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Private Property Rights, Moral Extensionism and the Wise-Use Movement: A Rawlsian Analysis

ERIC REITAN

Department of Philosophy
204 Hanner Hall
Oklahoma State University
Stillwater, OK 74078, USA
Email: reitan@okstate.edu

ABSTRACT

Efforts to protect endangered species by regulating the use of privately owned lands are routinely resisted by appeal to the private property rights of landowners. Recently, the 'wise-use' movement has emerged as a primary representative of these landowners' claims. In addressing the issues raised by the wise-use movement and others like them, legal scholars and philosophers have typically examined the scope of private property rights and the extent to which these rights should influence public policy decisions when weighed against other moral considerations. Whether from an anthropocentric standpoint or from a perspective of moral extensionism, the key question seems to be the extent to which prima facie property rights are overridden by other moral interests, not whether such rights claims can reasonably be appealed to at all in public discussions of environmental justice. I argue, however, that a morally extensionist perspective not only introduces more potential defeaters of prima facie property rights, but actually strips appeals to private property rights of their moral significance. Hence, I argue on Rawlsian grounds that appealing to private property rights in the way that the wise-use movement does is unreasonable in a pluralistic society. In so doing, I show that a Rawlsian perspective may be more congenial to the interests of moral extensionists than is typically thought.

KEYWORDS

Anthropocentrism, Endangered Species Act, moral extensionism, property rights, John Rawls, wise-use movement

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I. THE WISE-USE CHALLENGE TO THE ENDANGERED SPECIES ACT

Efforts to enact laws protecting endangered species on privately owned lands have repeatedly encountered principled resistance on the grounds that such laws violate the rights of property owners. One contemporary example of such resistance is the so-called 'wise-use' movement – a broad-based coalition, made up largely of landowners, who oppose environmental regulations on the grounds that they violate private property rights. Recently, on the website for the 'Center for the Defense of Free Enterprise' (the primary organisation of the wise-use movement), wise-use leader and chief spokesperson Ron Arnold expressed the perspective of the movement in the following way:

> Government takes private property from its owners by another, more insidious, method (than direct confiscation): Enacting harsh regulations that prevent an owner from using the property. Intrusive regulations have increased greatly in the past twenty years, and have been written without provisions for just compensation of property owners who lose their property rights through regulatory power. Property rights are rights to use and control physical things. When the use or control of things is removed from the owner by regulatory power, that owner's property rights have been damaged or destroyed.[1]

What Arnold has in mind here is what in legal terms is referred to as a 'regulatory taking' – a regulation that, in terms of interference with the property owner's rights, has roughly the same effect as physical confiscation.[2] When such regulatory takings have 'no provision for just compensation', Arnold treats them as amounting to governmental theft. Arnold regards a number of environmental regulations as amounting to theft in this way, but he particularly targets the Endangered Species Act (ESA), which he blames for 'devastating the homes and farms of the small property owner by forcing strict 'NO USE' zones where endangered species live'.[3]

In an earlier essay (Arnold, 1996), Arnold argues that the culprit behind these supposedly unjust regulations is an 'ideological environmentalism', one that unfairly imposes its worldview on others who do not share its premises. Apparently, Arnold perceives the wise-use movement to be offering a more reasonable approach that appeals to legitimate principles for public decision-making – specifically, that people have a right to private property, and that there is at least a prima facie duty to compensate private property owners for regulations that restrict the use of their property.

Arnold's claims here quite naturally evoke Rawls' understanding of what constitutes reasonable public discourse. In effect, Arnold can be taken to be saying that environmentalists are being unreasonable in that they are trying to defend and justify public policy decisions by appealing to an ideology that falls outside what Rawls calls the 'overlapping consensus' of reasonable comprehensive doctrines.

There may be some truth to this charge – although I will suggest at the end that the ESA *can* be defended in a way that avoids the charge of unreasonable public discourse, even if sometimes it is not. In what follows, however, I argue that in appealing to something like the Rawlsian standard of reasonable public discourse, Arnold undermines the public credibility not only of ideological environmentalists, but also of the wise-use movement itself. This is so because the notion of private property rights upon which the wise-use argument depends falls outside the overlapping consensus of reasonable comprehensive doctrines in a pluralistic society.

II. LEGAL CHALLENGES TO THE WISE-USE ARGUMENT

The argument of the wise-use movement might be summarised as follows: Environmental regulations such as the ESA, by restricting what private property owners can do with their property, deprive owners of the opportunity to use their property in profitable or personally beneficial ways. But since the essence of the right to property is the right to control physical things for personal benefit, depriving owners of such control amounts to taking property away from them. Insofar as property owners are not fully compensated for the value of the lost property, this is a violation of property rights akin to theft.

Recent legal attacks on this line of thinking have focused on challenging the presumption that *any* regulation restricting use of private property calls for compensation. Legal scholars distinguish sharply between regulatory takings that are justified by appeal to eminent domain, and those that are justified by appeal to the police power of the state. The former involves taking private property in order to promote some public good, whereas the latter involves taking in order to prevent harm.[4] Only the former is thought to justify compensation. The latter does not call for compensation for the simple reason that the right not to be harmed trumps the right to use private property as one sees fit, and therefore imposes limitations on the scope of the latter right. To regulate the use of private property to protect others from being harmed by illegitimate uses is not an imposition on the rights of the property holder (since the property holder has no right to use property in harmful ways), and therefore does not demand compensation. In philosophical terms, the law has recognised that private property rights are defeasible prima facie rights, and that they are defeated whenever they conflict with the more pressing right not to be harmed.[5]

Clearly, the force of the wise-use case against environmental regulation is significantly *weakened* by this legal challenge. Some variation of the wise-use argument, however, may withstand the challenge while preserving much of what the wise-use movement wants. The legal challenge undermines only one feature of the rights claim made by the wise-use movement – namely, its *overriding* character. But property rights as conceived by the wise-use movement

have other significant defining characteristics – most especially, as we will see, the feature of being *natural* rather than *contractual*, and thus imposing limits on what kinds of social agreements can legitimately be made concerning the regulation of property use. Property rights can be conceived as defeasible prima facie rights without abandoning this other feature.

So long as this remains so, the wise-use movement can accommodate the concerns of legal scholars and yet offer a strong public critique of many environmental regulations, especially the ESA. While the public may have an interest in preserving endangered species, it is far from clear that every extinction actively *harms* the public. Hence, much of what the ESA demands of property owners would seem to fall, not under the police power of the state, but under eminent domain. Wise-use pundits could therefore modify their argument as follows: While property rights must give way to the public's right not to be harmed, they do *not* have to give way to the public's interest in pursuing social goods. Furthermore, before a given use of private property can be legitimately restricted without compensation, it must first be *established* that this use actually does inflict harm.[6] Uncompensated regulatory takings can be publicly justified, then, *only* by reference to *provable harms* to the public. But many environmental regulations – especially those flowing out of the ESA – do not meet this test. At best, they can be justified by appeal to eminent domain, which does *not* overcome the rights of property owners and hence *cannot* justify uncompensated takings. Many environmentalists would surely want to argue at this point that even if the ESA does not clearly or obviously prevent harm to the public, it does clearly prevent harm to nonhuman organisms and to ecosystems. But the relevance of this observation relies on the assumption that nonhuman organisms or ecosystems have direct moral standing – that, in the language of numerous environmentalists, they have 'intrinsic worth'. Thus, justifying the ESA by appeal to protecting nonhuman organisms from harm involves appealing to contested ideologies, and hence has no public legitimacy that could justify overriding the right to property.

My intention is to challenge this modified argument by showing that from a Rawlsian perspective the sort of appeal to private property rights made by the wise-use movement is every bit as illegitimate as the environmentalist's appeal to the intrinsic worth of nonhuman organisms. I mean to do so by showing, as noted at the end of the previous section, that the former appeal (just as much as the latter) falls outside the overlapping consensus of reasonable comprehensive doctrines – what Rawls maintains is the only landscape in which public debate may be legitimately waged. It falls outside this overlapping consensus *because it assumes the truth of anthropocentrism*. In a pluralistic society such as our own, where reasonable persons can have a comprehensive worldview that is decidedly *not* anthropocentric, any argument that assumes the truth of anthropocentrism (and hence is sound *only if* anthropocentrism is true) turns out to be *unreasonable* when put forward as a public reason for action.[7] As such,

these sorts of arguments are not relevant to public decision-making and cannot serve as a basis for prohibiting uncompensated regulatory takings imposed for the sake of protecting endangered species. I will develop this last point in detail in the final section of the paper.

First, however, I will have to show that the kind of appeal to property rights made by the wise-use movement, even in the modified argument, makes no sense outside an anthropocentric framework. I defend this point in the next three sections by looking at the wise-use argument through a morally extensionist lens – that is, from a framework that extends moral standing to organisms outside the human community. In so doing, it is not my intention to refute the wise-use movement from morally extensionist assumptions that they surely would not accept. My point is simply to set the stage for the broader Rawlsian argument by showing that the wise-use argument is essentially and inescapably anthropocentric.

III. ANTHROPOCENTRISM, MORAL EXTENSIONISM, AND NATURAL PROPERTY RIGHTS

An anthropocentric moral framework (the framework shared by both the wise-use movement and the legal critics who challenge the adequacy of their perspective) assumes that only human beings have direct moral relevance, and non-human entities are morally relevant only to the extent that they impact our capacity to fulfil our moral obligations to humans. This framework can be contrasted with morally extensionist frameworks – by which I mean, roughly, any moral perspective that gives direct moral standing not only to the human population but also to other entities (organisms and/or systems) within the biosphere.[8] Since Aldo Leopold's (1949) seminal treatment of the subject in 'The Land Ethic', moral extensionism has become almost a new orthodoxy among environmentalists.[9] To adopt such an extensionist moral standpoint is not to deny moral standing to human beings, but to extend moral standing beyond the human community into the non-human world (specifically to other living organisms, but perhaps also to ecosystems).[10]

It is immediately apparent that a morally extensionist perspective would increase the number of entities who might be harmed by the use of private property, and hence would increase the number of cases in which the police power could legitimately restrict property use without compensation. In other words, it is immediately apparent that moral extensionism would increase the number of potential defeaters for the prima facie property rights claims of property owners. This is not a trivial result, and would certainly create problems for the wise-use argument (significantly restricting the scope within which the right to property holds sway). But the problems with the wise-use argument go even deeper. What

is *not* immediately apparent is that an extensionist perspective would altogether vitiate the kind of property rights to which the wise-use argument appeals.

And yet that is precisely what I will show. There is a widespread assumption, even among many environmental philosophers, that no matter where one stands on the issue of whether environmental regulations unfairly violate private property rights, the property rights claims of property owners must at the very least be taken into *consideration* in public decision-making.[11] I challenge this assumption. More precisely, I argue that from a morally extensionist perspective, the kind of private property rights claim needed to support even the moderated wise-use perspective (according to which property rights must be respected except to prevent harm) is rendered illegitimate, even incoherent.

This is not to say that, given an extensionist perspective, there is *no* conception of private property rights that can play a role in resolving human conflicts. As we will see in a later section, an understanding of property rights as *contractual* rights emerging out of a social agreement among human beings may still play a significant role in intra-species assessments of justice. Property rights so conceived become a species-specific method for conflict resolution akin to those found among other species (e.g., wolf hierarchies).

The problem is that this contractual understanding of property rights will not do the work that the wise-use movements wants their appeal to rights to do. Instead, the wise-use movement must treat property rights as *natural* – as pre-existing any social contract. In the strong form of its argument, the wise-use movement claims that any loss to the value of private property through regulatory power, without due compensation, amounts to theft. This claim, obviously, is intended to impose a restriction on what kinds of regulations the state is authorised to make. Even in the weaker version of the wise-use argument, which takes into account the legal challenge, we find a similar effort to impose restraints on what kinds of legislation can be legitimately instituted. Legislation that restricts property use for purposes *other than* prevention of harm to others, without compensation, is illegitimate.

This understanding of the force and scope of property rights is not consistent with treating property rights as emerging *out of* a social contract – precisely because property rights are put forward as *a limiting condition* on what can legitimately be contracted. Unless some substantive property rights *pre-exist* our social contract, we would have no strong basis for condemning a social contract that defined property rights so as to allow uncompensated regulatory takings, not merely under the auspices of the police power but also (at least in some cases) under the auspices of eminent domain. We can certainly imagine a social contract in which the *contracted* right to property is limited for the sake of social interests that go beyond the police power to prevent harm – for example, by the collective interest in preserving endangered species for the sake of as-yet-to-be discovered medicinal uses to which they might be put. Thus, it is

only if property rights are considered natural that even the moderated wise-use argument can be sustained.

What we will see is that property rights conceived in this sense are essentially meaningless from any widely extensionist moral standpoint. Extension of moral standing broadly to living organisms and ecosystems results in the dissolution of those moral properties whose significance depends upon the assumption of anthropocentrism. Natural property rights are, it turns out, moral properties of this sort.

IV. LOCKE ON PROPERTY RIGHTS

To see this, we need to look at the theoretical underpinnings of natural property rights. Current understanding of natural property rights is deeply rooted in the thinking of John Locke, who offered, in *The Second Treatise of Government*, a seminal justification for them. Although there may be other bases for according natural property rights to persons, it should be clear by the end of this discussion that the critique I offer with respect to the Lockean justification would extend to alternative justifications as well. Furthermore, as Eugene Hargrove (1980) has pointed out, Locke's conception of natural property rights has a particularly direct and important influence on contemporary understandings of private property. Hence, a focus on Locke seems appropriate.

According to Locke, all private ownership comes from the labour of the individual, not from the government, or a social contract with others, or God, or any other external authority. Hence, no government can, without justification, interfere with the right of individuals to dispose of their property as they see fit – a fact that renders Locke's account particularly amenable to the purposes of the wise-use movement. For Locke, in an original State of Nature the earth was the common property of all humanity (given to human beings by God to support their survival), with no one possessing any private dominion over any part of it. But in order to make use of the resources of nature, humans need to appropriate some of that common property for private use. On the simplest level, we cannot benefit from a piece of fruit so long as it remains the common property of all. We must eat it, at which point it is taken out of the common pool. But what justifies this transformation from common property to private property? Locke puts the point as follows:

> Though the earth, and all inferior creatures, be common to all men, yet every man has a property in his own person: this nobody has any right to but himself. The labour of his body, and the work of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property (Locke, *Second Treatise,* sec. 27).

According to Locke, then, each of us is by nature endowed with a sole proprietary right to our own persons – our bodies and the activities of our bodies. No one else can claim to possess my body or the work of my hands. And anything that I take out of the state of nature by the work of my own labour – anything that I *appropriate* for myself (where 'appropriation' is understood to involve at least the physical effort of collecting or harvesting the resource) – becomes mixed with my labour and hence is mine to do with as I please, assuming that it has not already been appropriated by someone else, and assuming that the manner and extent of my appropriation allows others a comparably extensive access to natural resources.[12]

But notice two things about this analysis. First, the whole earth, including all animals and plants, is taken to belong to humans in common. Second, humans – but not, it seems, animals or plants – are said to have an individual right to their own bodies and the labour of their bodies. Both of these assumptions, which together form Locke's foundation for private property rights, are decidedly anthropocentric in character. It is humans, collectively and individually, who are the bearers of rights – and it is therefore humans (and humans alone) who are the possessors of private property rights. From Locke's anthropocentric starting point – that God has given the rest of nature *to humans* to support their survival – nothing else *could* follow.

V. THE ESSENTIALLY ANTHROPOCENTRIC CHARACTER OF LOCKEAN PROPERTY RIGHTS

This anthropocentrism is not merely accidental. We can't simply extend natural property rights to the non-human world, and thereby create a morally extensionist view of private property. If we eliminate the anthropocentric underpinnings of Locke's argument for private property rights, we eliminate private property rights altogether – at least private property rights conceived of as natural to persons.

To see this, consider what would happen if we tried to extend Locke's thinking to all living organisms (what can be called 'biocentrism'), such that the unappropriated resources of the planet constitute a commons from which all living organisms have an equal moral right to access. Once a resource has been appropriated by a living organism for the purpose of ensuring survival or promoting well-being, that resource is removed from the commons. A resource can properly be said to be appropriated if a living organism has taken that resource into its physical structure, or has mixed its labour with that resource to make some product instrumental to the organism's purposes (e.g. a bird's nest or beaver dam). Once this is done, the resource becomes the private property of the organism, and no other organism has any right to it.

The absurdity of this biocentric account of property rights becomes clear as soon as we recognise that for a great many living organisms, the resources that

they depend on for survival are *other* living organisms. Few animals can survive on nothing but unappropriated resources. Herbivores must eat plants, and in so doing they are appropriating resources that have already been appropriated by the plant. Likewise, the herbivore is its predator's resource. But if Locke's idea of property rights is extended beyond one species to include all, then the herbivore has no right to appropriate the plant for its own use, and the predator has no right to appropriate the herbivore. This absurdity can be avoided only if we limit the extension of property rights to animals at the 'top' of their respective food chains. This solution won't work, however, for two reasons. First, the solution seems ad hoc: there appears to be no good reason, independent of the need to avoid the absurdity, that could justify extending moral standing to wolves but not to deer, etc. Once we break through the anthropocentric moral barrier, it becomes hard to identify a non-arbitrary ground for limiting the scope of moral concern to some sentient animals but not others. And a moral perspective that extends to all sentient animals, predator and prey alike, appears sufficient to generate problems for natural property rights. Second, to view ecosystems as hierarchical, with a theoretical 'top' of the food chain, is to oversimplify the far more complex character of ecosystemic relationships. Just think of the ways in which every 'top' predator provides resources to parasites, to insects such as mosquitoes, and to various microorganisms.

Any extensionist environmental ethic that is to be sensitive to the realities of ecosystems must permit access to resources that have already been appropriated by other living organisms. If resources in ecosystems are constantly being appropriated and re-appropriated through the labour of diverse organisms interacting in a dynamic web of interdependence, then the claim to private property is essentially the effort to remove some resources from that ecosystemic web. Appropriation through personal labour is, in Locke's system, supposed to justify such removal. But from any widely extensionist moral standpoint, appropriation cannot be legitimately appealed to as a criterion for restricting access to resources. How then can we morally justify the notion of natural property rights at all from any plausible morally extensionist perspective? We cannot. From such a perspective there can be no natural property rights as conceived by Locke.

Furthermore, the precise details of Locke's account of the origin of property rights are not necessary to generate these problems. If the right to property is the right to have essentially exclusive use of appropriated resources, then extending natural property rights beyond human beings to all sentient organisms will generate all the absurdities spelled out above – even if the other details of Locke's account are left out.

Natural property rights as traditionally understood are therefore *essentially* anthropocentric. They make sense only if humans have a unique place in the biosphere. But if moral extensionism is accepted, then natural property rights claims are simply an illegitimate attempt to exempt oneself and the products of one's labours from the dynamics of nature.

Of course, we can still view private property rights as part of a species-specific agreement among humans on how to resolve human-based conflicts about the allocation of resources. Understood in this way, private property rights continue to have significance. Many species have conflict-reducing strategies for allocating resources within their own ranks – such as hierarchies and territorialism. But no one would try to impose wolf-hierarchies on the whole of nature – and that would be exactly the sort of thing we'd be doing if we tried, in complex environmental decision-making involving the conflicting interests of diverse species, to attach to contractual human property rights the kind of decisive force demanded by the wise-use movement. From a standpoint of moral extensionism, human beings have an obligation to take into consideration the interests of non-humans. Human policies and practices that significantly affect the non-human world must therefore represent not merely the moral claims of human beings but also those of other living organisms. While contractual rights may well come into play with respect to the former, they have no bearing at all on the latter. As such, from an extensionist perspective contractual rights claims would carry little or no moral weight in determining environmental policies that are directed first and foremost towards the protection of non-human interests.

In short, from a morally extensionist perspective natural property rights are essentially incoherent while contractual property rights only make claims against a small subset of the total field of morally relevant entities. In either case, the claims of the wise-use movement collapse.

It is important to keep in mind that my aim here is *not* to critique the wise-use argument by assuming a morally extensionist perspective. It is certainly true that by assuming this perspective, uncompensated regulatory takings for the sake of protecting endangered species can be justified by appeal to the police power of the state: such regulations prevent harm to morally significant organisms. But this line of argument falls prey to Arnold's complaint that a controversial ideology is being foisted on those who do not embrace it. Everyone agrees that harms to humans have direct moral significance, but many deny that harms to nonhumans have such significance. Hence, it cannot be simply *assumed* that preventing such harms justifies truncations in the scope of property rights.

My purpose in showing that moral extensionism invalidates the claims of the wise-use movement is not in order to refute the movement's position by begging the question about whether anthropocentrism or extensionism is true. Rather, my aim is to highlight the fact that by relying on an argument that makes no sense form an extensionist standpoint, the wise-use movement is begging this very question. And *that* is highly significant from a Rawlsian political perspective.

VI. SIGNIFICANCE: WISE-USE AS AN EXAMPLE OF UNREASONABLE PUBLIC DISCOURSE

What the above analysis shows is that the claim that property rights offer a sufficient basis for opposing the ESA and similar environmental protection policies makes sense only if an anthropocentric worldview is embraced. But environmental policy decisions are made in a pluralistic society in which growing numbers of people bring a variety of morally-extensionist worldviews to the discourse. Given such a pluralistic context, John Rawls' account of what constitutes reasonable public discourse is especially relevant. It turns out that if we apply Rawls' thinking to this case, we find that the arguments of the wise-use movement are paradigmatically *unreasonable*.

It may seem strange to appeal to Rawls in this context, since the Rawlsian conception of justice, based as it is on rational agreement among *persons* in the original position, does not explicitly extend the sphere of justice to include the nonhuman world. Animals, plants, and ecosystems cannot enter into a social contract. But what becomes evident in the development of Rawls' perspective in *Political Liberalism* is that the conditions of just social cooperation must leave room for competing reasonable comprehensive doctrines – and this would include those comprehensive doctrines that are morally extensionist.

The fundamental question driving Rawls' project in *Political Liberalism* is summarised by Rawls himself as follows: 'How is it possible for there to exist over time a just and stable society of free and equal citizens, who remain profoundly divided by reasonable religious, philosophical, and moral doctrines?' (Rawls 1993: 4) In other words, how can reasonable public discourse and decision-making proceed in a pluralistic context such that all of the competing but reasonable comprehensive worldviews are respected over time? Rawls' answer is that public reason – that is, reason employed in public discourse to support public decisions about social policies and practices – must appeal to the 'overlapping consensus' among reasonable doctrines.

It is important to keep in mind here that the overlapping consensus is constituted by *all* the reasonable comprehensive doctrines that jointly constitute the pluralistic society. Rawls does at one point indicate that the doctrines making up the overlapping consensus include only those 'that gain a significant body of adherents and endure over time' (Rawls 2001: 32). But his persistent emphasis on reasonability as the criterion for inclusion in the consensus suggests that we should take these qualifications as serving to identify which comprehensive doctrines should really be classified as *constituents* of the pluralistic society. The idea here seems to be to preserve the stability of the overlapping consensus as a framework for public discourse by insisting that it need not change with every 'fad doctrine' that a few people take up for a brief time. Such fad doctrines, no matter how reasonable they might be in themselves, are not enduring features

of the pluralistic society. But every reasonable comprehensive doctrine that *is* an enduring feature of the pluralistic society must be included.

While 'a significant body of adherents' and 'enduring over time' are vague expressions, this vagueness should not constitute a difficulty in the present discourse since moral extensionism has endured and expanded in American culture since at least the middle of the twentieth century and has gained a substantial body of adherents over that time. The success of moral extensionism rests in part with the ways in which it has tapped into and found connections with deeply entrenched traditional belief systems, becoming in many cases a part of these older systems of thought. It is this trend which has led Mary Evelyn Tucker to hold that 'religions are beginning to move into their ecological phase and find their planetary expression' (Tucker 2003: 14). In any event, moral extensionism is clearly more than just a fad.

But if the *key* criterion for inclusion within the overlapping consensus is reasonability, we need to say something about what makes a doctrine reasonable. A comprehensive doctrine is reasonable to the extent that it permits its adherents to be reasonable – where reasonable persons are taken to be those who 'desire for its own sake a social world in which they, as free and equal, can cooperate with others on terms all can accept' (Rawls 1993: 50). Conversely, a comprehensive doctrine would be unreasonable to the extent that something about its content *precludes* its adherents from being reasonable in the indicated sense. Examples would include any worldview whose basic presuppositions entail commitment to a social world characterised by inequality and oppression (such as that of white supremacist groups), and any fanatical ideology which holds that only adherents to its distinctive precepts should be afforded social and political standing (such as at least some forms of religious fundamentalism). Such comprehensive doctrines, no matter how many adherents they have and no matter how enduring they might be over time, are excluded from playing any role in constituting the overlapping consensus from which reasonable public discourse draws its premises.

Understood in this light, both anthropocentric and morally extensionist perspectives have every appearance of being reasonable. Neither doctrine precludes its adherents from desiring a social world characterised by the freedom and equality of all its (human) members, nor does either perspective *require* those who embrace it to impose their purely private reasons on others in public discourse (no matter how frequently individual adherents might choose to do so). Both doctrines leave room for establishing an overlapping consensus – that is, a set of reasons for action that do not depend upon a particular comprehensive doctrine but instead can be affirmed by adherents to any reasonable comprehensive doctrine in the pluralistic society.

According to Rawls, this overlapping consensus among reasonable doctrines emerges through the application of his basic conception of justice as fairness as applied to the context of a pluralistic society: what is fair from the standpoint

of *any* reasonable comprehensive doctrine is what is in keeping with the basic principles that would be agreed to by rational representatives of these doctrines operating from behind an appropriate 'veil of ignorance'. This veil of ignorance has the function of representing what it would be like for the various representatives to pursue agreement without appeal to the bargaining advantages that often accompany contingent social realities. And Rawls notes that in a pluralistic society, 'the fact that we affirm a particular religious, philosophical, or moral comprehensive doctrine with its associated conception of the good is not a reason for us to propose, or expect others to accept, a conception of justice that favours those of that persuasion' (Rawls 1993: 24). Rawls is convinced that so long as the representatives of the comprehensive doctrines are not committed to principles of inequality or oppression by virtue of the content of those doctrines (in other words, so long as the doctrines they represent are reasonable in his sense), decision-making behind this veil of ignorance will generate an overlapping consensus that includes Rawls' own political conception of justice (Rawls 2001: 32–3). As such, the overlapping consensus of reasonable comprehensive doctrines is guaranteed to have enough richness of content to serve as a fruitful foundation for public discourse without the need to import the often conflicting beliefs that fall outside the consensus.

To engage in reasonable public discourse involves, then, setting aside the reasons that are persuasive *only from the standpoint of a particular comprehensive doctrine*, and appealing only to reasons that fall within the overlapping consensus. For example, a concern for preserving the sustainability of human societies and the health of the geo-ecological systems upon which those societies depend would appear to fall within an overlapping consensus among anthropocentric *and* morally extensionist moral systems (albeit for different reasons). Hence, it would be reasonable in public discourse for those who support environmental protection policies to refer to the role that these policies could play in preserving sustainable human societies and the health of the geo-ecological systems upon which they depend. It would also be reasonable for those who advocate private control over resources to discuss the ways in which private control encourages resource conservation.[13] What is not reasonable in public discourse is to appeal to premises of one's comprehensive doctrine that fall outside the scope of the overlapping consensus. Hence, it is not reasonable for moral extensionists to propose, as a public argument for uncompensated regulatory takings done for the sake of protecting an endangered species, the moral duty to respect the intrinsic value of that species. This may be shared as a *personal* reason for supporting such a policy, and may be a motivating factor in the environmentalist's enthusiasm for the policy. But to expect an argument based on the particular doctrines of one comprehensive worldview to determine public decision-making in a pluralistic society is, from a Rawlsian perspective, unreasonable.

Public decision-making in a pluralistic setting must be based on premises that fall within the overlapping consensus of reasonable doctrines. And for this

very reason it is not reasonable for the wise-use movement to argue against environmental policies such as the ESA on the basis of an essentially anthropocentric notion of private property rights. To claim that the state *must* compensate property owners for regulatory takings, when the regulations do not demonstrably protect the public from harm but are instead justified for the sake of protecting endangered species, is to assume the existence of natural property rights. And this assumption can be made only if a strictly anthropocentric worldview is embraced – in other words, only if it is assumed that direct moral relevance extends *only* to humans. But insofar as some of the comprehensive doctrines that form the overlapping consensus deny this assumption, it is unreasonable to appeal to it in public debate.

A wise-use sympathiser might argue at this point that, even if some of the arguments of the movement are inappropriate from a Rawlsian perspective, they still have a legitimate claim against the ESA. In fact, their objection to the ESA can be justified by the very perspective that I have brought to bear against the wise-use movement in this essay: the legal implications of the ESA fall outside the scope of what could be supported by the overlapping consensus of reasonable doctrines, in that these implications can ultimately be justified only by reference to morally extensionist assumptions. In particular, the ESA makes no distinction among endangered species by reference to their utility to human beings, and as such falls outside any overlapping consensus in a pluralistic society that includes anthropocentric comprehensive doctrines.

Consider an example offered by David Ehrenfeld, who notes that while 'lichens, which were once ubiquitous, might play some arcane but vital role in the long-term ecology of forests, the same claim could not seriously be made for the furbish lousewort, a small member of the snapdragon family which has probably never been other than a rare constituent of the forests of Maine' (Ehrenfeld 1981: 188). Since the ESA requires the preservation of the furbish lousewort, it appears as if its requirements exceed what can be justified by reference to the overlapping consensus of comprehensive doctrines.

Hence, even though the wise-use movement cannot justify their opposition to the ESA based on their strong Lockean conception of property rights, they *can* legitimately complain that the ESA itself is justified by appeal to principles that fall outside the overlapping consensus of reasonable comprehensive doctrines.

The claim here – that the ESA is unreasonable in a Rawlsian sense – rests on the assumption that a strong commitment to preserving biodiversity (that is, one that extends even to the preservation of species that seem to have little or no effect on human flourishing) cannot be justified *except* by appeal to morally extensionist assumptions that fall outside the overlapping consensus. But this assumption is not obviously true. In fact, E.O. Wilson – a seminal figure in calling public attention to the role of biodiversity in the maintenance

of ecosystems – endorses precisely such a strong commitment on essentially anthropocentric grounds:

> What difference does it make if some species are extinguished, if even half of all the species on earth disappear? Let me count the ways. New sources of scientific information will be lost. Vast potential biological wealth will be destroyed. Still undeveloped medicines, crops, pharmaceuticals, timber, fibres, pulps, soil-restoring vegetation, petroleum substitutes, and other products and amenities will never come to light. It is fashionable in some quarters to wave aside the small and obscure, the bugs and the weeds, forgetting that an obscure moth from Latin America saved Australia's pastureland from overgrowth by cactus, that the rosy periwinkle provided the cure for Hodgkin's disease and childhood lymphocytic leukaemia … that a chemical from the saliva of leeches dissolves blood clots during surgery, and so on down a roster already grown long and illustrious despite limited research addressed to it (Wilson 1992: 345).

In addition to the possibility of losing out on potentially valuable resources when species become extinct, Wilson also stresses the ways in which biodiversity supports ecological stability, the lack of which might threaten human welfare. He also addresses the more abstract questions of how our environment contributes to our psychological health, suggesting that an environment substantially similar to the one in which we evolved – that is, an environment rich in biodiversity – may be more congenial to the health of the human psyche than other, less biodiverse environments (Wilson 1992: 345–51).

Throughout this line of argument, the justification for a strong respect for biodiversity is anthropocentric in character. The argument, as applied to the ESA, would run roughly as follows: While it is not obvious, given our present knowledge, how the furbish lousewort might contribute to human flourishing, valuable contributions to human society have come from equally unlikely sources. By allowing species to go extinct at rates that exceed the emergence of new species, we allow the storehouse of potential resources to decline, which in turn may well reduce our capacity to respond to human and social ills. Furthermore, the safest course for protecting the health of the ecosystems upon which human society depends is to try our best to preserve or even increase the amount of biodiversity in those systems. Therefore, given our limited understanding, human interests are most reliably served by a policy that protects *any* species that becomes endangered, not just the ones whose value we understand and appreciate.

Notice that this anthropocentric defence of the ESA appeals ultimately to the public interest in preserving a diverse array of potential resources and sources of life-enrichment. It does not appeal mainly to the harms that species extinction does to the public, but rather to the lost opportunities. In other words, this justification for the ESA appeals to eminent domain rather than to the police power of the state. The significance of my argument here is this: The view that

compensation is *required* for regulatory takings done under the auspices of eminent domain makes sense only from an anthropocentric standpoint, and hence falls outside the overlapping consensus of comprehensive doctrines. While a society might *choose* to compensate property holders for these regulatory takings, we cannot assume that there is a natural right to property that *demands* such compensation. To assume this, and to oppose the ESA on these grounds, is to engage in unreasonable public discourse.

The point here is that the public policy of protecting even those endangered species that have no known direct benefit to human beings can and is defended on the basis of assumptions that are not unique to moral extensionists, and hence that may readily fall within the scope of the overlapping consensus of reasonable doctrines. The wise-use objections to the ESA, on the contrary, depend ultimately on arguments that fall clearly outside this scope. The wise-use movement is, in effect, guilty of seeking to impose its private ideology on public discourse – the very thing that Ron Arnold accuses the environmental movement of doing in his essay, 'Overcoming Ideology'. From the essentially Rawlsian stance that Arnold adopts in his critique of environmentalist arguments, he and the rest of the wise-use movement are – to put the point simply and starkly – unreasonable ideologues.

This conclusion is significant, in part, because it shows us the error of taking too far the view that a Rawlsian understanding of reasonable public discourse decisively favors anthropocentric doctrines over extensionist ones.[14] Since morally extensionist perspectives *include* human interests within the scope of direct moral concern, while anthropocentric perspectives include *only* human interests, it seems as if the moral concerns of anthropocentrists are in a sense *contained within* the scope of the moral extensionist's concerns. As such, an overlapping consensus would more fully represent the concerns of anthropocentrists than it would those of moral extensionists. This would seem to slant the Rawlsian understanding of reasonable discourse decisively in favor of the anthropocentrist, giving anthropocentric arguments a prima facie reasonableness that extensionist arguments lack. But even if there is some truth to this line of thinking, it can easily be taken too far. While the anthropocentric assumption that humans have direct moral relevance is included within the overlapping consensus, their assumption that *only* humans matter is *excluded*. And this exclusion has great significance for environmental discourse. Among other things, it implies that certain kinds of anthropocentric arguments are unreasonable – for example, the wise-use argument examined above. Hence, even though a Rawlsian understanding of reasonable public discourse may not give environmentalists everything they hope for, it undermines the hegemony of anthropocentrism that has so often shut out moral extensionist concerns in the past. And this is hardly a trivial outcome for the moral extensionist.

NOTES

[1] These quotes recently appeared on the web page entitled 'The Center's Issues and Positions', on the *Center for the Defense of Free Enterprise* website. The website has since undergone extensive reconstruction, and the Arnold essay has been replaced by a series of shorter position pieces by multiple authors. These shorter pieces express essentially the same ideas, but in a less unified way. See http://www.cdfe.org/issues.htm.

[2] Regulatory taking was first recognised as a legal category in the Pennsylvania Coal Co. v. Mahon decision of 1922.

[3] Again, this quote appeared in the since deleted web page.

[4] The classic formulation of this distinction is offered by Ernst Freund (1904: 546–7).

[5] For concise treatment of this line of argument, see Peter Byrne (1995). For a more developed treatment of the same basic line of argument, see Lynda J. Oswald (2000)

[6] It is not at all clear that Arnold would embrace this modification of the wise-use argument, especially given his conviction that the right to property is the 'key' to all other freedoms – an idea that Arnold thinks is supported by the Supreme Court ruling in *Lynch vs. Household Finance Corporation* (Arnold 2000: 19). Nevertheless, insofar as the unmodified argument is so strikingly untenable, I will treat this modified argument as a kind of 'friendly amendment' to the explicitly articulated wise-use perspective.

[7] This is not to say that the worldview of the wise-use movement is an irrational comprehensive doctrine whose implications cannot help to constitute the overlapping consensus in a pluralistic society. Rather, it is to say that the wise-use movement is bringing into the public debate dimensions of its comprehensive doctrine that fall outside the overlapping consensus. Many environmentalists may be guilty of the same thing, insofar as they bring to the table considerations that those who accept the ideology of the wise-use movement would be unwilling to take seriously. It is worth noting, however, that these environmentalists also tend to be less ready to explicitly endorse an essentially Rawlsian understanding of reasonable public discourse, often arguing that the very survival of flourishing human-natural systems depends on a widespread conversion of human beings away from prevalent anthropocentric worldviews.

[8] This use of the term 'moral extensionism' may not precisely correspond with common usage, according to which extending direct moral consideration to classes of humans that have not previously been considered (e.g. future generations) would also qualify as moral extensionism. Nevertheless, because the term is *typically* used in connection with moral perspectives that extend direct moral standing to non-human entities, it serves as a useful summary term for a variety of moral perspectives – ecocentrism, biocentrism, zoocentrism, etc. – that are united by their insistence that not only humans have direct moral standing.

[9] Since Leopold's seminal essay, widely extensionist perspectives have been developed and defended by J. Baird Callicott (1987), Kenneth E. Goodpaster (1978), Paul W. Taylor (1981), and others. The case for extending moral consideration more narrowly to animals is made strongly by Peter Singer (1975) and Tom Regan (1983).

[10] It seems evident that any comprehensive moral doctrine that *excluded* human beings from the scope of direct moral concern would be among the doctrines that Rawls would regard as in themselves unreasonable, and therefore of the sort that should *not* be included within the overlapping consensus of reasonable doctrines.

[11] A number of recent philosophical essays argue that the property rights claims of landowners are not decisive in the way that the wise-use movement thinks, without ever directly challenging the judgment that these claims are relevant to public decision-making. See, for example, Ellen Frankel Paul (1981), Robert E. Goodin (1990), and Zev Trachtenberg (1996).

[12] Locke assumes throughout his argument that there are sufficient natural resources for the whole of humanity, and that the only limit on private property ownership is therefore the industry of individuals. As Hargrove has noted, this assumption – whatever its merits at the time of Locke's writing – is not true today. Hence, the current scarcity of natural resources poses a significant challenge to any Lockean notion of private property rights. I will not explore in detail this difficulty with private property rights, since it has been adequately addressed elsewhere. See Hargrove (1980: 140–8).

[13] Thus, for example, Garret Hardin's (1968) arguments in 'The Tragedy of the Commons' have relevance to public discourse concerning the proper scope of private property rights.

[14] A view that Rawls himself endorses (Rawls 1993: 245–6).

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