

From Neil Gorsuch to Amartya Sen: Natural Law, Ethics, Economics

The nomination of Judge Neil Gorsuch to the Supreme Court has renewed the legal debate concerning natural law, a philosophy that grounds the law's legitimacy in universal ethical values originating in human nature and reason. Natural law is often contrasted with legal positivism and realism, which dispense with notions of transcendent morality, articulating a jurisprudence where social science and political facts help ground legal policy choices. In practice, the realist approach came to be most associated with the progressive, activist wing of the Warren court, while natural law influences much of the conservative jurisprudence espoused by organizations like the Federalist Society.

But the concept of natural law does not necessarily entail the economic and social approaches espoused by many of its proponents today in the United States. An illuminating contrast can be found in the evolution over the past three decades of ethically grounded environmental and social policies to guide international development lending and investment.

In the 1980s, the social and environmental impacts of World Bank lending, for example on vulnerable indigenous groups and populations displaced by large infrastructure projects, and bank projects that accelerated destruction of rainforests and biodiversity in borrowing countries led to popular resistance movements in nations such as India and Brazil, as well as to growing protests of civil society groups in the bank's donor nations. The impetus for these protests was not just the economic self-interest of adversely affected groups, but moral objections to harming marginalized populations and ethical alarm over the destruction of species and ecosystems — rationalized by development leaders as trade-offs for economic progress.

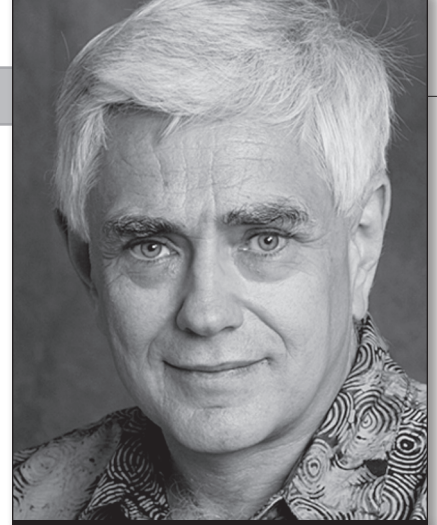
In response, the bank promulgated the first "safeguard policy" in 1980 for the equitable treatment of populations involuntarily resettled by financed projects, followed by policies on protection of indigenous peoples and requirements for environmental and social assessment and protection of natural habitats and biodiversity. Analogous safeguard procedures were adopted by other multilateral development banks, bilateral aid agencies and export credit agencies, and private banks.

One can elaborate in some cases utilitarian, economic reasons for these policies, as well as scientific justifications for many of the environmental protections. But the safeguards are grounded in growing, internationally shared awareness of non-economic ethical values that should serve as limits to lending and investment.

A needed global ethic for long-term human well-being and indeed for planetary survival

None other than Amartya Sen, viewed by many as the greatest living development economist, has espoused a view of economics that is closer to a natural law interpretation as opposed to the more conventional, positivist, utilitarian approach. Sen maintains that most economic analysis has gone astray by forgetting its historical origins as a branch of moral philosophy. "The methodology of so-called 'positive economics,'" Sen writes, "has not only shunned normative analysis in economics, it has also had the effect of ignoring a variety of complex ethical considerations which affect actual human behavior."

Sen observes that the contemporary revival of interest in Adam Smith has often mischaracterized his thought. "It would be . . . hard to carve out from [Smith's] works any theory of the sufficiency of the market economy, of the need to accept the dominance of capital," Sen wrote in 2009. In Smith's *The Theory of Moral Sentiments*, Sen notes,



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Smith prioritizes the role of universally shared ethical values in social and economic behavior.

Paradoxically, the World Bank recently weakened its safeguards, acquiescing to the views of some bank management and member governments that they are impediments to lending and to remaining competitive with other financial institutions. This policy retreat went forth as global environmental and social threats become more acute, and despite bank internal reviews that found projects adversely affecting over three million people, often in violation of its resettlement policy.

The greater paradox is that the natural law rationale, sometimes advanced domestically to justify weakening government regulation, arguably supports with greater cogency stronger environmental and social safeguards, both domestically and internationally.

The challenge is whether the forces that have been unleashed through globalization — which have catalyzed the resurgence of reactionary, populist, nationalist, neo-mercantilist politics in many countries — can be constrained and guided by standards that are agreed upon and enforced. Such rules would have to be grounded in common ethical principles that societies recognize as having priority over short-term, parochial economic and political goals.

The debate over natural law in the legal and economic spheres leads us to the urgency of a global ethic for long-term human well-being, indeed, an ethic for survival.