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earth

A Distributional Framework
for Protecting Capabilities
in Environmental
Law and Policy

BREENA HOLLAND

OXFORD

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Breena Holland

Associate Professor, Lehigh University

Political Science & the Environmental Initiative

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To Edith and Stephen

Preface

This book develops and applies a new theoretical framework for thinking and reasoning about the purpose, value, and social implications of environmental protection policies. I rely most heavily on a particular theory of social justice—the “capabilities approach” advanced by Martha Nussbaum—to provide the framework’s guiding normative principle and basic conceptual logic. The capabilities approach has much in common with rights-based approaches to evaluating and designing policies because it treats individual-level political protections as constitutional guarantees owed to citizens living in liberal democratic societies. The individualistic focus has particular advantages for addressing the inequitable impacts that environmental policies produce, such as those that expose people to different levels of environmental harm. The approach to designing and evaluating environmental policy that I develop treats a certain level of environmental quality as an entitlement to which each individual citizen has a basic political guarantee. However, I define this individual guarantee in terms of a person’s capabilities rather than a person’s rights. As a conception of individual well-being and advantage, people’s capabilities are preferable to rights, most simply, because the former defines a sphere of action that rights commonly protect, as well as the preconditions that make it possible for people to engage in specific forms of protected action. By extending the account of what is worthy of political protection to include these enabling conditions I hope to advance an evaluative framework that clarifies and reveals the vital role the natural environment plays in a meaningful and flourishing human life, and therefore to affirm environmental quality as a matter of basic political protection.

Environmental policy gives rise to many different kinds of questions. Those that motivate the present project concern issues of valuation, justification, and participation. How should we value the natural environment when we assess the social value of policies that protect it? On what theoretical and philosophical basis should we seek to justify environmental protection? What role should citizens, experts, and various other stakeholders play in environmental policy decisions? Because my intent is to bring a particular theoretical approach to justice to bear on answering these questions, this book is an exercise of applied political theory. I set the stage for this

exercise by first introducing the contemporary environmental policy context (Chapter 1), the problems that give rise to questions of valuation, justification, and participation (Chapter 1 and Chapter 2), and the primary aims and innovations of the relevant literature on human capabilities (Chapter 3). Readers who are familiar with current practices and trends in environmental policy, such as stakeholder collaboration and citizen participation, and the use of economic analysis to assess environmental policies, may wish to skip or skim through Chapter 1 and Chapter 2, which review the problems and questions to which these trends and practices in environmental policy give rise. Likewise, readers who are familiar with the rapidly growing literature on human capabilities may wish to skip or skim through Chapter 3, where I introduce this literature—capabilities theory—as providing both a theory of well-being and the theory of justice and discuss why the theories are relevant to questions of valuation, justification, and participation in environmental policy.

It was many years ago, when I was a doctoral student at the University of Chicago, that I first began thinking about the relationship between people's capabilities and the natural environment. Since then, I have continually found the broad conception of well-being that capabilities theory offers to be productive in illuminating the unseen or unacknowledged impacts that environmental problems have on different people. While environmental degradation is increasingly recognized as bad for the planet as a whole, its impact on different people varies widely and is often difficult to measure in ways that link the actions of different people. Yet our ecological connectedness to each other is significant and inescapable—its importance has sustained my interest in developing a general framework for thinking and reasoning about the role of environmental relationships in making people capable of doing and achieving things that make their lives meaningful and good. Thus, while this book has a theoretical orientation, it is inspired by the very practical problem, which is that the laws providing protection from environmental harms and access to environmental benefits do not serve all citizens equally. Some people have an easier time avoiding environmental problems, and others have an easier time accessing environmental benefits. If the environment's value were a purely subjective matter, and if the environment contributed to people's lives in relatively similar ways, then these varying impacts might be less problematic. But environmental relationships are highly varied and some of them are objectively good for us regardless of what any person subjectively values.

In proposing a framework for designing and evaluating environmental policies that can address inequities resulting from the complexity and significance of environmental relationships, this manuscript draws heavily on theoretical ideas, but it also reasons through the practical application of these

ideas to address questions of value, justice, and participation that arise in the context of environmental policy decisions. Scholarship like this, which endeavors to work back and forth between theory and practice, runs the risk of pleasing neither theoreticians nor practitioners. I have been aware of this problem from the start and settled on the goal of saying enough to convince both audiences that advancing this work in either direction is a worthwhile task. Many people have helped me in this endeavor. I cannot thank them all here, but wish to express my gratitude to those who played a significant role in helping me to complete the present project.

First, I wish to thank Jeremy Bendik-Keymer for first proposing that I write on the topic of human capabilities when we were both taking Martha Nussbaum's graduate course on Neo-Aristotelian political thought at the University of Chicago. Jeremy not only helped me conceptualize the project, he also offered critical feedback on nearly every chapter that evolved into a dissertation and then a book manuscript. Jeremy's passion for philosophical thinking and intellectual capacity can be inspiring and consuming; I am certain it sustained me through many moments of academic doubt. He has been an ongoing source of rigorous thinking, creativity, and passion for learning, from which I have benefitted in more ways than I can convey.

Second, I wish to thank my dissertation committee at the University of Chicago, which was chaired by the late Iris Marion Young. In addition to providing continual commentary and review, Iris played an important role in orienting my initial doctoral project to fit within the context of a larger research agenda that made it possible for me to continue working on the ideas long after completing the dissertation. I miss experiencing the immediacy and strength of her personality and ideas, but am so grateful to have had the chance to know her and the significant body of work she left with us. Martha Nussbaum's guidance has also been crucial to this project. Her capacity for absorbing information about environmental issues as yet another area of knowledge continues to astound and inspire me. I am lucky to have had her help in navigating the broad literature that has emerged on capabilities. I have always insisted that her work in this literature has particular advantages for questions that interest me in environmental policy, but I appreciate her patience with my speed and inelegance in demonstrating why. She has been a thoughtful and crucial source of advice throughout the drafting of this manuscript and the professional life I tried to balance while writing it. Cass Sunstein and Leigh Raymond also played crucial roles in my effort to apply capabilities theory to environmental policy. Leigh provided significant policy expertise combined with a genuine interest in normative political theory, which gave me confidence and direction in developing the ideas and bringing them down to the level of application. Cass's overall confidence in the project and his remarkable capacity to reorient and reframe my thinking

about law and policy in only a few sentences cleared away some seemingly insurmountable barriers in my argument. I am immensely thankful to have had the guidance of such a talented and inspiring group of scholars.

Several other people at the University of Chicago have been central to my completion of this manuscript. Ted Steck has been a great friend and colleague who created an intellectual home for me as a graduate student and became a formidable interlocutor as he learned about my research. Murat Arsel endured the most intense stages of my initial writing, and provided a constant source of support and humor. Jennifer Rubenstein has provided essential insight at particular stages as well as ongoing friendship and inspiration. I am also grateful for the many opportunities I had to travel with John Overton, which helped me to think through the environmental dimensions of people's capabilities in many different physical and social contexts.

At Lehigh University I have been supported by a remarkable group of colleagues who have made my work life both enjoyable and meaningful. In the Political Science Department, Janet Laible, Rick Matthews, Ted Morgan, Laura Olson, and Al Wurth have all given me their time and support in more ways than I can count. Many other members of the Lehigh community have also been crucial to my finishing the book and my thinking about human capabilities. I especially wish to thank Nandini Deo, John Gillroy, Seth Moglen, Judy Lasker, Dork Sahagian, John Savage, and Joan Ramage.

Off campus I have many colleagues in the environmental political theory community who have made time to read and comment on my work amidst busy schedules and competing demands. I owe a great deal of my progress to David Schlosberg, whose enthusiasm and challenging questions brought the ideas to life; I am so thankful for his mentorship and generosity of time and spirit. At various stages valuable feedback has been provided by Sheri Breen, Antje Brock, Chris Buck, Peter Cannavò, Lisa Ellis, Joel Kassiola, Teena Gabrielson, Cheryl Hall, Tim Luke, John Meyer, Jouni Paavola, Christopher Robinson, Fabian Scholtes, Kristin Shrader-Frechette, Kim Smith, Les Thiele, Steve Vanderheiden, Harlan Wilson, and Rafi Youatt. John Meyer, in particular, has been remarkable in always finding the time to review my work and provide professional advice; I hope that I can someday be as helpful to others as the environmental political theory (EPT) community has been to me. There are many more people who are part of this community, and I thank them all for creating a supportive, engaging, and learned intellectual community, as well as something besides warmer weather to look forward to in the spring.

Finally, I wish to thank a close group of friends and family who have put up with my writing habits, endured my neuroses, and constantly engaged me in discussing the ideas in this book. Bronwen Morgan and Dorian LaGuardia are lifelong friends who have contributed more than anyone to my academic

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List of Abbreviations

CAA	Clean Air Act
CAIR	Clean Air Interstate Rule
CARR	capabilities approach to regulatory rulemaking
CBA	cost-benefit analysis
CBO	Congressional Budget Office
DMV	deliberative monetary valuation
EAB	Environmental Appeals Board
EBM	ecosystem-based management
EPA	Environmental Protection Agency
FIFRA	Federal Insecticide, Fungicide, and Rodenticide Act
GDP	gross domestic product
GHG	greenhouse gas
GNP	gross national product
IPCC	International Panel on Climate Change
NAAQS	national ambient air quality standards
NEPA	National Environmental Policy Act
OECD	Organisation for Economic Co-operation and Development
OMB	Office of Management and Budget
RCRA	Resource Conservation and Recovery Act
RIAs	regulatory impact analyses/assessments
SDWA	Safe Drinking Water Act
SIP	state implementation plan
SUVs	sports utility vehicles
TEV	total economic value
TSCA	Toxic Substances Control Act
VMT	vehicle miles travelled
WTA	willingness to accept
WTP	willingness to pay

1

Introduction: Economic Analysis, Democratic Procedure, and Distributional Assessment in Environmental Policy

1.1 Establishing a Role for Distributional Assessment in Environmental Policy

How should we value the natural environment when considering the impact of environmental policies on individual people? What normative principles should we appeal to in determining an environmental policy's overall contribution to society? Should these principles guide the design and implementation of environmental policies, or should environmental policies take shape through political processes, in which various stakeholders deliberate and come to agreement about policy design and implementation? On what basis can a democratic society protect nature when citizens are not willing to support this goal? Why does the environmental crisis facing contemporary society call for redefining the role of both citizens and experts in making environmental decisions? This book addresses each of these questions in the context of its broader aim to develop and defend a new normative framework for evaluating environmental policies.

In contemporary environmental law and policy, economic analysis provides the dominant theoretical framework for thinking and reasoning about environmental protection. Broadly speaking, this framework involves evaluating environmental protection with respect to the goal of producing economically efficient policies, and valuing specific environmental resources with respect to their success in satisfying the subjective preferences that people express as consumers making market choices. Various laws and executive orders require this kind of analysis, and advocates of both weaker and stronger environmental protection often draw on such analyses to influence the public debate in ways that support their