unlike faith, makes no universal claim, and if properly used, can help nations and individuals live in understanding and mutual coexistence. But, regardless of his success in this matter, Rawls is a Western philosopher who depends on reason. In his view, reason can allow for these beliefs, but reason must decide all questions.

Accepting reason does not require us to accept various forms of Western materialism that seem to go hand-in-hand with reason, religious tolerance, individualism, and democracy. Rawls recognized this problem in his book *The Law of Peoples*.<sup>26</sup> He divided the world into Western democracies, reasonably decent hierarchical peoples, and outlaw states; the United States pursued a different foreign policy with regard to each.<sup>27</sup>

The second problem in using *A Theory of Justice* to decide international environmental issues arises from the nature of the original position.<sup>28</sup> In the original position as initially described, individuals often represented economic classes. This allowed Rawls to assume a unity of interest among the individuals represented. All working-class people may have relatively similar economic interests, and so forth. Even a highly homogenous society has winners and losers on many issues.

This assumption fails when considering international problems. There is no reason to believe that a single individual can adequately represent the interests of a nation. Most notably, nations have economic winners and losers. One could try to solve this problem by having more individuals represent each nation along

---

23. Whether Rawls succeeds in defending natural law from the all-encompassing claims of utilitarianism is an open question. I think that he does succeed in showing there is a place for "natural law" in the twenty-first century.

24. WINONA LADUKE, ALL OUR RELATIONS: NATIVE STRUGGLES FOR LAND AND LIFE 5-6 (1999).

25. JAN ITARTKE, INTRODUCTION TO MOTHER EARTH SPIRITUALITY: NATIVE AMERICAN PATHS TO HEALING OURSELVES AND OUR WORLD xiii ("The perspective of Native Americans in regard to Mother Earth spirituality holds great promise for the environmental movement.").

26. See *id.* at 9-10 (stating that the purpose of developing the Law of Peoples is to "work out the ideals and principles of the *foreign policy* of a reasonably just *liberal* people") (emphasis added).

27. JOHN RAWLS, THE LAW OF PEOPLES 10 (Harvard Univ. Press 2001).

28. Chartier wrote an interesting and informative critique on how the original position changes when applied internationally rather than domestically. Gary Chartier, *People or Persons? Revising Rawls on Global Justice*, 27 B.C. INT'L & COMP. L. REV. 1 (2004).



economic class lines. Or, one could have an individual represent the working class in the United States, another individual representing the working class in India, and so forth. But the working class in the United States will likely have much better economic conditions than their counterparts in the developing world. They will also face different types of problems.

There is also no particular reason to believe that nations will have the same interests as those who make up the nation.<sup>29</sup> Those who benefit from the status quo resist change. People oppressed by their national governments will likely want a change in government. Therefore, whoever represents the nation in the original position determines the result.

Making individuals in the original position represent classes also allowed Rawls to assume that benefiting the least-well-off class would generally benefit all classes above it. Neither of these assumptions holds when addressing international issues.<sup>30</sup> Helping Uganda, Ethiopia, and other poor African nations may not affect the lives of those in Mongolia, Turkestan, and other Asian countries. These countries are not economically linked as the economic classes of a single nation are.

Third, Rawls avoided the difficult question of how to value economic goods by leaving the specific results to the bargaining of the parties. To satisfy the "difference" principle, the more economically-favored classes benefiting from a change must only assure that the least-favored class receives some benefit. The amount of the benefit is not determined by the theory of justice so long as some benefit accrues.

In environmental issues, however, one must directly confront valuation problems. For example, what is the value of a pristine Grand Canyon? When a researcher asks how much money one would demand before allowing the destruction of the Grand Canyon, the figure is often very large. When a researcher asks how much money one is willing to pay to preserve the Grand Canyon in its pristine state, the answer is likely much less.

Further, as a good (for which demand increases with one's income), the demand for a pristine Grand Canyon will be greater among wealthy U.S. citizens than poor Mexican citizens. This will make reaching an agreement in the original position more difficult. The wealthier classes may lose more than the least-favored class will gain in absolute dollars and cents. Some of the wealthier classes surely will believe that keeping the Grand Canyon pristine cannot be valued monetarily. Proportionally, the least-favored class may gain significantly more from greater employment, low-cost housing, and basic medical care than wealthier classes. If everyone acts in their own best interest, this difference between absolute and proportional benefits may prevent an agreement.

---

29. Rawls wrote that his law of peoples "is fair to peoples and not to individual persons." RAWLS, *supra* note 27 at 17 n.9. How a nation treats other nations and how it treats its own citizens are two different subjects. *Id.* at 83.

30. Rawls would write that his assumption of "close-knittedness" fails. *See id.* at 70-72.

Nonetheless, there is a way forward, but more information is needed about the specific environmental choices facing society, such as global warming. Unfortunately, all scientific predictions about global warming and its effects are tentative and may prove wrong. The effects of global warming may include a new Ice Age in the Northern Hemisphere or the long-term rising of the oceans. The great uncertainty about the effects of global warming prevents any easy agreement between individuals in the original position.

The best that can be done is to have representative individuals in the original position consider various factual scenarios. They could then agree on the terms for each scenario. If these terms are all the same, then they may reach an agreement. Most likely, however, the terms will differ. The individuals will then have to evaluate the likelihood of each scenario occurring and the consequences of a wrong choice.

#### V. INTERGENERATIONAL ENVIRONMENTAL ISSUES

Justice in intergenerational environmental issues raises a difficult problem for all theories of justice, including Rawls' theory. While it is reasonable and fair to argue that a person's situation at birth—whether she is born intelligent or not—is unrelated to her personal merit, it is not reasonable to argue that birth status always has nothing to do with merit. The behavior of the child's parents before birth can affect a person's birth status. A mother who smokes and drinks can seriously affect the future health of her child. Society can also shape the newborn for good or ill by providing free health care for the mother-to-be. This means that individuals in the original position must consider the merit and desires of others when agreeing on a social contract theory to govern intergenerational justice.

This point about merit is easily made. In the United States, a child's chance of becoming President of the United States depends on many factors. Were her parents sharecroppers or industrialists? Was she born in 1900 or 2000? In an example more on point, children in developing nations face radically different prospects than those born in modern industrial democracies, such as the United States.

On the other hand, parents, grandparents, and others often work to improve future generations. The merits of the parents can therefore very much affect the prospects of their children and grandchildren. Eliminating this powerful force for improvement seems both unwise and impossible. It is unwise because this force often helps to improve the human condition; it is impossible because natural selection has built parental instincts into human beings. Equally, some unfair, even criminal, decisions or actions in the past can give newborns an unfair advantage over others. Debates over whether a particular advantage is fair are almost inevitably contentious and never-ending.

Such debate over the fairest course to pursue environmental issues inevitably leads to the tragedy of the commons, whether or not nationalism is involved. Governments must act to regulate pollution to avoid this tragedy. They can do so by delaying action on pollution through command-and-control or by market systems, but they must act to make the individual cost of pollution equal to the social cost of pollution.

Representative individuals in the original position will fail, however, to decide on the best way to achieve this for many reasons. This article has already examined a few of the reasons: representative individuals lack the necessary information to properly value environmental goods; the weak sense of justice held by those in the original position does not allow for the powerful emotions necessary to motivate sacrifices; and enlightened self-interest conflicts with self-sacrifice for others.

Equally fundamental, social contract theories provide little help with issues requiring historical consciousness. Social contract theories often assume that one set of terms can work for all human societies for all time, but nothing in history suggests this is true. Hunters and gatherers often have different needs and wants than early agriculturalists, and both groups would find the modern United States difficult to understand or accept. Types of government and systems of law vary from one nation to another. Therefore, incorporating historical differences into the original position would destroy the necessary consensus.

Three suggestions, although none perfect, may help Rawls’ theory of justice become more meaningful in intergenerational environmental issues. First, historical claims for justice should be limited to those involving environmental issues. The process of solving environmental issues will not include the solving of claims for exploitation and oppression. This does not make the latter claims unimportant or invalid, but separation is necessary to allow agreement in the original position.

Second, and perhaps more controversially, newborns in the modern industrial democracies should be born innocent. The demerits and crimes of their parents and ancestors are not theirs. Further, mere participation in the society into which they were born should not make them guilty. Representative individuals in the original position would not know whether they might become the children of guilty parents, and therefore, would make guilt depend on individual choices and not birth status. Finally, any hope of creating a structure that can fairly solve all environmental problems for all time should be surrendered. History teaches that people and nations vary too much for such a grand goal.

Intergenerational environmental justice issues push Rawls’ theory of justice to the brink of uselessness. But, by severely limiting its claims to universality and narrowing its focus, this article intends to provide some hope of using it fruitfully.

VI. USING RAWLS' THEORY OF JUSTICE AS FAIRNESS TO  
ADDRESS GLOBAL WARMING

For many reasons, using Rawls' theory of justice as fairness in global warming has proven extremely difficult. His approach to risk was wrong for environmental issues. Rawls' use of reason and other ideas from the Enlightenment seriously compromised his theory's claim to universality. Finally, intergenerational environmental issues cause problems so severe that Rawls' theory needs careful limiting to be useful. Nonetheless, enough of Rawls' theory remains to test whether the partial cap on greenhouse emissions included in the Kyoto Protocol meets Rawls' theory of justice.

Reason would support a wide range of attitudes toward risk. Some people would prefer to maximize their chances of being born into a modern, industrialized democracy instead of being assured that any traditional society they are born into meets minimum standards. Further, risk-averse behavior on a national or global scale requires that human beings plan for a variety of possible outcomes rather than risking everything on one strategy that might not work. This allows people some choice after birth about which society they enter.

Finally, representative individuals in the original position would know that global warming will inevitably cause massive changes to some traditional nations. Ice caps will melt. Animals, on which some traditional nations rely, may die out locally or globally. It is impossible for traditional nations to remain the same because of global warming or global development. The question is how to manage that change.

This article argues that representative people in the original position would agree upon a social contract with the widest possible range of choice for traditional nations and their citizens. The concept of justice as fairness suggests that traditional nations would retain their political rights in the form of the right to choose from options presented by interactions with modern, industrialized democracies. These options would range from minimal to full integration as a nation and as individual citizens.

The Kyoto Protocol contains no commitments regarding the political rights of traditional nations. It speaks only of "common but differentiated responsibilities."<sup>31</sup> While other treaties and documents speak of indigenous rights, analysis using Rawls' theory of justice suggests that this separation is inadequate. Treaties addressing global warming should directly address its impact on traditional nations.

The Kyoto Protocol contained a cap on emissions of greenhouse gases for certain nations.<sup>32</sup> China, India, and other developing nations rejected the cap as

---

31. Kyoto Protocol to the United Nations Framework Convention on Climate Change art. 10, Dec. 11, 1997, 37 I.L.M. 22 (1998).

32. *Id.* at Art. 3.

impossible for them because it would unfairly limit their economic growth.<sup>33</sup> Some people believed that the rejection was based on the West's historically greater emissions of greenhouse gases and history of colonization and exploitation.<sup>34</sup> Even accepting as likely that the West's history of colonization and exploitation caused greater emission of greenhouse gases and greater economic development in the modern Western industrial democracies, the issue should fall to the side in future discussion. As previously discussed, this claim destroys the focus on fairly solving environmental issues in the original position.

Further, the representative individuals in the original position will agree on terms for the next hundred years or so. If one assumes that they will not be risk-averse as initially defined by Rawls, but will approach risk from a broader perspective that encourages some risk-taking, they will approach uncertainty by agreeing on the likely causes of, effects of, and possible solutions to, global warming over the next several hundred years. In a full discussion, they would discuss reasonable alternatives to the most likely course of global warming and try to decide how their actions would or should differ.

For purposes of this article, it is assumed that global warming will most likely cause moderate, gradual, and largely controllable effects in rich, developed countries but more severe, even catastrophic, events for some developing countries. Would individuals in the original position, not knowing whether they would live in modern industrial democracies or in developing countries, agree on a social contract that allowed developing nations like China or India to avoid any caps on emissions in order to foster economic growth? This article argues they would not. The individuals might find themselves living on a Pacific atoll or in Bangladesh, where they would face the catastrophic effects of global warming. They would not care who emitted the greenhouse gases, only that they were emitted. They would not accept that the need for economic development in China and India outweighed their own rights.

But they also would know that they might face catastrophic effects in any event. Drastic reductions of future emissions by China, India, or the United States might not stop the flooding and death. What would the individuals agree upon knowing this is possible? The individuals most likely would not impose a stringent cap at this time. Instead, they would focus on getting agreement on the concept of a cap. Too stringent a cap would limit the economic growth necessary to pay for their relocation or for new technology that might help them. In other words, they would hedge their bets.

---

33. See, e.g., Anup Shah, *Climate Justice and Equity*, available at <http://www.Globalissues.org/EnvIssues/GlobalWarming/Justice>.

34. See, e.g., Yin Shao Long, *Climate Change and the Kyoto Protocol*, available at <http://www.twinside.org.sg/title/yysl.htm>.

## VII. CONCLUSION

Refining Rawls' theory of justice shows that the Kyoto Protocol should have included a cap of greenhouse emissions for all nations. This would require developing nations to take more risks. It should also require the industrialized world to help traditional nations more. These conclusions come from the careful reworking of Rawls' theory of justice in order to apply it to international environmental problems. This reworking has severely challenged Rawls' theory, but the challenge has proven fruitful.

\* \* \*