Legal and Political Challenges of Governing the Environment and Climate Change

Ruling Nature

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Legal and Political Challenges of Governing the Environment and Climate Change

The environment has not always been protected by law. It was not until the middle of the twentieth century that 'the environment' came to be understood as an entity in need of special care, when the law–politics duo firmly fixed their focus on this issue.

In this book Wickham and Goodie tell the story of how law and politics first came upon the environment as an object in need of special attention. They outline the unlikely intersection of aesthetics and science that made 'the environment' into the matter of great concern it is today. The book describes the way private common-law strategies and public-law legislative strategies have approached the task of protecting the environment, and explore the greatest environmental challenge to have so far confronted environmental law and politics: the threat of global climate change. The book offers descriptions of many of the strategies being deployed to meet this challenge and presents some troubling assessments of them.

The book will be of great interest to students, teachers, and researchers of environmental law, socio-legal studies, environmental studies, and political theory.

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This excellent book explains environmental policy in general and climate change policy in particular as the product of what the authors call 'legal-political government'. The concept of legal-political government is an attempt to capture the nature of constitutionality and legality in liberal-democratic societies, and has the conditions of legitimate contestation over policy at its heart. The insights this concept brings to the successes and failure of environmental policy-making are striking and persuasive. This book should be read by all seeking some objective account of vexed environmental issues and particularly climate change.

Professor David Campbell, Law School, Lancaster University

For MPHW, HNGDW, and JSW

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Contents

1 Introduction

Towards a legal-political narrative

How can we know 'the environment'?

The environment is a chameleon. As an object of aesthetic contemplation it is landscape, horizon, and universe; it might be glimpsed through painting, poetry, novels, and sculpture but it is never totally exposed. As an object of morality it is both the source of natural good and a marker of humanity's capacity for degradation and exploitation. As an object of science it is an ever expanding and ever demanding frontier of knowledge – knowledge about what it was, what it is, and what it might be. As an object of economics it is the ultimate resource, that from which immense wealth can be created, but also that which can destroy wealth, precisely because it can destroy us. As an object of religion it is a gift from the heavens which confronts faith almost as often as it confirms it. As an object of law it is a tremendous challenge – the challenge of protecting it, as well as, among other things, the challenge of determining how it is to be protected and how its fruits are to be distributed. As an object of politics it is a site of constant contest.

In its capacity as a chameleon the environment is all these things simultaneously. This makes it anything but straightforward to write a book about how the environment and climate change are being governed by law and politics in a wide range of countries. We will fully explain this form of government in great detail in the next chapter. For now it is enough to know that we have in mind those countries which came to adopt the system of rule whereby law and politics are related in a very particular manner, a manner by which the two elements temper each other's attempts at superiority and in so doing end up producing a stronger whole than either part could ever have produced alone. The system emerged in the sixteenth and seventeenth centuries in England, France, Germany, and the Netherlands. It spread relatively quickly to other parts of Europe and to North America. It can now be said to include, at least, Australasia, much of South America, much of Asia, parts of Africa, and aspects of the United Nations and other multilateral forums.

In setting out to write the book we knew we could not simply excise the law–politics–environment and climate change intersection from its broader context, from its full personality, as it were. We knew we had to find a

framework which would allow us to focus on law–politics–environment and climate change in such a way as to allow sufficient room for the aesthetic, moral, religious, scientific, and economic aspects of the environment and climate change. In other words, we had to make sure we could bring these other aspects into our law-and-politics story of the government of the environment and climate change.

We are confident we have found a way to meet the challenge. We propose that a particular slice of the history of natural law contains the seeds of those discourses that have made law and politics the dominant mechanisms for governing the environment and climate change in the wide range of countries set out above – dominant, but not so much so that they do not have to constantly deal with moral, religious, economic, aesthetic, and scientific elements as they go about the governing.

In saying this, we are not proposing a comprehensive history of natural law as a complex intersection of intersections – that is well beyond the scope of the book, and well beyond our competence. Instead, what we are offering – to be contained in a few pages of this Introduction – is a brief ideal-type account[1] of an important moment (albeit a long moment) in the history of natural law, a thumbnail sketch which can serve as the launching pad for the more substantive chapters of the book. Our sketch, we suggest, can help us explain, first, the way the environment has become an object of legal-political government, which is the main aim of our book,[2] and, second, to explain the way legal-political government is dealing with the threat of climate change, which is the subsidiary aim of our book.

An ideal-type account of a slice of the history of natural law as the basis of our account of the legal-political government of the environment and climate change

Our account of what we regard as the most crucial long moment in the history of natural law focuses more on the 'nature' component than the 'law' component. In short, our account has it that in Europe, from (at least) the thirteenth century through to the seventeenth, drawing on different ancient sources, two rival understandings of nature, contained in two rival understandings of human nature, developed in such a way as to underpin two rival versions of natural law, which in turn have gone on to underpin two rival approaches to

1 By ideal-type account we mean one consistent with Weber's 'self-proclaimed technique' of ideal types, which aims 'to intentionally emphasize certain facts in a "one sided way" as a method of analysis, but his point very often is also to conceptually define a domain or conceptual space in which even the most extreme actual cases have elements of the "opposite" conceptual category' (Turner 2002: 1).

2 In attempting to explain the emergence of the environment as an object of legal-political government perhaps we are attempting something like Ryan Walter's succinct explanation of the emergence of the economy as an object of what we would call legal-political government (Walter 2011).

government, one of which informs legal-political government. We will start with the two rival understandings of nature, which are contained in the two distinct understandings of human nature.

On the one hand is a vision of humans as a product of perfect nature. The earliest form of this vision was provided by Aristotle. For him, nature is perfect, so humans must have it in them to be perfect too, even though they more often than not think and act in extremely imperfect ways. The form of this explanation that has been most influential in the modern world is the Christianized form developed by the thirteenth-century theologian Thomas Aquinas, for whom God is the source of nature's perfection and hence the source of humans' potential for perfection. Aquinas's Christianized Aristotelianism, which became known as scholasticism, opened the door to later versions of nature's perfection, some of which, like that of Gottfried Wilhelm Leibniz, maintained a role for God, while others, like the reason-focused versions developed in the eighteenth century by Immanuel Kant and in the twentieth century by John Rawls, are at the heart of much secular thinking about nature today.

To sum up, our first understanding of nature is built around the idea of perfectibility. By this perfectionist way of thinking, while humans are not always perfect they will always strive towards perfection because nature is ultimately perfect and is therefore always, of necessity, seeking to return that which it has produced to perfection. Natural law for this position is the law that helps nature to perfect humans and their societies; while humans often stray from the path of perfection, natural law will bring them back to that path. In Aquinas's seminal version, God is 'the divine mind or reason from whose creative intellection emanate the essences or "natures" of all things ... thereby constituting the *lex aeterna* or eternal law of the cosmos' (Hunter 2010: 477). Humans are able to know this law because, for Aquinas, as we indicated earlier, human nature 'shares the rational nature of God' (Hunter 2010: 477). This tradition is the basis of the most enduring form of opposition to legal-political government, usually featuring the idea that reason-based morality and/or religion are more powerful than law and politics, that law and politics have their place, but must know that their place is below morality and/or religion.

The rival to this understanding, which also has its roots in ancient Greek thought, this time in Epicurean and Stoic thought, refuses the idea of perfection. For Epicurus and his followers, as for the Stoics, humans are not perfect; their disquietude and constant violence make this empirically obvious, or so this understanding has it. More than this, nature is not perfect and instead of seeking perfection we should learn to accept nature's imperfect ways (including imperfect humans), we should study them carefully, and we should develop techniques to help us avoid the dangers of nature, especially the dangers of the uncontrolled passions of fractious humans.

In the face of the extremely violent civil wars in Europe in the sixteenth and seventeenth centuries, born mainly from religious turmoil, it is not surprising

that these anti-perfectionist ideas were rejuvenated by some key early modern thinkers into something approaching a new science of humans and their society.[3] For example, in the sixteenth century they were rejuvenated by Jean Bodin in France and by Hugo Grotius and Justus Lipsius in the Netherlands (with not a little influence of thinking from earlier that century by Niccolo Machiavelli, writing in the different context of the political machinations of the northern Italian city-states), but their most famous advocates were the seventeenth-century political philosopher Thomas Hobbes in England and his main German follower Samuel Pufendorf. This early modern rejuvenation, particularly in Hobbes's hands, has become so influential as a mode of thinking about law and politics that, notwithstanding its roots in the ancient world, the seventeenth century is often reasonably treated as the beginning of the anti-perfectionist tradition, usually known as the civil tradition. This tradition is the basis of legal-political government. In the twentieth and twenty-first centuries the main Anglophone politico-legal inheritors of this tradition include Stephen Holmes, Ian Hunter, and Martin Loughlin (to name just a few).

In pursuing its three main goals – accept nature's imperfect ways (including imperfect humans); study these ways of nature carefully; and develop techniques to help avoid the dangers of nature, especially the dangers of the uncontrolled passions of fractious humans – the anti-perfectionist thinkers came to believe that while humans are fractious, they also, by their nature, fear death and its consequences and, because of this, ultimately crave peace. On the basis of this belief, the main advocates of this position, especially Hobbes, following Bodin's lead, proposed that the only sustained way in which humans' destructiveness can be overcome is by the strongest possible authority, which Hobbes called 'Leviathan' but which came to be widely known as the sovereign. Humans, by their nature, will fear and respect this authority, as the representative of God on earth and/or the repository of nature's power of life and death over them, and they will respect the peace this authority delivers to them in forcing them to control their formerly uncontrolled passions.

The rival anti-perfectionist understanding of nature, then, focuses on dealing with the difficulties thrown up by nature's immense power, including the immense power of humans. In particular this understanding has it that nature provides a means by which humans' natural capacity for destruction can, to a great extent, be curtailed. Natural law for this position is the combination of, on the one hand, the law imposed by the strongest earthly authority, which is itself seen to be natural, and, on the other, the law provided directly by nature, which determines that humans, because of their nature, will fear the sovereign and thereby respect the sovereign's laws, especially because those laws will severely punish those who fail to control passions and commit violence against others on the basis of this failure.

The rivalry between the perfectionist opposition to legal-political

3 In the third volume of his 'Visions of Politics' collection, Quentin Skinner, focusing on Hobbes, calls the new science of humans and their society 'civil science' (Skinner 2002b).

government and anti-perfectionist legal-political government itself is, as we keep saying, ongoing. The perfectionist position holds that the earthly laws of earthly rulers and the earthly politics in which they engage must always be subservient to externally sourced natural law. In this way, earthly law and earthly politics can and should always be judged against the externally sourced moral and/or religious criteria provided by natural law. In this way, if earthly law and earthly politics are not seeking perfection they are failing, and any force seeking to uphold natural law, which is by its nature superior, should strive to overcome regimes which are practising such inferior law and inferior politics.

For the anti-perfectionists, on the other hand, there can be no force superior to the sovereign. Any ruler who or which attains sovereignty, whether individual (a king or queen or prince) or assembly (a parliament), is, by the anti-perfectionists' understanding of natural law, the appropriate source of earthly law and politics, though only if he, she, or it is seeking to use his, her, or its rule to limit the dangers posed by uncontrolled passions.

Before we move on we should remind the reader that, as is the way with ideal-type accounts, not every position in the history of the development of legal-political government fits neatly within one or the other of our two rivals. While the figures mentioned above (Aristotle, Aquinas, Kant, et al. on one side; Hobbes, Pufendorf, et al. on the other) are indeed emblematic of the positions we have ascribed to them, many other important thinkers in the history of natural law and the history of the development of legal-political government are not. For example, thinkers like Alberico Gentili, Hugo Grotius, and Emer de Vattel, to name three, blend aspects of both traditions into their thought. Similarly, certain notions which might feature in any history of the development of legal-political government are blends of the two rival understandings of government at the heart of our narrative. For example, the notion of society can be said to be that which perfect nature provides, inasmuch as this understanding of nature includes humans as creatures too weak to survive without the companionship of other humans, and it can be said to be that which is achieved only when sovereign rule is strong enough to guarantee a peace so sustainable as to allow humans to interact without fear of death from other humans.

With this caveat in mind we trust the reader can see how present-day thinking about environment and climate change (be it legal, political, aesthetic, moral, religious, scientific, or economic thinking, or some combination of them) is influenced by both the lines of thought being laid out (even if the influence is indirect).

We move now to elaborate the rival visions of law and politics as they are understood, on the one hand, by perfectionist critics of legal-political government and, on the other, by the anti-perfectionist advocates of legal-political government. For the perfectionists, the appropriate sphere of operation for law and politics is the sphere of perfect justice, which nature extends to the entire planet and the entire universe. In this way, national governments – trapped in constant contests with one another – cannot be the highest authority. Inasmuch as the sphere of perfect natural justice is universal, a universal

standard of law and politics must, by nature, override any national standards. So international law and politics are, or should be, superior, because by their nature they should strive towards perfect natural justice, being above the petty contests that define national law and national politics. In this way, universal perfect natural justice sets the standard for all law and all politics and, because they are refined reflections of this perfect standard, international law and politics are the most appropriate earthly vessels to pursue ultimate justice.

For the anti-perfectionists, or civil thinkers, of course, there is no such thing as the sphere of perfect justice. The places where law and politics operate are the places on earth where they have come to operate over time, in the particular territories that have come to be governed by law and politics. As such, the sphere of operation for legal-political government in the modern world has come to be the system of modern states initially established by the 1648 Treaty of Westphalia, which helped bring to a close the devastating Thirty Years' War in Germany (another of the religion-inspired civil wars referred to earlier). This system – which developed in piecemeal fashion as the rulers of various territories learned what legal-political government could and could not do in the wake of the civil wars – formally recognizes as a modern state any territory which is governed in line with the principles of sovereign rule set out above (the rulers must be the strongest force in the territory, able to dominate rival forces to the point of governing in the name of restricting the dangers of uncontrolled passions). Under this system the ultimate bearer of sovereignty in each territory came to be the state itself (which Hobbes referred to as the commonwealth or *civitas*).

In line with this, the state is, for the anti-perfectionist or civil way of thinking, the ultimate actor of legal-political government. International law and international politics are not superior, nor are they to be judged against a universal criterion of perfect justice. Instead international law and politics reflect the earthly relations between states, subject to all the politicking, diplomacy, and warfare which history suggests they will be subject to. Far from being about perfect justice, then, international law and politics are about treaties, alliances, and other such markers of earthly interactions. For this position, national laws and national politics are neither necessarily inferior nor necessarily superior to international law and politics. As nations are, at least since the middle of the seventeenth century, usually defined as states, national laws and politics for some states are sometimes able to override the international obligations of those states, while for other states their national laws and politics will be forced into submission by international law and politics (which in practice often means 'in the name of stronger states involved in the particular treaty or other such arrangement').[4]

4 Obviously there are many exceptions to our point about nations being 'usually defined as states', including instances in which suppressed national sentiments within existing states become strong enough that those states are broken into smaller states, thereby legitimizing the previously suppressed claims to nationhood.

What this means for the legal-political government of the environment and climate change

With the rival understandings of the basis of government laid out, we need to say something more by way of introducing each understanding's treatment of environment and climate change, in preparation for the detailed arguments to be presented in later chapters. Of course, as objects of government, environment and climate change are not ideal types in the way that our two rival understandings are ideal types; instead, they are real-world, real-time entities. As such, they do not always fit neatly within one or other of our two rivals. It might be said that certain extreme environmentalist positions in present-day debates about climate change, for example, are entirely the product of the perfectionist camp, which mainly opposes legal-political government in the name of morality and/or religion, while treaties arrived at after laborious international negotiations, such as the Kyoto Protocol, are entirely the product of the civil or anti-perfectionist advocates of legal-political government. But we think it wise to remain cognizant of the fact that all the contributions to these debates are real-world positions and most will contain at least some traces of both the rivals we have been at pains to describe.

In line with this point, we might say that most present-day debates about the environment and climate change have a long history but a short memory. They have a long history in that, as we just said, it would be very difficult for a contribution to be made to these debates that is not sourced, to one degree or another, in these rival camps. Yet they have a short memory inasmuch as there is precious little awareness displayed of this long history. Too many contributors to the debates speak or write as if their particular vision of the environment and global climate change is a-historical, as if their thinking is informed by present-day facts alone.

To help make our 'long history' argument clearer, we will extend the above distinction between a hypothetical extreme environmentalist position which opposes compromise and a hypothetical position concerned to negotiate workable treaties. This will give us a chance to discuss the ways in which aesthetic, moral, religious, scientific, and economic discourses feed into our story, which so far has focused mostly on the history of legal and political discourses.

The extreme environmentalist position set out above might involve an aesthetic attachment to the beauty of the environment born of, for example, nineteenth-century Romantic movements in literature and art, movements which were often committed to a perfectionist view of the environment, often as the product of a perfect God, or a perfect Nature, or both. But it might equally involve an aesthetic attachment to the environment born of nothing more than a personal calculation that big expanses of water and old forests are better to look at and listen to than urban decay. There is no necessary connection between a given aesthetic approach to the environment and a perfectionist understanding of nature or an anti-perfectionist understanding, though of

course it would help an analysis of any given debate about the environment to seek to determine which aesthetic discourses are being drawn upon.

With regard to the economy, the extreme environmentalist position might involve a perfectionist antagonism to any economic development of the environment. But it might equally involve a belief that certain types of economic development can enhance human interaction with the environment at the same time as allowing certain firms and individuals to make a monetary profit from it. There is no necessary connection between a given economic approach to the environment and an anti-perfectionist understanding of nature or a perfectionist understanding, though again it would help an analysis of any given debate about the environment to seek to determine which economic discourses are being drawn upon. And if we combine these two elements, it might be that a firm seeking permission to mine for shale-based gas in a wilderness area is only interested in profit and will always seek ways to minimize the impact of legal and political hurdles, as is consistent with a certain type of thinking about the economy as an independent domain, a domain which emerged only in the nineteenth century (Walter 2008a, 2008b, 2011). But it might equally be that the principals of the firm have a personal aesthetic attachment to the beauty of the wilderness they are keen to mine, perhaps born of the nineteenth-century Romantic movements mentioned above, and yet, in being no less attached to their firm, also think it possible to mine the area without harming its beauty. In this scenario, the firm will be willing to not only follow legal and political directives but even to hire in specialists of their own to help protect the beauty of the area.

The reader, we feel sure, is getting the picture: the different discourses of the environment – legal, political, aesthetic, moral, religious, scientific, and/or economic – can combine in any number of ways, some completely in line with legal-political government, some completely in line with opposition to it, and some located between the two. We need say no more about combinations of legal, political, aesthetic, and economic discourses of the environment. But we still need to say something about the diverse character of the moral, religious, and scientific discourses which are nearly always present in modern debates about the environment.

The intersections between the environment and each of moral, religious, and scientific discourses are perhaps more one-sided than are the intersections of the environment and the legal, political, aesthetic, and economic discourses discussed so far, but they are not by any means completely one-sided. The intersection between the environment and science is easier to explain than those between environment and morality or religion, so we will tackle it first. It is easier to explain simply because a battle between a perfectionist view of science and an anti-perfectionist view has been waged very publicly over the last ten years or so. This battle is extremely germane to our book; it is that waged over the role of science in determining and possibly mitigating anthropogenic climate change.

In this setting, a view of science as the highest possible authority on whether anthropogenic climate change is occurring has seen it afforded a

quasi-perfectionist reputation, though rarely has this been done by scientists themselves. This 'highest possible authority' view has been opposed on two sides, as it were. On the one hand, albeit only occasionally, it has been opposed by an ultra-perfectionist view which regrets the fact that science is not doing enough to demonstrate the 'ultimate truth' of climate change. On the other hand, and much more often, it has been opposed by the view, shared by most scientists themselves, that science is not about the search for perfect knowledge but is, rather, concerned to establish only the best possible knowledge available at a given time by testing the evidence at hand. In the midst of this complex ongoing argument about science and its role, a plethora of opinions has emerged about whether climate change has ever taken place, about whether it is now taking place, about whether it will keep taking place, and so on.

So, we can conclude that at the intersection of the environment and science, as with the other real-world intersections we have discussed, perfectionist and anti-perfectionist understandings cannot be neatly separated one from another in the way that they can in our ideal-type account.

Moral and religious discourses may seem at first glance to be completely dominated by perfectionist thinking, inasmuch as they are discourses concerned with ultimate standards for living and dying. But, yet again, in the real world this is not always the case. In the course of their intersection with the environment, moral and religious discourses are often open to anti-perfectionist thinking. To explain what we mean it is best that we deal with religious discourses and then link them to moral discourses. Probably the most obvious examples in the long period at the centre of our concerns (the sixteenth century to the present) are the many subtle varieties of religious doctrine developed as part of and in the wake of the confessional disputes/wars in Europe often known as the Reformation. In this way the perfectionist thinking of strict Roman Catholic doctrine (and strict Lutheran doctrine for that matter) was challenged by different currents of anti-perfectionist thinking behind the many forms of Calvinist and other dissenting religious doctrines that emerged over hundreds of years. Some, such as the anti-perfectionist arguments of Christian Thomasius, a student of Pufendorf's, were very well developed:

> [A]ccording to Thomasius's anti-doctrinal, Epicurean style of Protestantism, the number of divine commandments relevant to salvation could be reduced to just three: to love God, and one's neighbor, and to have contempt for oneself (as a creature of passions always prone to disorder). As a result, all of the things that the competing confessions declared to be essential, and over which so much blood had been spilled – all of the church liturgies and sacraments, the vehement doctrinal disputes over the Trinity, the nature of Christ's presence in the Eucharist, the relation between Christ's 'two natures and one person', and so on – could be declared to be matters of moral indifference, turning them into matters of 'Christian freedom' or else of political regulation.
>
> (Hunter et al. 2007: xvi–xvii)

This is to say that Thomasius kept separate 'the fields of religion and politics in a way that ... removed salvation from the domain of church ritual ... and removed political authority from the domain of salvation'. The effect of this move was to leave 'individuals privately free to pursue salvation as they saw fit', and to leave the churches 'with the status of voluntary associations under state supervision' (Hunter et al. 2007: xvii).

In the domain of morality the influence of the alliance between Epicureanism and dissenting forms of Protestantism was equally important. The idea that there could only ever be one true morality, by which all things must be judged, was challenged in a variety of ways. For instance, the conventionalism developed by those, like Hobbes, keen to build a science of human behaviour held that all morals are in fact historically developed conventions. It should be noted that for this position morality was still vital, as a guide for living and dying, but it could no longer be assumed to be the same at all times and in all places (this style of commitment to morality remains important to anti-perfectionist arguments today). In a very similar vein, some international law thinkers, such as Vattel, developed a flexible way of understanding the moral obligations of parties to international treaties. This mode of understanding, in seeking 'to show how general principles can be explicated to suit particular cases and circumstances', is often known as casuistry. Casuistry is 'dedicated to managing the circumstances where the principles do not apply ... by mobilising arrays of lower-level conventions and customs that have been developed for and through specific "cases"' (Hunter 2012: 14).

The key question and the structure of the book

We have said enough to allow us to now pose what we regard as our book's key question: how do law and politics, entwined in various complex relations with sovereignty, the state, morality, religion, economy, aesthetics, and science, attempt to govern the environment and climate change?

We should emphasize, before we discuss the book's structure, that in answering the key question we will not attempt to hide our qualified admiration for the system of legal-political government. We say 'qualified admiration' because its record, as we will say many times hereafter, is checkered. As well as delivering the benefits we will discuss in the coming chapters, this system has been involved in colonial excesses, the French Revolution, the American Civil War, the First and Second World Wars, many economic depressions, to name just some of its more obvious inglorious moments. More than this, it quite often promises much more than it can deliver on a number of its noble goals, like wiping out poverty, improving the living conditions of minorities, generally looking out for the downtrodden, and, particularly relevant to us, helping those affected by natural disasters, such as Hurricane Katrina or the more recent Japanese earthquake and tsunami.

As a general remark on the other side of the ledger we might point to the system's resilience in at least always trying (or nearly always trying) to face up