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Bruce Ledewitz

Duquesne University, ledewitz@duq.edu

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Protecting Posterity: Economics, Abortion Politics, and the Law

David Orr's essay, "The Right to Life," is a heartfelt plea to the American economic, political, and legal communities to consider the danger our environment is in and act with dispatch to change our ways. I can only second his sense of imminent peril, and I can only add three observations to his cogent analysis.

In terms of economics, it is encouraging that Federal Judge Richard Posner, the founder of the law-and-economics movement in the United States, now recognizes, in a book aptly named *Catastrophe*, that humankind faces serious peril, particularly with regard to global warming (Posner 2004). Yet it is obvious from Orr's description of the book that Judge Posner does not acknowledge the role he and his methods of analysis have played in leading us to the environmental abyss. It is Judge Posner who has consistently advanced the view that man does, and should, act rationally to further his self-interest. Unfortunately, it is rational, in this narrow sense, for the current generation of human beings to use up the resources of this planet and disrupt its environmental systems to increase its own wealth. Commitments such as human solidarity or the intrinsic value of nature or sacrifice for others have always been treated by Judge Posner as vague fantasies. For him, the only values that are important are what can be bought and sold in the market.

Even in that sense of market, Judge Posner has led us astray. He must have known that the price system was not measuring all costs while we dis-

rupted the environment in this century. In effect, humans were using up capital and calling it growth. In the bizarre economics that valued coral reefs, for example, only if they were blown up in fishing, the financial incentive to destroy the Earth's capacity to sustain human life was almost irresistible. For many years, Judge Posner was in a position to address these crucial matters. Now, when it is almost too late, he places the blame on others—on the scientific illiteracy of the citizenry. The problem all along has been the form of industrial capitalism Judge Posner helped prop up.

In the realm of politics, Orr calls upon the pro-life movement to recognize the many ways in which human and other forms of life are threatened today. He clearly hopes that a broader life coalition can be formed in American politics. This is the context for the title of his essay, "The Right to Life." Orr's argument here has precursors. It is reminiscent of the seamless garment and consistent ethic of life position symbolized during his lifetime by Cardinal Joseph L. Bernardin. It is a call that cannot be repeated too often. The relationship between life issues and environmental threats has not been sufficiently stressed.

Yet, Orr seems hesitant to press his argument in the other direction—to environmentalists concerning opposition to abortion. Here he says almost nothing, beyond noting that the fetus has "no defenders other than those now living..." Much more than this would be needed to persuade an environmental movement, which, as Orr must be aware, has

been almost entirely pro-choice in a political sense. If he intends to make an environmental argument against abortion, or against easy access to abortion, he has not done so in this essay.

An environmental pro-life position has never been presented in mainstream American political life. By pro-life I am not referring to a fetus-at-any-cost position that would sacrifice the health of women or force them to bear the children of their rapists. I am not defending the recent legislation in South Dakota. I am referring instead to a devaluing of natural human life that uses abortion to achieve "designer babies" and, in many places, male offspring. Abortion plays a clear role in the nightmare world that Bill McKibben (2003) warns us against in *Enough: Staying Human in an Engineered Age* (Henry Holt, New York). Abortion is part of that inhuman engineering.

Environmentalists, including McKibben, have not been sufficiently critical in their thinking about the abortion issue. Abortion policy that considers human beings at the earliest stage of development as mere things to be used for our purposes, is the same thinking that considers the whole Earth as a thing to be used for our own purposes. To be an environmentalist should mean at least to be highly suspicious of abortion.

The legal aspect of Orr's essay is the longest but least focused part. He argues that the constitutional system of checks and balances has failed us because all branches of government have been captured by an extremist

faction within the Republican Party. The press can no longer fulfill its constitutional role of watchdog because of corporate media concentration. Advertising and political contributions have been given constitutional protection and now threaten to overwhelm our ability to make political judgments. As a result of all these and other trends, our national political discourse, once the envy of the world, is “pathetically limited.”

There is a good deal of truth in all this, and it is probably also true that the current interpretation of the Constitution by the courts has had something to do with it. Yet, Karl Marx expected money interests to dominate any capitalist country, without regard to its particular form of constitution and judicial review. In other words, I am not sure how significant a role law has played in bringing us to the political situation Orr is criticizing.

What can be said with certainty is that the law, even if it has not caused our problems, has not protected us against the fundamental failure of the political system that our environmental inaction demonstrates. The environmental crisis has simply not been addressed in constitutional terms. This omission by the law is noteworthy because the selfishness of the current generation with regard to the future would have horrified the founders of our nation, who wrote in the preamble of the U.S. Constitution of providing “Blessings” to “our Posterity.” They would be disappointed that their Constitution has not protected their posterity.

Can American constitutional law address this intergenerational crisis? Orr proposes a principle that no generation has the right to permanently alter the Earth and its systems. Can

such a principle be enforced in our courts? This question has two aspects—one technical and one fundamental. Technically, the question raises an issue of standing: who has the ability to go into court to represent the interests of persons not yet born? Fundamentally, the question raises the issue of the appropriate role of courts in a democratic system. The technical issue is not insurmountable. There are numerous instances in law in which future interests are taken into account. The harder matter is what rights future generations can be said to have under our Constitution.

Since the abortion decision *Roe v. Wade* in 1973—with its attendant corrosive impact on political life—the courts in general, and the Supreme Court in particular, have been wary of entering into deeply divisive issues without the guidance of specific constitutional texts. In recent years, and with some exceptions, the courts have tended not to declare new, “nontextual” rights. The environmental rights of future generations would be just such a nontextual right. Orr should therefore expect little help from the courts in enforcing his principle. We then are left to the same political processes that have not functioned well in the current environmental crisis.

Yet, this may not be the end of the matter. Whenever the courts enforce nontextual rights against majoritarian action, a question is addressed to the courts. By what right, it is asked, do you purport to rule over the people? By what right do you overturn democratically enacted law? Justice Antonin Scalia (1990) once wrote that judges do not know truth any better than “nine people picked at random from the Kansas City phone

directory” and thus have no special claim to wisdom that would justify their deciding controversial political issues.

Justice Scalia may be right, in general, about judges and democracy. But in what Orr calls this “intergenerational . . . tyranny,” the people themselves have no right to rule. This generation of voters has no right to take the fruits of the Earth and use them up. Those fruits rightfully belong to the humans and nonhumans that will follow us. Whatever harm would come from an aggressive judiciary attempting to protect the interests of the seventh generation could not fairly be called a democratic harm. It is no more undemocratic for the courts to intervene on behalf of our posterity than it would have been undemocratic to protect slaves from their masters when slaves had no right to vote.

It may yet occur, therefore, that one day the U.S. Constitution will be interpreted to protect our posterity from the selfishness of a current and temporary majority that seems inclined to consider only its own ease. Even if our judges were to do no more than speak the truth to this majority, they might play an important role in reinvigorating our common political life.

Bruce Ledewitz

Duquesne University School of Law, Pittsburgh PA 15282, U.S.A., email ledewitz@duq.edu

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