ESSAY

Advocacy, Frame, and the Intergenerational Imperative: A Reply to Professor Weiss on "Beyond Fairness to Future Generations"

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Edith Brown Weiss's thoughtful critique of my article "Beyond Fairness to Future Generations" revisits some old issues and raises some new ones.[1] At least five of these issues warrant further comment here.

I. THE THEORETICAL BASIS OF OUR CONCERN FOR FUTURE GENERATIONS

Underlying my proposal in "Beyond Fairness" is the conviction that we can achieve intergenerational equity in environmental matters in part by harnessing our inherent tendency to care about certain members of future generations in certain ways. As products of natural selection, human beings "care" about future generations in the sense that each of us is genetically predisposed to do whatever it takes to perpetuate our genes into the next generation in the form of individuals who are genetically predisposed to do the same. We can achieve this objective by focusing on

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1. Edith Brown Weiss, *A Reply to Barresi's "Beyond Fairness to Future Generations*," 11 TUL. ENV. L.J. 89 (1997) [hereinafter Weiss Reply].

our own offspring, by focusing on the offspring of close relatives, or by focusing on both.

As the genetic function of this predisposition suggests, our concern about members of future generations tends to vary in proportion to the degree to which we perceive them to be related to us. We tend to care more about our own offspring than about the offspring of our siblings. We tend to care more about the offspring of our siblings than about the offspring of our distant cousins, and so on. We tend to care least about the offspring of people who seem to be the most distantly related to us. The offspring of people of races, ethnic groups, or territorial jurisdictions different from our own tend to fall into this category to a greater or lesser degree.

How these biological principles play themselves out in human society is especially complex because humans have invented culture, which can be conceptualized as an accretion of conscious choices that members of past and present generations have made about the desirability of perpetuating particular living arrangements. Nevertheless, culture tends to reinforce biology. Many common cultural practices—such as nepotism, Western intestacy statutes, and perhaps even socialism to patriotism—can be explained by reference to a genetic predisposition to do whatever is necessary to enhance one's own reproductive success.

Professor Weiss seems to acknowledge the strength of the evidence in support of these points, but goes on to suggest that we should seek to identify other theories in which to "root" our concern for future generations because of the possibility that our biologically-based concern might cease to exist. Professor Weiss fails to offer any reason why we should expect our biologically based concern to cease to exist, however, thus highlighting the weakness of her argument.

To "care" about future generations in the biological sense that I have described is the essence of what it means to be a member of a species that is the product of natural selection. Accordingly, it is difficult to imagine any likely set of circumstances that would cause our species to stop "caring" about future generations in this sense. The only set of circumstances that readily comes to mind would require the simultaneous occurrence of a prolonged cessation of natural selection with regard to virtually all human beings and an equally prolonged period of genetic drift so pernicious as to rob virtually all of us of that part of our genetic inheritance that embodies the biological reason for being a member of any species: to perpetuate genes into the next generation in a way that ensures that the individuals who carry those genes will tend to do the

same.[2] The occurrence of such a set of circumstances seems so unlikely as to be unworthy of serious concern.

Nevertheless, there is at least one compelling reason why we should seek to further elucidate the source of our inherent concern for future generations and the manner in which that concern tends to manifest itself. A more comprehensive theoretical understanding of the source and nature of that concern would allow us to assess more accurately the likelihood that any legal regimen intended to achieve intergenerational equity would appeal to our deeply rooted predispositions. Unfortunately, as I argue in "Beyond Fairness," none of the Western religious, legal, or other doctrines offered by Professor Weiss in her own proposal currently seems to be a significant source of our concern for future generations in the Western industrial democracies that I argue must endorse any effort intended to achieve intergenerational equity if that effort is to succeed.[3]

The effort to further elucidate the source and nature of our inherent concern for members of future generations should continue, as should efforts to enhance the impact of that concern by developing additional rationales for taking specific actions that will help to vindicate it. If undertaken in an appropriate manner, such efforts should help to ensure that we succeed in developing a legal regimen that is adequate to the task of achieving intergenerational equity in environmental matters. If undertaken in an inappropriate manner, however, such efforts could help to ensure that we fail.

Professor Weiss refers to my effort to elucidate the biological basis of our inherent concern for members of future generations as "rooting" our concern for members of future generations in biology.[4] Her use of the

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2. "Genetic drift" in this context refers to a random shift over the course of generations in the frequencies of genes not subject to the pressures of natural selection, which eventually can produce either a population in which all individuals carry a given form of a gene or a population in which no individuals carry that form of the gene. *See* DOUGLAS J. FUTUYAMA, EVOLUTIONARY BIOLOGY 129-30 (2d ed. 1986).

3. One might make a similar argument with regard to many of the non-Western religious, legal, and other doctrines on which Professor Weiss also relies. *Cf.* EDITH BROWN WEISS, IN FAIRNESS TO FUTURE GENERATIONS 18, 20 (1989) [hereinafter WEISS]. The empirical evidence strongly suggests that whatever role these doctrines may have played in non-Western cultures in the distant past, they have not remained sufficiently viable to prevent the creation of serious environmental problems. *See, e.g.*, Stan Grossfeld, *Trouble in Paradise*, BOSTON SUNDAY GLOBE, May 30, 1993, at 8 (discussing environmental problems in Madagascar); Sheryl WuDunn, *Chinese Suffer from Rising Pollution as Byproduct of the Industrial Boom*, N.Y. TIMES, Feb. 28, 1993, at 1:20; *Asia Fire Damage Over $1B*, Feb. 25, 1998, *available in* LEXIS, Nexis Library, AP File (deliberately set forest fires in Indonesia). Indeed, to the extent that the environmentally friendly doctrines to which Professor Weiss refers remain viable at all, either in Western or major non-Western cultures, they seem to remain viable primarily as vestigial reminders of an ancestral cultural condition.

4. Weiss Reply, *supra* note 1, at 89.

verb "rooting" in this context is unfortunate because it implies the act of planting, which in turns implies that we are free to pick and choose among theoretical explanations of our concern without regard to the empirical realities of the world in which we live. To believe that we have this sort of freedom would be to fall prey to Cartesian dualism, the tendency inherent in Western thought to erect a philosophical barrier between mind and body, between matter and spirit, and between the physical world and the intellectual one, which we have inherited from Plato through Descartes, and which environmentalists from across the ideological spectrum often blame as the source of our environmental problems.[5]

One empirical reality of the world in which we live is that we are members of a biological species that has been produced by biological processes. Although it would be foolish to argue that the relationship between human genotypes and complex human behaviors is a deterministic one, it would be equally foolish to argue that we can ignore or neutralize our biological predispositions merely by force of will. Our biological predispositions continue to exert a powerful influence on our behavior. If they did not, then we would expect to find:

> societies without love, without ambition, without sexual desire, without marriage, . . . in which old people were considered more beautiful than twenty-year-olds, in which wealth did not purchase power over others, in which people did not discriminate in favor of their own friends and against strangers, in which parents did not love their own children.[6]

Proponents of legal reforms intended to achieve intergenerational equity in environmental matters would do well to be sensitive to our biological predispositions. These predispositions could serve either as obstacles in

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5. Plato's conception of the ideal form, of which material objects are only an imitation, established a dichotomy between the world of thought and the world of sensation. *See* THE WORLD OF PLATO AND ARISTOTLE 31-33 (James B. Wilbur & Harold J. Allen eds., 1979) (quoting PLATO'S REPUBLIC Book VI). Descartes carried Plato's dichotomy further, conceiving of the mind as separate from the body and from the rest of the material world, *see René Descartes, Meditations on the First Philosophy*, *in* A DISCOURSE ON METHOD 65, 85-94 (John Veitch trans., 1912) [hereinafter A DISCOURSE ON METHOD], and applying the intellectually detached perspective that this conception implies in the scientific method that he had developed previously. *See René Descartes, A Discourse on Method*, *in* A DISCOURSE ON METHOD, *supra*, at 1, 10-18. Environmentalists from across the ideological spectrum have argued that the modern legacy of this philosophical world view is a conviction that we humans are apart from, and therefore free to exploit, non-human nature. *See, e.g.*, SENATOR AL GORE, EARTH IN THE BALANCE 217-18, 249-53 (1992); CHRISTOPHER MANES, GREEN RAGE 227 (1990).

6. MATT RIDLEY, THE RED QUEEN: SEX AND THE EVOLUTION OF HUMAN NATURE 7 (1993); *see also* Kingsley R. Browne, *Sex and Temperament in Modern Society: A Darwinian View of the Glass Ceiling and the Gender Gap*, 37 ARIZ. L. REV. 971, 1102-03 (1995).

the path of those reforms, or, as my analysis in "Beyond Fairness" suggests, as powerful catalysts of their success.[7]

Proponents of legal reforms intended to achieve intergenerational equity in environmental matters also would do well to be sensitive to our cultural predispositions, which also are empirical realities of the world in which we live. These cultural predispositions manifest themselves in the existing pattern of human norms and the behaviors derived from them, which limit the range of acceptable new norms and the behaviors that those new norms imply. Both the failure of Wilsonian idealism to avert the cataclysm of World War II and the collapse of national Prohibition amid the pervasive flouting of its norms should serve as cautionary tales to anyone who would institutionalize new norms in the belief that mere institutionalization will be sufficient to guarantee compliance.[8]

Professor Weiss makes an admirable attempt to erect her proposal on a foundation of norms ostensibly derived from a variety of the world's existing religious, legal, and other traditions. As I have argued both in "Beyond Fairness" and elsewhere in this Article, however, the evidence strongly suggests that whatever the normative content of those traditions may have been in the distant past, their present serviceability as a theoretical foundation for her proposal is much more apparent than real. The theoretical principles that I have identified would provide a much more solid foundation.

II. THE ACCEPTABILITY OF MY PROPOSAL TO DEVELOPING COUNTRIES

In her response to "Beyond Fairness," Professor Weiss revisits the issue of the acceptability to developing countries of a legal regimen intended to achieve intergenerational equity in environmental matters. Professor Weiss is correct insofar as she observes that the contribution of developing countries to certain environmental problems—such as global climate change—is expected to surpass that of developed countries in future decades.[9] She therefore is also correct insofar as she argues that the acceptability to developing countries of any legal regimen intended to achieve intergenerational equity in environmental matters is a necessary precondition for the success of such a regimen. To say that the

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7. *See* Paul A. Barresi, *Beyond Fairness to Future Generations: An Intragenerational Alternative to Intergenerational Equity in the International Environmental Arena*, 11 TUL. ENV. L.J. 59, 70 (1997).

8. *See* SEAN DENNIS CASHMAN, PROHIBITION: THE LIE OF THE LAND (1981); EDWARD HALLETT CARR, THE TWENTY YEARS' CRISIS, 1919-1939 (Harper & Row 1964) (2d ed. 1946).

9. *See* WORKING GROUP III, *INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 1995: ECONOMIC AND SOCIAL DIMENSIONS OF CLIMATE CHANGE* 95-97 (James P. Bruce et al. eds., 1996).

acceptability of a legal regimen to developing countries is a necessary precondition, however, is not to say that it is a sufficient one. As I argue in "Beyond Fairness," developing countries are unlikely to be able to participate meaningfully in any legal regimen intended to achieve intergenerational equity in environmental matters without substantial economic and technological assistance from the Western industrial democracies. Any such legal regimen still would have to be acceptable to the Western industrial democracies, perhaps all the more so given the likelihood that developing countries will come to play the principal role in perpetuating particular environmental problems, and thus will require a correspondingly larger amount of Western economic and technological aid.

My primary focus in "Beyond Fairness" was on developing an alternative to Professor Weiss's proposal that would be culturally more acceptable to the Western industrial democracies, whose endorsement of any effort to achieve intergenerational equity in environmental matters will be essential if that effort is to succeed. Accordingly, I proposed a legal regimen based on intranational, intragenerational, individual legal rights and duties only, which fits squarely within Western legal and other cultural traditions. In her reply to "Beyond Fairness," Professor Weiss objects to my proposal on the ground that its individual rights and duties component would make it unacceptable to African or Eastern countries whose legal and other cultural traditions are more communitarian than those of the West.

Professor Weiss's objection would be a problematic one if the theoretical coherence or practical effectiveness of my proposal were dependent on each and every country structuring its intranational contract in precisely the same manner. Fortunately, such is not the case. Neither the cultural acceptability of my proposal to the Western industrial democracies nor its effectiveness in achieving intergenerational equity in environmental matters would be compromised if some countries were to base their intranational contracts on group rights and duties, even if those group rights and duties were to be intergenerational. Nor would group-based intranational contracts in the African or Eastern countries to which Professor Weiss refers be inconsistent with humans' biologically-based predisposition to care about certain members of future generations in certain ways, or with the cultural corollaries of this predisposition. To the extent that the groups to which the intranational contractual rights and duties would attach were defined by clan, tribal, ethnic, racial, or perhaps even linguistic or religious criteria, the boundaries of those groups would reflect perceptions of genetic relationships. In any case, the Western industrial democracies still could structure their own intranational

contracts in a manner that would be consistent with Western legal and other cultural traditions, and all of the countries whose support would be required if intergenerational equity is to be achieved would find the new legal regimen to be culturally acceptable.

III. THE RELEVANCE OF NATIONAL CULTURES

Professor Weiss also takes issue with my reliance on *intra*national contracts as the exclusive means by which principles of intergenerational equity in environmental matters are to implemented. Although Professor Weiss would rely on states to guarantee the rights and duties embodied in her own proposal,[10] she argues that my exclusive reliance on *intra*national contracts is anachronistic given the increasingly important role played by non-state actors in the international system.

Although the trend toward non-state actors playing an increasingly important role in the international system is manifest, it would be a mistake to conclude from this trend that nation-states—or, more to the point, that *national cultures*—are no longer forces to be reckoned with. Ironically, Professor Weiss's reference to "ethnic minorities" as one species of non-state actor whose participation in international affairs points to the diminished importance of states provides dramatic evidence that national cultures remain a potent international force. Ethnic minorities, almost by definition, are cultural minorities. The power of cultural minorities to shape international affairs has been demonstrated most dramatically in recent years in those parts of the world where state boundaries have been inartfully superimposed on preexisting cultural ones—often by imperial, colonial, or neocolonial powers—thus forcing multiple cultural groups to live together within the borders of a single state or isolating the members of a single cultural group within the borders of multiple states.[11]

Furthermore, the other non-state actors to which Professor Weiss refers—among them multinational corporations, subunits of national governments, and local nongovernmental organizations—are not cultureless entities. They all are comprised of human beings, who can be expected to bring their cultural predispositions to bear on their international activities.

On the other hand, the trend toward transnational actors such as multinational corporations, intergovernmental organizations, and

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10. WEISS, *supra* note 3, at 48,109.

11. *See, e.g.*, DAVID FROMKIN, A PEACE TO END ALL PEACE 558-67 (1989) (the Middle East); Roger Cohen, *A Cycle of War and Illusion*, N.Y. TIMES, Sept. 24, 1995, at 4:3 (the Balkans); James C. McKinley, Jr., *Searching in Vain for Rwanda's Moral High Ground*, N.Y. TIMES, Dec. 21, 1997, at 4:3.

multinational nongovernmental organizations playing an increasingly important role in international affairs could be viewed as the harbinger of an incipient global cultural homogenization, which would make cultural differences less relevant as a constraint on the content of a legal regimen intended to achieve intergenerational equity in environmental matters. The evidence strongly suggests, however, that in ways ranging from the trivial to the profound, any global cultural homogenization that may be taking place is occurring largely along Western—especially American—lines. South Africans dine in restaurants whose walls are decorated with paintings of the Continental Congress and stained-glass murals of American cattle drives;[12] the French stock up on pumpkins in order to celebrate an American-style "Olaween;"[13] and companies from Tokyo to Berlin rush to cash in on the worldwide popularity of American pop culture.[14] On a more ominous note, some observers blame the influence of the norms of female beauty currently fashionable in Western pop culture for an epidemic of eating disorders among young women in Asia.[15] In the sociopolitical realm, Francis Fukuyama has made a powerful case that the ideas embodied in Western liberalism have achieved an ideological hegemony throughout most of modern world,[16] although his conclusion that we have therefore reached the "end of history" in a Hegelian sense has been controversial from the start.

Given the ongoing power of national cultures to shape the modern world, my exclusive reliance on *intra*national contracts as a means to achieve intergenerational equity in environmental matters is entirely appropriate, especially insofar as it would help to ensure the support of the Western industrial democracies, whose support will be essential if intergenerational equity is to be achieved. An exclusive reliance on *intra*national contracts would be "anachronistic" only if national cultures were no longer forces to be reckoned with in the modern world, which they manifestly are.

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12. Donald G. McNeil, Jr., *South Africa's American Romance*, N.Y. TIMES, Dec. 7, 1997, at 4:3.

13. Roger Cohen, *AH-lo-een: An American Holiday in Paris?*, N.Y. TIMES, Oct. 31, 1997, at 2.

14. *See* Edmund L. Andrews, *American Pop Culture, Foreign-Owned*, N.Y. TIMES, Mar. 29, 1998, at 4, 16.

15. *See* Sonni Effron, *Asia Notes A Rise in Eating Disorders*, L.A. TIMES, Nov. 2, 1997, at A1.

16. *See* Francis Fukuyama, *The End of History?*, NAT'L INTEREST, Summer 1989, at 3; *see also* FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN (1992).

IV. THE EMERGENCE OF PRINCIPLES OF INTERGENERATIONAL EQUITY IN INTERNATIONAL LAW

In her reply to "Beyond Fairness," Professor Weiss offers the current content of international environmental law as evidence in support of the proposition that "an intergenerational principle of fairness has already struck a deep chord within many different cultural traditions."[17] The quoted language seems to imply a retreat from her earlier position, in which she strongly suggested that the elements of her proposal were acceptable to all of the major cultural traditions of the world.[18] Perhaps this implication was an inadvertent one. In any case, I understand Professor Weiss to be claiming in her response to "Beyond Fairness" that the principles currently embodied in international law demonstrate the existence of a deeply rooted, essentially worldwide, cross-cultural consensus in favor of recognizing intergenerational group rights and duties in environmental matters. The evidence that she offers in support of this claim certainly demonstrates the presence of *some* support in *some* quarters for *some* of the principles embodied in her proposal, but it falls far short of demonstrating the existence of a cross-cultural consensus of the type and scope that she claims.

As an initial matter, there is an important distinction to be made between mere manifestations of concern about the welfare of future generations and the embrace of intergenerational group rights and duties as a means to vindicate that concern. In a world where human beings are inherently predisposed to care about members of future generations, we would expect to find abundant evidence of the former, although not necessarily of the latter. Furthermore, to say that intergenerational environmental group rights and duties are *becoming* a part of international and national law, or are *emerging* as issues in international and national jurisprudence, is not necessarily to say that they have become so firmly established in any of these realms that they demonstrate the existence of a cross-cultural consensus in their favor of the depth and breadth claimed by Professor Weiss. In light of these observations, the evidence offered by Professor Weiss in support of her claim provides considerably less support than she seems to suppose.

The four International Court of Justice (ICJ) opinions cited by Professor Weiss are especially illuminating in this regard. In two of the four opinions, the majority of the ICJ clearly articulates its concern for the welfare of future generations, but fails to raise the issue of intergenerational group rights and duties as a means to vindicate that

17. *See* Weiss Reply, *supra* note 1, at 97.
18. *See* WEISS, *supra* note 3, at 17-21, 38.

concern.[19] In the other two opinions, the majority does not address the welfare of future generations at all.[20] To the extent that the ICJ opinions cited by Professor Weiss provide any support for the existence of a deeply rooted, essentially worldwide, cross-cultural consensus in favor of recognizing intergenerational group rights and duties in environmental matters, that support comes from the remarks of Judge Weeramantry, who relies on evidence similar to the evidence on which Professor Weiss relies in making similar sorts of arguments.[21] Indeed, Judge Weeramantry repeatedly cites to Professor Weiss's own work.[22] The most revealing feature of Judge Weeramantry's remarks, however, is that they are the remarks of a *single* judge writing in *separate* and *dissenting* opinions. The same remarks, if endorsed by a majority of the court, would have provided a much firmer foundation for Professor Weiss's claim.

Professor Weiss also offers *Minors Oposa v. Secretary of the Department of Environment and Natural Resources*,[23] the 1993 Supreme Court of the Philippines decision to which I refer in "Beyond Fairness," as evidence in support of her claim that a deeply rooted, essentially worldwide, cross-cultural consensus exists in favor of recognizing intergenerational environmental group rights and duties. As an initial matter, Professor Weiss errs in claiming that I offered *Minors Oposa* in support of the individual rights component of my proposal. I did not. I offered *Minors Oposa* only in support of the intranational component of my proposal. My argument was that *Minors Oposa* provides support for the appropriateness of a legal regimen based solely on intranational contracts because *Minors Oposa* was decided by a national court under national law on principles of intergenerational equity for future generation nationals *of that nation state*.

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19. *See* Gabcíkovo-Nagymaros Project (*Hungary v. Slovakia*), para. 53, Sept. 25, 1997 (visited May 28, 1998) <http://www.icj-cij.org/idocket/ihs/ihsjudgement/ihsjudcontent.html> [hereinafter *Danube*]; Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. 809, 821, 822 (1996) [hereinafter 1996 Advisory Opinion].

20. *See* Request for an Examination of the Situation in Accordance with paragraph 63 of the Court's Judgement of 20 December 1974 in the Nuclear Test (*New Zealand v. France*), 1995 I.C.J. 288 (Sept. 1995) [hereinafter 1995 Nuclear Test]; Maritime Delimitation in the Area Between Greenland and Jan Mayen (*Denmark v. Norway*), 1993 I.C.J. 38 (June 1993) [hereinafter *Denmark v. Norway*].

21. *See Danube*, *supra* note 19, para. 11, 16, 17 (Weeramantry, J., separate opinion); 1996 Advisory Opinion, *supra* note 19, at 888, 905-06 (Weeramantry, J., dissenting); 1995 Nuclear Test, *supra* note 20, at 341-42 (Weeramantry, J., dissenting); *Denmark v. Norway*, *supra* note 20, at 274-78 (Weeramantry, J., separate opinion).

22. *See* 1996 Advisory Opinion, *supra* note 19, at 888 n.23 (Weeramantry, J., dissenting); 1995 Nuclear Test, *supra* note 20, at 341 (Weeramantry, J., dissenting); *Denmark v. Norway*, *supra* note 20, at 277 n.1, 277 n.3 (Weeramantry, J., separate opinion).

23. Minors Oposa v. Secretary of the Dep't of Env't and Nat. Resources, 33 I.L.M. 173 (1994).

Be that as it may, even *Minors Oposa* arguably provides less support for the existence of a cross-cultural consensus of the type and scope claimed by Professor Weiss than she supposes, although the court's language leaves room for interpretation in that regard. The court in *Minors Oposa* ruled that the minor plaintiffs could file a class suit "for themselves, for *others of their generation* and for *the succeeding generations*" in order to vindicate environmental rights recognized by the Filipino Constitution.[24] On its face, the quoted language suggests that the court conceived of each future generation as unitary, but conceived of the present generation as a mere aggregation of individuals. Thus, to the extent that *Minors Oposa* implies a recognition by Filipino law of both intergenerational environmental rights and intergenerational environmental duties, the court's language suggests that the court intended to pair *group* rights with *individual* duties. The court offered no rationale for this peculiar juxtaposition, suggesting the possibility that it might have been inadvertent. If it was not inadvertent, then *Minors Oposa* merely stands for the proposition that intergenerational group rights, if not intergenerational group duties, enjoy *some* support in *some* quarters as a means for vindicating our inherent predisposition to care about members of future generations, which I do not deny. My argument is that these rights and duties do not enjoy *sufficient* support in the *right* quarters to serve as a solid foundation for an effective legal regimen intended to achieve intergenerational equity in environmental matters, and that we therefore should look elsewhere for the theoretical building blocks with which to construct that foundation if our primary interest is in ensuring that the legal regimen that rests on it will be effective.

Professor Weiss also offers the reports of two groups of legal experts in support of her claim that a deeply rooted, essentially worldwide, cross-cultural consensus exists in favor of recognizing intergenerational environmental group rights and duties.[25] These expert reports are probative, but not dispositive. If the evidence on the basis of which the experts formed their opinions truly demonstrates the existence of a cross-cultural consensus of the type and scope claimed by Professor Weiss, then that evidence ought to be able to stand on its own.

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24. 33 I.L.M. at 185 (emphasis added).

25. *See Final Report of the Expert Group Workshop on International Environmental Law Aiming at Sustainable Development*, U.N. Environment Programme, at 13-14, para. 44-45, UNEP/IEL/WS/3/2 (1996); *Report of the Expert Group Meeting on Identification of Principles of International Law for Sustainable Development*, Comm. on Sustainable Development, 4th Sess., Background Paper #3, at 12, para. 41-42 (1995).

Professor Weiss also offers preambles to various international legal instruments and *travaux preparatoires* in support of her claim.[26] These documents provide ambiguous support at best. Although they provide some evidence that certain legal principles are "developing" or "emerging" in international environmental law, and abundant evidence that members of the international community are concerned about the welfare of members of future generations, they hardly demonstrate the existence of a cross-cultural consensus of the type and scope claimed by Professor Weiss. The most telling evidence in this regard is that all of the language in question is precatory. The signatories to the documents in which this precatory language appears need not have concerned themselves with the practical implications of endorsing principles that they then would have been required to implement domestically in accordance with international law. The assertion of these principles in precatory form might just as easily have stemmed from a perceived need on the part of the signatories to produce an agreement in the face of pressure exerted by nongovernmental organizations or other politically powerful actors as from deeply rooted cultural convictions.

The declaration pending before UNESCO and the generational bill of rights proposed by the Cousteau Society provide similarly weak support for Professor Weiss's claim.[27] These proposals make clear that some support for recognizing intergenerational environmental group rights and duties exists in some quarters, which I again do not deny. As mere proposals for action, however, they fail to provide much solid evidence in support of the existence of a cross-cultural consensus of the type and scope claimed by Professor Weiss. Her case would become much stronger in this regard if these proposals were to be adopted by an appropriate international body in a form that would make them enforceable as a matter of international law.

Professor Weiss's ostensible purpose in presenting all of this evidence is to demonstrate the existence of a deeply rooted, essentially worldwide, cross-cultural consensus in favor of the recognition of intergenerational group rights and duties in environmental matters. Her analysis makes clear that a concern for the welfare of future generations has found expression in international law, which is precisely what one

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26. *See* Convention on International Trade in Endangered Species, Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243 (1973); Convention on Biological Diversity, June 5, 1992, 31 I.L.M. 818 (entered into force Dec. 29, 1993); United Nations Framework Convention on Climate Change, May 29, 1992, 31 I.L.M. 849 (entered into force March 21, 1994); Eighth Commission, Institut de Droit International, Responsibility and Liability under International Law for Environmental Damage, adopted Sept. 4, 1997, Francisco Orrego Vicuña, rapporteur; The Environment, Travaux preparatoires, 67 Annuaire de l'Institut de Droit International 311 (1997).

27. *See* Weiss Reply, *supra* note 1, at 97.

would expect in a world where human beings are inherently predisposed to care about members of future generations. Her analysis also makes clear that intergenerational environmental group rights and duties have been raised as an issue in international legal discourse. What her analysis fails to demonstrate, however, is the existence of a deeply rooted, essentially worldwide, cross-cultural consensus in favor of the recognition of intergenerational environmental group rights and duties. She must therefore fall back on the content of the world's cultures themselves for evidence in support of her claim. As I argue both in "Beyond Fairness" and elsewhere in this Article, that evidence is all too lacking, at least (but probably not exclusively) with regard to the Western industrial democracies, whose support will be essential if intergenerational equity in environmental matters is to be achieved.

V. DOES IT MATTER?

The remaining issue is the most important one. Professor Weiss raises it twice in her reply to "Beyond Fairness," once in the first paragraph and again in the fourth. In both places, she observes that my proposal and hers both seek to achieve intergenerational equity in environmental matters, and differ only in the means by which they propose to achieve it.[28] She then asks, in effect: Does it matter? Professor Weiss seems to have intended this question as a rhetorical one, although it should be anything but that. The answer to the question is: Yes, it does matter, for a profoundly important reason. It matters because of the way in which humans perceive and respond to their world.

At the core of the way in which humans perceive and respond to their world are the notions of *frame* and *frame alignment*. Sociologist Erving Goffman used the term *frame* to describe the cognitive device used by individuals to interpret and organize experience.[29] Frames allow individuals to answer the questions: What is going on here? and: How should I respond?[30] As conceived by sociologist David Snow and his collaborators, frame *alignment* is the process by which two individuals come to interpret the same experience through the same frame.[31] Advocates of policy change—such as the change that would be required to implement a new legal regimen intended to achieve intergenerational equity in environmental matters—must convert a critical mass of

28. *See id.* at 89, 90.

29. *See* ERVING GOFFMAN, FRAME ANALYSIS 10-11, 13, 21 (1974).

30. *See id.* at 8, 13, 21; *see also* David A. Snow et al., *Frame Alignment Processes, Micromobilization, and Movement Participation*, 51 AM. SOC. REV. 464, 464 (1986).

31. *See* Snow et al., *supra* note 30, at 464.

politically relevant actors to their point of view. Frame alignment is at the core of this process.[32]

Students of social movements have been especially active in exploring the role played by frames and frame alignment in catalyzing policy change. Political scientist Sidney Tarrow offers the most up-to-date summary of the literature,[33] to which political scientist William Gamson, sociologist David Snow, and their collaborators have made especially valuable contributions.[34] These scholars have made a compelling case in favor of the proposition that the prospects for frame alignment improve the more a frame resonates with the thematic content of the culture in which the targets of the frame alignment effort live.[35] The more deeply rooted the theme and the more harmonious the resonance of the frame with that theme, the more likely frame alignment is to occur.[36]

The politically relevant actors in this case include—at a minimum—the world's politicians, bureaucrats, judges, leaders of nongovernmental organizations, and, in societies where governments are democratically responsive, mass publics. In order to secure the adoption and implementation of any legal regimen intended to achieve intergenerational equity in environmental matters, advocates of legal reform will be required to convert a critical mass of these actors to their point of view. In other words, these advocates will have to ensure that the frames of those actors become aligned with their own.

In this context, the difference between my proposal and Professor Weiss's is the difference between a proposal whose adoption and implementation would require advocates to bring about an incremental measure of frame alignment and a proposal whose adoption and

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32. *See* Bert Klandermans, *The Formation and Mobilization of Consensus*, *in* 1 INTERNATIONAL SOCIAL MOVEMENT RESEARCH 173, 175-76 (Bert Klandermans et al. eds., 1988); Snow et al., *supra* note 30, at 464.

33. *See* SIDNEY TARROW, POWER IN MOVEMENT 118-34 (1994).

34. *See* WILLIAM A. GAMSON, TALKING POLITICS (1992); William Gamson, *Political Discourse and Collective Action*, *in* 1 INTERNATIONAL SOCIAL MOVEMENT RESEARCH 219 (Bert Klandermans et al. eds., 1988) [hereinafter Gamson 1988]; William A. Gamson, *The Political Culture of the Arab-Israeli Conflict*, 5 CONFLICT MGMT. & PEACE SCI. 79 (1981); William A. Gamson & Kathryn E. Lasch, *The Political Culture of Social Welfare Policy*, *in* EVALUATING THE WELFARE STATE 397 (Shimon E. Spiro & Ephraim Yuchtman-Yaar eds., 1983); David A. Snow & Robert D. Benford, *Ideology, Frame Resonance, and Participant Mobilization*, *in* 1 INTERNATIONAL SOCIAL MOVEMENT RESEARCH 197 (Bert Klandermans et al. eds., 1988); Snow et al., *supra* note 30.

35. *See* Gamson, *supra* note 34, at 135; Gamson 1988, *supra* note 34, at 220-21, 227; Snow & Benford, *supra* note 34, at 210.

36. *See* Snow & Benford, *supra* note 34, at 205-06, 210-11. The author is exploring frames, frame alignment, and culture in the context of selected aspects of environmental politics, public policy-making, and law, and working toward developing a research methodology that will help to facilitate the pursuit of replicable quantitative analyses of frame alignment processes, in a Ph.D. dissertation in progress at Boston University.

implementation would require advocates to bring about a radical one. It is the difference between a legal regimen whose appeal to some of the most important politically relevant actors likely would be great and a legal regimen whose appeal to those actors likely would be small. It is the difference between a plan of action whose prospects for success rest on some of the most fundamental realities of the human condition and a plan of action whose prospects for success rest largely on more shaky ground.

If the need to achieve intergenerational equity in environmental matters is as urgent as Professor Weiss suggests—and there is every reason to believe that it is—then the work of developing and promoting a new legal regimen that will help us to reach that goal must go on. To the extent that Professor Weiss's long-standing commitment to the cause of intergenerational equity will help to speed us on our way, her continued presence in the vanguard of the search for the most appropriate path to success should be welcomed with enthusiasm.