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# Environmental Legal Professionalism Adapted to Citizen Suit Processes

Brion L. Blackwelder

*Nova Southeastern University - Shepard Broad Law Center*, [blackwelderb@nsu.law.nova.edu](mailto:blackwelderb@nsu.law.nova.edu)

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# ENVIRONMENTAL LEGAL PROFESSIONALISM ADAPTED TO CITIZEN SUIT PROCESSES

BRION BLACKWELDER\*

## INTRODUCTION

Many of us working in environmental citizen suits will spend very large portions of our careers mired down in aspects of the legal process that really should not exist. Some chronic impediments jeopardize and compromise the very effectiveness of environmental law. We all know about the devastation wreaked upon public involvement by strategic suits deterring public participation, especially in siting decisions and land use issues. We watch with deep despair over wholesale displacement of environmental concerns, such as in expropriation compensation provisions in international trade. We face situations such as sustainability only to find a lack of objective standards leaves everything to a political process. We rely upon government experts, only to have to navigate the maze of the Housekeeping Statute to get the chance to obtain their testimony. And especially under state law, the fees for attorneys and experts under provisions for citizen suits may be so tenuous or adverse as to deter enforcement actions by citizens.

Certain core problems for citizen suits ought to be addressed by environmental legal professionalism. This somnolent field can be awakened and transformed. The field has yielded no specific construction for environmental professionalism. It is time to put forward some solutions.

Previous calls for change in professional ethics from leading scholars in environmental law stop short of describing specific methods. Culture, however, has not stopped short in its demand that environmental ethics be brought about by environmental law. To meet these calls for change and to link general environmental ethics to the profession, is a matter for a construction of professionalism. To create such a construction, it is ordinarily productive to use a widely acceptable theory for a source.

Here, the source drawn upon is the renowned ethical theory of democracy, known as "deliberative democracy." This political theory is quite dynamic and applicable, affording a foundation of professionalism for environmental law, distinct from traditional professionalism. At its heart, deliberative democracy creates processes for genuine inclusiveness and preparation of participants. This paper imports the political ethics theory directly into a legal professionalism definition, called here to set it apart, "green legal professionalism." The definition addresses processes arising in the legal system that broadly determine the prospect of citizen suits, to place those processes at the forefront of environmental professionalism. The definition establishes an agenda for an

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\* Associate Professor, Nova Southeastern University Shepard Broad Law Center and Of Counsel to the Environmental and Land Use Law Center, Inc., Fort Lauderdale, Florida.

activist professionalism. While theoretical underpinnings are often of lesser interest to the practical professionals engaged in citizen suits, the rest of the profession who determine the parameters of professionalism will be skeptical of recognizing different treatment for environmental law until its basis is presented. And despite the often indirect nature of professionalism, unless it becomes part of the approach, problems will remain. If we ignore the potential of a revised professionalism to change unethical processes now thwarting citizens' environmental litigation, many suits will never happen, many cannot succeed, and many will make us wish we never tried.

So while having a "construction" or model for green legal professionalism is beneficial, the citizen suit practitioner wants practical guidance, "give me something I can use." The following highlights leading dilemmas where environmental law could be augmented by professionalism, to help its delivery of society's prescribed future. These examples are intended to persuade citizen suit practitioners that they can keep or gain much ground through professionalism. The most basic theoretical terms and definitions are set out first, then core citizen suit applications are presented. Some necessary discussion of the background and implications then follows.

#### I. THE THEORETICAL UNDERPINNING: DELIBERATIVE DEMOCRACY

Bob Pepperman Taylor, who works in the environmental branch of ethics, has given a definition of environmental ethics. He states it is the "essential task of environmental ethics: to investigate [1] the nature of our moral obligations to the natural world and [2] the principles for resolving conflicts between our environmental and our human values."<sup>1</sup>

The components of Taylor's definition can help give the components of environmental legal ethics. First, it frames environmental ethics' task as investigation for what the moral obligation is. From Christopher D. Stone's observations, it is clear the law inquiry needs to know what the "standards for which morality has spoken" are.<sup>2</sup> Once we find the future that society has chosen, then we can go forward with the law inquiry. Stone opts out, however, of getting law into the business of "generating and justifying general standards of conduct."<sup>3</sup> This is reasonable, for it would be unproductive to expect lawyers to be the ones to decide what society should want for its environment, as it is a cultural question for the whole of society. Lawyers do need society to provide them parameters of an environmental ethic. The second matter framed by

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1. Bob Pepperman Taylor, *Democracy and Environmental Ethics*, in DEMOCRACY AND THE ENVIRONMENT 86, 104 (William M. Lafferty & James Meadowcroft eds., 1996) (numerical division supplied) (citation omitted).

2. CHRISTOPHER D. STONE, EARTH AND OTHER ETHICS: THE CASE FOR MORAL PLURALISM 41 (1987).

3. *Id.*

Taylor's definition addresses the investigation of conflict resolution principles.<sup>4</sup> Stone also states this is the main law task, the "emphasis is on authoritatively implementing" the morally selected standards, "how we arrange our affairs" to get us to that future.<sup>5</sup>

So here it is. Are we lawyers really implementing society's intended environmental future? Or, are we pushing around with no professionalism to call us to account, to make us select for the processes necessary to lead to that future?

Some valuable suggestions for how to find out if we have so arranged our affairs come from political scientist John S. Dryzek, who has both evaluated democratic theory and examined environmentalism.<sup>6</sup> In democratic theory prior to about 1990, more satisfaction existed for making collective democratic decisions under the methods of voting, representation, and interest aggregation like political parties or interest groups. Although democratic legitimacy under such methods became questioned, the questioning is an essential part of democracy's constant discussion of its own processes.<sup>7</sup>

There came, in this postmodern era, "a strong deliberative turn" in the theory of democracy. "Increasingly, democratic legitimacy came to be seen in terms of the ability or opportunity to participate in effective deliberation on the part of those subject to collective decisions."<sup>8</sup> The deliberation means reflective communication, a social process in which the participants are amenable to altering their views. Removed from the deliberation are coercive aspects of domination, manipulation, threats, and similar "agents of distortion," as the participants are to have equality in deliberative competence. Authenticity in the democracy comes from the degree the "reflective preferences influence collective outcomes."<sup>9</sup>

To arrange our affairs to get us to values endorsed by our communities, Dryzek presents ecological democratization as the condition for which we should investigate. His effort finds a mechanism compatible with our political principles to implement the community values. Dryzek concludes "ecological democracy" leads to the success of community interests over selfish interests.<sup>10</sup> The key is

4. Taylor, *supra* note 1, at 104.

5. STONE, *supra* note 2, at 41.

6. Among his writings on the subject are: JOHN S. DRYZEK, *DELIBERATIVE DEMOCRACY AND BEYOND: LIBERALS, CRITICS, AND CONTESTATIONS* (2000) [hereinafter *DELIBERATIVE DEMOCRACY*]; JOHN S. DRYZEK, *THE POLITICS OF THE EARTH: ENVIRONMENTAL DISCOURSES* (1997) [hereinafter *POLITICS OF THE EARTH*]; and John S. Dryzek, *Strategies of Ecological Democratization*, in *DEMOCRACY AND THE ENVIRONMENT* 108 (William M. Lafferty & James Meadowcroft eds., 1996) [hereinafter *Dryzek*].

7. *DELIBERATIVE DEMOCRACY*, *supra* note 6, at 1.

8. *Id.*

9. *Id.* at 2. Dryzek points out that deliberative democracy as a process dates back to ancient Greece, with many contributors through history, and supporters who identify themselves as deliberative democrats, such as John Rawls. *Id.*

10. *POLITICS OF THE EARTH*, *supra* note 6, at 200.

bona fide democratic debate. He sets out details of his approach, to describe how categories of actions enhance democratic values. Dryzek indicates:

enhancement of democratic values, or democratization, may be unpacked into three aspects: franchise refers simply to the number of individuals participating in any setting, scope concerns the range of issues which are subject to popular control, and authenticity refers to the degree to which this control is substantive as opposed to symbolic, informed as opposed to ignorant, and engaged in competent fashion. Positive movement in any one of these criteria constitutes democratization.<sup>11</sup>

## II. A DEFINITION FOR GREEN LEGAL PROFESSIONALISM

So the ethical principles help us assemble an entire statement of definition for green professionalism inquiries. The proposed definition is as follows:

*Green legal professionalism recognizes the law is to help society achieve an environmental future as expressed in leading formulations by society of its moral obligations towards the environment. The methodology for law is analogous to other ecological democratization. The numbers of individuals participating in any setting must be sufficient to achieve the selected future. The range of issues subject to participation must be capable of achieving the selected future. The participation must be substantive as opposed to symbolic. The participation must be informed as opposed to ignorant. The participation must be engaged in competent fashion. Lawyers' professional conduct should work for achievement of the environmental future and ecological democratization.<sup>12</sup>*

Thus, green professionalism emphasizes the practice of law that supports participation and participants in sufficient numbers to achieve the environmental future society intends. It is the way ordinary or popular environmental ethics, such as a community value standard, bear upon lawyers' professional conduct in an adversary system. Its mechanism of ecological democratization works upon the accepted processes Dryzek describes of our culture's social and political system.<sup>13</sup> The value standards are ones inclusive of society's other values, such as economic considerations and environmental justice.

Does an attorney need to espouse an environmental ethic, in order to promote this construction of professionalism? The answer is no, because the purpose of ecological democratization is to allow persons who do advocate from any motive to be able to legitimately present their rationale as environmental decisions are made. The professionalism opens the process to the ethical alternatives so important in our society. Whatever ethic an attorney and the clients may espouse, professionalism should expect that members privileged to be in the

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11. Dryzek, *supra* note 6, at 109 (emphasis deleted).

12. This proposed definition is the author's, derived from the ideas of Dryzek, Taylor, and Stone in the foregoing discussion.

13. The franchise, scope and authenticity processes in Dryzek's definition of democratization, Dryzek, *supra* note 6, at 108, 109, are also explained by him in DELIBERATIVE DEMOCRACY, *supra* note 6, at 29.

profession will work for democratic principles when the legal system works out the disputes, so that society's ethic will be fairly considered. The adversary system, which benefits from professionalism, necessarily accepts fairness. In Futrell's terms, the practitioner counseling reluctant clients who do not share in the vision of Earth Day will get some support. Futrell's hypothetical lawyer will need to tell the client that because of the current state of environmental law, the effect of what the client wants will be evaluated in terms of ecological democratization because that is what environmental law has come to be understood to mean in the profession.<sup>14</sup> And, the democratization is more than a process occurring within the profession. It is a cooperative venture among social institutions, one being the institution of lawyering. Deliberative and discursive theorists see the methodology as of increasing significance in the approaches to be taken for problems worldwide.<sup>15</sup>

### III. CORE CONTROVERSIES FOR GREEN LEGAL PROFESSIONALISM: SLAPP, TRADE AGREEMENTS, SUSTAINABILITY AND OBJECTIVE STANDARDS, AVAILABILITY OF GOVERNMENT EXPERTS, AND ATTORNEYS FEES

Green legal professionalism needs to take on the Strategic Lawsuit Against Public Participation (SLAPP) suit. This is an aspect of Dryzek's franchise, where the inclusiveness and treatment of participants in the legal setting is at stake.<sup>16</sup> In SLAPP suits, quick disposition by injunction upon improper conduct should suffice as a remedy. They should never jeopardize the free speech and willingness of participants in environmental matters.

Green legal professionalism needs to intercede against certain international trade proposals that threaten to globalize an expansively re-defined takings doctrine, and thereby oblige compensation of investment affected by environmental regulations. This is an aspect of ecological democratization's scope, where the range of issues the participants are allowed to address is jeopardized. The upshot is that if international trade wishes to prevent protectionism masquerading as environmental regulation, it must give intense attention as to whether the regulation is bona fide and carefully constructed to address a legitimate environmental need, rather than preemptively destroying the regulation by making it only effective upon compensation. That is, trade needs to find ways to reject pretextual regulations, and ways to respect authentically-based regulations. Trade solutions that undercut environmental regulations run against the environmental ethic, which is too strong in our culture and in our laws to be treated in that fashion without enormously acrimonious reaction. Green legal professionalism tells international trade to find real processes to

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14. J. William Futrell, *Environmental Ethics, Legal Ethics, and Codes of Professional Responsibility*, 27 *LOY. L.A. L. REV.* 825, 825 (1994).

15. *DELIBERATIVE DEMOCRACY*, *supra* note 6, at 115-39, 174-75.

16. *Id.* at 29.

protect investors from the only thing from which they deserve protection (currently usually meaning compensation), that is, nationalizing or expropriating (essentially meaning stealing) an investment for selfish motive. This is in contrast to the inherent limitation property has of public uses and purposes as well as private ones.<sup>17</sup> Expanding the takings doctrine of the U.S. beyond real property is a shocking contradiction to the environmental trend in property law, recognizing the “green wood” and context aspects that accompany property ownership as limitations.<sup>18</sup>

Key professionalism issues of authenticity are set out according to its three aspects in the foregoing definition proposed for green legal professionalism: substantive as opposed to symbolic, informed as opposed to ignorant, and engaged in competent fashion.

The professionalism has to press for scientific methodologies to replace political ones, to provide a reviewable standard, as has finally occurred to a notable extent in fisheries management. Dryzekian analysis would identify such progress as part of authenticity, where the participants’ input is genuinely, rather than symbolically, included in the minds of decision-makers.<sup>19</sup>

The aspect of how much information and expertise is available to the participants is discussed in terms of the availability of governmental experts for citizen suits. In Dryzek’s terms this is also authenticity, where participants have available the information and expertise necessary in the setting.<sup>20</sup> Experts from government must be available to litigants, state or federal, free of politicization.

And, the practical availability of attorneys fees to citizen suits is a central concern. In ecological democratization terms this is also a part of authenticity, often determining whether the quality, skill and resources of the participants rises to the level necessary in the context. The participants need to be boosted, by improved citizen suit attorney fees provisions in state and federal laws.

And in exchange, green legal professionalism works to eliminate delay and unfairness. Knowing the process is inclusive, and that objective standards are involved, supporters of environmental law do not need to rely on desperate attempts to frustrate approvals while they hope for political change. Elimination of gamesmanship can reduce society’s perception of environmental laws and their supporters as obstructions and obstructionists, and will certainly boost economic benefits and investors.

The agenda of green legal professionalism is inclusion of environmental consideration, and participation, in legal disputes. The agenda is defense and advocacy of a process of ecological democratization in the law.

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17. The idea to regard property as private in its possession but common or communal in its use dates to Aristotle’s *Politics II*, 1263a30.

18. See Robert J. Goldstein, *Green Wood in the Bundle of Sticks: Fitting Environmental Ethics and Ecology into Real Property Law*, 25 B.C. ENVTL. AFF. L. REV. 347 (1998).

19. POLITICS OF THE EARTH, *supra* note 6, at 109.

20. *Id.*

*A. The Inclusiveness and Treatment of Participants in the Legal Setting: SLAPP Suits*

A phenomenon limiting ecological democratization generally, and particularly citizen suits, is one that originated in environmental citizen suits and disputes: the Strategic Lawsuit Against Public Participation, known to environmental lawyers as SLAPP, is a term coined in a 1988 article by Professors George Pring and Penelope Canan.<sup>21</sup> They define SLAPP as four elements: 1) a civil complaint or counterclaim for monetary damages, 2) filed against nongovernmental individuals or organizations, 3) because of their communication to government bodies, government officials or the electorate, and 4) on a substantial issue of some public interest or concern.<sup>22</sup> Many forms of SLAPP occur, from independent actions to counterclaims. Often it is the threat or risk of SLAPP and its close cousin, sanctions, that is the deterrent.

There are only generalized projections of the number of environmental enforcements by citizens that have been deterred by the prospect of SLAPP.<sup>23</sup> But if a citizen suit practitioner of local issues like zoning or siting of undesirable land uses is asked, the probability is they will relate many examples of deterred citizens, abundant conversations about local organizations investing scarce resources into officer and director liability insurance, and citizens organizations who have become so cautious as to destroy their function as activists and voices in society.

In short, SLAPP has replaced standing as the primary focus needed for the green legal professionalism inquiry of the franchise, especially in land use, zoning, and siting. Allowing such suits against persons actively engaged in free speech and legal redress of grievances is of serious consequence to community activists upon whose participation many environmental implementations are meant to rely.

Citizen suit clients are, by way of analogy, akin to private attorneys general.<sup>24</sup> Some comparison may be made between their treatment and that of a federal prosecutor. The federal prosecutor enjoys absolute immunity from civil actions based upon prosecutorial acts, "even when committed with ill-will", and "even if the prosecutor presents false evidence or withholds exculpatory evidence."<sup>25</sup>

21. Penelope Canan & George W. Pring, *Strategic Lawsuits Against Public Participation*, 35 SOC. PROBS. 506 (1988).

22. Penelope Canan & George W. Pring, *Studying Strategic Lawsuits Against Public Participation: Mixing Quantitative and Qualitative Approaches*, 22 L. & SOC'Y REV. 385, 387 (1988).

23. Some of these are summarized in a publication available from the OFFICE OF ATTORNEY GENERAL OF FLORIDA, STRATEGIC LAWSUITS AGAINST PUBLIC PARTICIPATION (SLAPPS) IN FLORIDA: SURVEY AND REPORT (1993).

24. For a definition of Private Attorneys General, found under the Attorneys General definition, see BLACK'S LAW DICTIONARY 129 (6th ed. 1990).

25. Rodolphe J.A. de Seife, *The King is Dead, Long Live the King! The Court-Created American*



While the doctrine of this sovereign immunity has had its basis questioned, it serves to protect against meritless suits and protects officials pursuing their duties.<sup>26</sup> Reform suggestions are that it is "possible to create a system in which lawyers and litigants are properly discouraged from bringing frivolous lawsuits, where claims are handled in an efficient and fair manner, and prosecutors, among others, are held accountable for their tortious conduct."<sup>27</sup> Such reforms might take the form of an administrative court system, one that is "expert, efficient, impartial" and not burdening the court system or allowing remedies of a disproportionate nature, balancing the need for accountability and justice against the burdens on the courts and agencies.<sup>28</sup>

Of course, citizen suit clients are not prosecutors, but they are inadequately shielded from meritless tort claims. The whole scenario interferes with their performance of their civic duties to their communities. SLAPP has turned civic and community activists into sheep, widely and pervasively destroying the involvement of the public in public decisions.

The net product on the citizen activist side is that only the toughest-minded citizens tend to bring the citizen suits or to be active and outspoken, and it is hard for groups unfamiliar with litigation to remain involved. The net result on the developer side is that bullying and mind-game tactics have become a regular feature. Forget about accomplishing the ethical goal of society's environmental law in this setting. Yet a central theme of the environmental ethic is "community value." But how can a community generate its value where it is so intimidated?

Our professionalism question arises: Do we have a process that fosters the end result intended by our society for its environmental quality? Of course, we do not. The process is diverted into another dimension of dispute detached from the desired environmental outcome. Citizens are reluctant to participate, and developers go forward with whatever they can influence the agencies to approve. Cases become very rare. The cases now involve hard-minded citizens pushed to the limit, who wage all-out litigation warfare with a developmental interest (usually with some anything-goes agency dragged along) which gambled on its bullying strategy instead of re-evaluating its proposal, which stretched and contorted the limits set by environmental law. The issue is with the fundamental tenet of ecological democratization, that the number of individuals included, and their treatment, should be optimum with respect to the achievement of the environmental implementation society desires. SLAPP has to be resolved, whether by greater First Amendment protection through the courts, by legislation, by referendum, or by counter-SLAPP suits. SLAPP is killing off civic involvement and activism at many levels throughout society. SLAPP solutions

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*Concept of Immunity: The Negation of Equality and Accountability Under the Law*, 24 HOFSTRA L. REV. 981, 1042 (1996).

26. *Id.*

27. *Id.*

28. *Id.* at 1058.

must be the foremost priority for green legal professionalism to protect the franchise that is basic to ecological democratization in many issues, especially land use and siting decisions.

One possibility is to accord SLAPP defendants the protection of attorneys' fees should they prevail, and posting of bond or cash by SLAPP plaintiffs in security of recovery of funds for the defense. Such a provision might resemble ones where the court may require filing of a bond or equivalent security for attorney and expert witness fees if a temporary restraining order or preliminary injunction is sought.<sup>29</sup> Professionalism dialogue over proposals such as this may at least lead to a number of reforms. One such reform may concern remedies to limit them to injunctive relief designed to prevent damages in the event an economic entity were disparaged.

Turning to the proponents of SLAPP, it is true that NIMBYs, or persons who say "Not In My Back Yard" to proposed developments, can sometimes use environmental provisions to delay and frustrate persons who ultimately have the right to do as they propose. The right to use the provisions of law to protect one's back yard is of course basic in our system. But the concept that it is necessary in order to protect the rights of developers, to be able to wage a SLAPP suit, in which a developer may claim millions of dollars in damages because someone wrote a letter or spoke their mind at a civic meeting about the developer's traits, is wholly flawed.

What of a situation where someone simply dislikes a development or activity that is within all the environmental regulatory restraints, and has been given NEPA-like consideration of environmental impacts, but still requires permissions. Delay in obtaining permits will be expensive to industry or development, perhaps critically so. While many strategic citizen suits may exercise a right to challenge, even though success on the merits is extremely unlikely, if resultant delay will make a project too expensive to pursue, the suit may be considered a strategic success. Objectors can exact a heavy cost. But such activities abuse the environmental goals of society. These make-them-jump-through-hoops suits are the other side of the coin. Solutions involve expedited procedures to afford professionalism checks upon the citizens' side of the issues. Unquestionably, suits of delay place business at enmity with environmentalists. The environmentalists begin such suits because they feel disempowered and left out of legal processes with embedded political imbalances.

The point is that in a deliberative democracy, there is less of a need for the strategic-delay suit than the SLAPP suit. Each interest is treated in a deliberative approach and the process itself earns great respect. If the process is democratization, it is likely both sides will let reforms eliminate such extreme behaviors. A reciprocal solution can be fostered in a professionalism based upon democratization.

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29. *E.g.*, 42 U.S.C. § 6972(c) (2000).

B. *The Range of Issues Participants Are Allowed to Address: Trade Expropriation*

Dryzek calls scope “the range of issues which are subject to popular control.”<sup>30</sup> In citizens suits, scope is the subject matter allowed (under the provisions of the statutes or the courts’ rulings) to be addressed. The least amount of scope is where environmental law is swept aside by a raw free-market provision, and thereby precluded from consideration.<sup>31</sup>

One of the greatest threats to sustainable environmental quality is the failure to build protections into international trade agreements.<sup>32</sup> However great the threat from the recent history of the three-nation North American Free Trade Agreement (NAFTA) agreement-making, newer trade proposals ominously threaten to disable environmental provisions even more comprehensively. A NAFTA result has already been “probably the largest single ‘takings’ case in U.S. history,” brought over regulation of a gasoline additive.<sup>33</sup> The trade proposals have given rise not only to the prospect of globalizing the takings doctrine, but expanding it. This is done by changing from a takings doctrine generally applicable to real property, and including broadly defined investments, without connection to real property at all.<sup>34</sup>

The provisions of Chapter 11 of the North American Free Trade Agreement address expropriation and compensation, providing the parties (U.S., Canada, and Mexico) may not directly or indirectly nationalize or expropriate an investment of an investor or a party in its territory, except for a public purpose, on a nondiscriminatory basis, and under both fairness standards and on payment of compensation.<sup>35</sup> This last provision is of course the focal issue. Any measure such as a law or regulation can be called into question as triggering the need for compensation. “NAFTA does not require that these broadly-defined investor

30. POLITICS OF THE EARTH, *supra* note 6, at 109.

31. Such as preclusion of the Food and Drug Administration to regulate tobacco products. See *FDA v. Brown & Williamson Tobacco, Corp.*, 529 U.S. 120 (2000).

32. FLASHPOINTS IN ENVIRONMENTAL POLICYMAKING: CONTROVERSIES IN ACHIEVING SUSTAINABILITY 2 (Sheldon Kamieniecki et al. eds., 1997) [hereinafter FLASHPOINTS]. The political scientists in the extensive study of sustainability set out six “major flashpoints,” of which international trade and free trade is one. *Id.* at v-vi, 2. The analysis found the reason trade fails to correctly address sustainability is that the need is not built into the trade codes, which may be resolved by input of awareness and ethos to trade decisions. See *id.* at 338.

33. Joel C. Beauvais, Note, *Regulatory Expropriations Under NAFTA: Emerging Principles & Lingering Doubts*, 10 N.Y.U. ENVTL. L. J. 245, 245 (2002). The takings claim discussed is the *Methanex* case, an environmental dispute over use of a gasoline additive banned in California. The claim is discussed also by Joseph A. Strazzeri, Note, *A Lucas Analysis of Regulatory Expropriations Under NAFTA Chapter Eleven*, 14 GEO. INT’L ENVTL. L. REV. 837 (2002) and a number of cites from Beauvais, *supra*, at 246 n.8 (critiquing NAFTA’s Chapter 11).

34. Beauvais, *supra* note 33, at 266, 281-82.

35. North American Free Trade Agreement, 1993, Can.-Mex.-U.S., 32 I.L.M. 289, ch. 11.

protections be balanced against competing social concerns, such as human rights, environmental protection, or public health.<sup>36</sup>

For example, in the Florida Water Resources Act of 1972 the legislature “revised the concepts of water law in Florida. Ownership of land [under the Act] does not carry with it the ownership of water or even the right to use water. The waters in the state are held in trust for the benefit of the people of the state.”<sup>37</sup> Use requires permits. Under NAFTA, it would be argued that Florida would be unable to enact such a law today as the compensable effect on foreign investors in real estate would preclude it. The globalization risk is from, for example, the negotiations for a Free Trade Agreement for the Americas, perhaps a few years away and involving thirty-four countries, not just the NAFTA three. Negotiations for twenty-nine countries’ Multilateral Agreement on Investment (MAI) were abandoned in 1998. Those negotiations could have meant verbatim incorporation of the NAFTA expropriation language into MAI, in other words, the provisions would have been extensively globalized.<sup>38</sup> Also, proceedings for compensation would be conducted by trade tribunals strongly criticized for being insulated from public participation and scrutiny as they implement the trade law’s effects on environmental law.<sup>39</sup>

Green legal professionalism approaches implementation of environmental law through the strong processes of ecological democratization.<sup>40</sup> Such processes are necessary for our profession to deliver on the instruction of society to implement all the many expectations and promises of our laws. Where those processes are being cut away, we have a fundamental professionalism dilemma. Do we advocate loyally for the processes necessary to all these environmental laws, or do we stand by while they are, basically, repealed? Professionalism supports the creation of national and international environmental law and regulations through a democratic process. Professionalism cooperates with other institutions in objection to the exemption of business activity from the processes of environmental law.

36. Beauvais, *supra* note 33, at 266.

37. Irene K. Quincey, *History of Regulation of Consumptive Use*, in *FLORIDA ENVIRONMENTAL AND LAND USE LAW* (The Florida Bar 2001).

38. The hemispheric negotiations are on-again-off-again and hard to predict. See Christopher John Duncan, *Reconciling U.S. Regulatory Procedure with the WTO Reformulated Gasoline Case*, in *RECONCILING ENVIRONMENT AND TRADE* 185 (Edith Brown Weiss & John H. Jackson eds., 2001). Some websites keeping pace with them are the Free Trade Agreement of the Americas official website at [http://www.ftaa\\_alca.org](http://www.ftaa_alca.org), and various civil society organizations at <http://www.citizenstrade.org>.

39. Beauvais, *supra* note 33, at 254-55.

40. Dryzek has applied the “burgeoning literature on deliberative democracy” to environmental discourse, in his other writings. See *DELIBERATIVE DEMOCRACY*, *supra* note 6, at 7; Dryzek, *supra* note 6. The linkage to legal professionalism is the present author’s.

C. *The Amount the Participants' Input is Genuinely in the Minds of the Decision-makers (Compared to Symbolic Inclusion): Objectivity in Sustainability*

In studying the problem of how to measure environmental risk so that sustainability can be achieved, political scientists have commented that it is political interests that interfere. Their suggested solution is methodologies can be made essentially scientific rather than political.<sup>41</sup>

The Magnuson-Stevens Fishery Conservation and Management Act<sup>42</sup> provides for sustainable yield. In particular, eight Regional Fishery Management Councils develop plans to achieve and maintain, on a continuing basis, the optimum yield (defined as the "maximum sustainable yield") from each fishery.<sup>43</sup>

An illustrative sequence occurred in the history of the law. The version of the Act adopted in 1976 got the fisheries administration going, setting up the regional councils to plan and manage, yet, it failed to prevent the measurable decline of fisheries. Thus in 1996, amendments were adopted to build on the structure and oblige effective plans.<sup>44</sup> Then, application of the Act by courts obliged management plans to adhere to the standard set for the maximum sustainable yield. For example, a plan for summer flounder landings had only an 18% likelihood of achieving the target, that is, it was over five times as likely to fail as to succeed. The court found the Act required at least a 50% probability of success.<sup>45</sup>

The legal history of fisheries management demonstrates sustainability's power as establishing a baseline, and providing for intergenerational effectiveness. When the original baseline proved ineffective, new criteria were legislated. When implementation lagged, citizen enforcement through the courts worked. The very terms of the scientific quotas and fishery plans are set by sustainability.<sup>46</sup> Many battles will cause fisheries management to evolve, but the driving norm has gone from free market to sustainability. The effect is an economic sustainability basis, which consequentially also tends toward an ecological sustainability.

Describing conservative activist judges' effect on environmental law, the National Resources Defense Council issued a report. The organization states the choice is between anti-environmental activism or proper respect for the law. The subject areas of this kind of activism, they report, are multiple. The commerce

41. George A. Gonzalez, Conclusion: *Obstacles to Obtaining Sustainability* 335, 338, in FLASHPOINTS, *supra* note 32 (referring to Walter A. Rosenbaum, *Regulation at Risk: The Controversial Politics and Science of Comparative Risk Assessment* also in FLASHPOINTS, *supra* note 32).

42. 16 U.S.C. §§ 1801-1883 (2000).

43. *Id.* §§ 1851(a)(1), 1854(b)(1).

44. Kristen M. Fletcher, *Fix It! Constructing a Recommendation to the Ocean Commission for the Future of Fisheries*, 8 ROGER WILLIAMS U. L. REV. 93, 95-96 (2002).

45. *Natural Res. Def. Council, Inc. v. Daley*, 209 F.3d 747, 754-55 (D.C. Cir. 2000).

46. Shi-Ling Hsu & James E. Wilen, *Ecosystem Management and the 1996 Sustainable Fisheries Act*, 24 ECOLOGY L.Q. 799, 801-02 (1999).

clause is used to prevent congress from acting. The takings clause is used to force payment to polluters before they must end their pollution. The Eleventh Amendment<sup>47</sup> is used to excuse state compliance with federal laws. Standing is used as a barrier. Ideology of judges projects negatively in interpretation of the intent of the laws.<sup>48</sup>

One aspect of genuine judicial decision-making in land-use cases is the disclosure of why Justices select particular standards of review. Robert J. Hopperton suggests an “entrenched expectation” should be that all opinions give a “reasoned elaboration” for the basis of the standards they apply. Such a “procedural expectation would obligate Justices to *disclose* their premises for deploying deferential judicial review, or heightened judicial review, or activist judicial review, etc., and to set forth their reasoning process” concerning the selection.<sup>49</sup> The disclosure process is seen as a helpful continuing remedy, but no panacea. It works against many of the ways the merits of the cases fail to register as needing redress. Without disclosure, the decision-makers are more likely to fall into “personal predilections . . . [e]rratic subjectivity of judgment, analytical laxness, intellectual incoherence, the imagining of too much history, and the manipulation of technical requirements.”<sup>50</sup> Trade agreements extend concern about adjudication into yet another dimension. The investor-state dispute mechanism (ISDM) provisions of NAFTA, for example, use binding arbitration, criticized for “institutional legitimacy and procedural safeguards” as the panels for arbitration are not “a standing body of independent, professional judges” nor does precedent bind the tribunals and “there is no general mechanism for appeal,” work being “largely insulated from public scrutiny or public participation.”<sup>51</sup>

Others have proposed that courts in limited circumstances use their discretion to shift the presumption of validity or constitutionality of a land-use decision. This should occur, they say, where the courts see facially suspect patterns like spot zoning or implausible departures from comprehensive plans. In those circumstances, the local government would have a higher burden of justification because of the evidence that the process had failed, and “something is amiss” in the view of “sensible state judges, who often have extensive experience with municipal politics.”<sup>52</sup>

47. U.S. CONST. amend. XI.

48. SHARON BUCCINO ET AL., *HOSTILE ENVIRONMENT: HOW ACTIVIST JUDGES THREATEN OUR AIR, WATER, AND LAND* (2001).

49. Robert J. Hopperton, *Majoritarian and Counter-Majoritarian Difficulties: Democracy, Distrust, and Disclosure in American Land-Use Jurisprudence—a Response to Professors Mandelker and Tarlock's Reply*, 24 B.C. ENVTL. AFF. L. REV. 541, 558 (1997).

50. *Id.* at 559.

51. Beauvais, *supra* note 33, at 262-63.

52. Daniel R. Mandelker & A. Dan Tarlock, *Two Cheers for Shifting the Presumption of Validity: A Reply to Professor Hopperton*, 24 B.C. ENVTL. AFF. L. REV. 103, 111 (1996).

Many opportunities exist for delivery of objective standards and meaningful review fitting the circumstances of environmental cases. These opportunities to implement the goals of environmental law should be what professionalism supports.

*D. How Much Information and Expertise is Available to the Participants: Housekeeping Statutes*

The general rights of citizens to access governmental information has a perplexing exception: "when discovery entails a subpoena of governmental agencies."<sup>53</sup> Most federal agencies, operating under the Housekeeping Statute, have regulations limiting access to agency records and employee testimony.<sup>54</sup> The regulations "commonly give the heads of agencies the power to refuse requests for the testimony of agency employees. . . . The standards created by the regulations to guide agency determinations . . . are extremely varied and ill-defined" often leaving "unfettered discretion to affect the outcome of private civil actions."<sup>55</sup>

"No compelling reason justifies singling out federal agencies and allowing them virtually unrestrained discretion to avoid discovery requests for employee testimony."<sup>56</sup> "If an agency head decides not to allow a subordinate to testify, private litigants in state court have many procedural hurdles to jump before they can adequately challenge the agency head's determination."<sup>57</sup>

The proposed solution, offered by Jason C. Grech, is very direct. Federal legislation could require "agencies to follow the Federal Rules of Civil Procedure when reviewing requests for employee testimony."<sup>58</sup> Additionally, legislatively granting federal courts jurisdiction to determine matters including sovereign immunity and settling the "myth of a housekeeping privilege" are needed.<sup>59</sup>

Given the expertise of federal environmental agency employees concerning environmental citizen suits, whether in federal or state courts, green legal professionalism should target the Housekeeping Statute as a priority for reform, at least in the context of state and federal environmental citizen suits.

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53. Jason C. Grech, Note, *Exxon Shipping, The Power To Subpoena Federal Agency Employees, and the Housekeeping Statute: Cleaning Up the Housekeeping Privilege for the Chimney-Sweeper's Benefit*, 37 WM. & MARY L. REV. 1137, 1138 (1996).

54. *Id.* at 1143.

55. *Id.* at 1145-47.

56. *Id.* at 1181.

57. *Id.* at 1151.

58. *Id.* at 1181.

59. *Id.* at 1182.

*E. Whether the Quality, Skill and Resources of the Participants Rises to the Level Necessary in the Context: Attorney Fees*

Attorney and expert witness fees are a dominating concern in determining the quality, skill and resources of citizen suit practice. On the federal level, the availability of fees under many environmental laws typically means that those asserting public goals without financial self-interest may recover fees, and the federal application when researched in 1990 had not meant awards against unsuccessful public interest litigants.<sup>60</sup> This is despite the phrasing of the fee provisions in statutes that imply any prevailing or substantially prevailing party is entitled to fees; the legislative intent has been recognized to mean the fees are intended for the plaintiffs who bring the citizen suits.<sup>61</sup>

The same is not necessarily true of state fee-shifting acts. For example, in Florida the costs and attorney's fees are mandatory to the prevailing party, a situation described as likely to have deterred the use of the plaintiffs' suit provision itself and caused most public-interest parties to restrict themselves either to interventions, since there is no fee liability provision in the intervention portion of the statute,<sup>62</sup> or perhaps to administrative proceedings. The history and interpretation of the Florida provisions are sparse and do not secure the same comfort for use that many federal statutes provide.

It is hard to keep a public debate going. With environmental matters, there are multiple debates and endless detail. Advantage tends to lean toward business. As Sagoff describes it, "We hear on all sides that government is routinized, mechanical, entrenched, and bureaucratized; the jargon alone is enough to dissuade the most mettlesome meddler."<sup>63</sup>

As Manus states, there are problems about the environmental movement's future. He indicates "nature rarely has been championed by a truly powerful political leader. . . . U.S. culture continues to grope for a sustainable nature philosophy, something to serve as a polluter's conscience" when the laws are inadequate, and the long-standing fear that "the public's pro-environment

60. Robert L. Boese, *Liability for Attorneys' Fees in Environmental Litigation*, 38 LA. B.J. 93, 93-94 (1990).

61. Numerous federal environmental statutes containing such provisions are described by Boese, *supra* note 60, at 94 n.6.

62. Carol A. Forthman, *Environmental Issues*, in FLORIDA REAL PROPERTY LITIGATION (2001) (discussing section 403.412(2)(f) of the Florida Statutes, which provides "the prevailing party or parties shall be entitled to costs and attorneys fees" and may require posting of surety bond or cash by plaintiffs. The statute has discretionary fees for NPDES actions).

63. Mark Sagoff, *At the Shrine of Our Lady of Fátima, or Why Political Questions Are Not All Economic*, in EARTH ETHICS: ENVIRONMENTAL ETHICS, ANIMAL RIGHTS, AND PRACTICAL APPLICATIONS 372, 377 (James P. Sterba ed., 1995).



sentiment will regress, and that no sufficiently solid legal structure exists to carry us through to the next surge” in the cycle of interest.<sup>64</sup>

The question for us is, we cannot generate enough controversy or even enough attention to conciliation, for all the environmental activities present in a boom-town world. We can do better, by applying our perspective of ecological democracy. However, so much is still inadequate and unaddressed. The population of the boom-town takes a long lag time to catch on and associate with the vigors of public activity needed to defend the environment.

Political advisor Dick Morris has described the cycles bearing on social causes. He finds times dictate whether to be aggressive or conciliatory. Morris' advice for producing change in moderate times is to work incrementally, such as in the private sector for gradual adoption of the goals. His example is the private sector health care reform after national reform failed. Eventually consensus runs its course, as new issues generate new controversies. These renew the “relevance” of democracy.<sup>65</sup>

Examples of more incremental work can be seen in efforts to induce compliance and tailor emissions trading, where political opposition has thwarted more effective solutions like emissions taxes to get industry to internalize costs and negative externalities. Or, where national security, due to violence, has experienced difficulty accepting reasons to assist cultures and natural systems, links to eco-cultural security can be made.<sup>66</sup>

The fickle nature of society's attention span for environmental issues means strong support is required of the resources behind citizen suits. Attorney and expert witness fees are particularly pressing to establish better enforcement under state law.

#### IV. CALLS FOR CHANGE IN ENVIRONMENTAL LEGAL ETHICS

In 1994, the President of the Environmental Law Institute, J. William Futrell, stated the greatest achievement of the first twenty-five years of modern environmental law has been codification of a change in ethical responsibilities to the natural world, such as the National Environmental Policy Act's goals bearing upon sustainability. He proposes, “[d]uring the next twenty-five years, the most important development in environmental law will be to implement that ethical advance as practitioners counsel reluctant clients, many of whom do not share

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64. Peter Manus, *One Hundred Years of Green: A Legal Perspective on Three Twentieth Century Nature Philosophers*, 59 U. PITT. L. REV. 557, 560 (1998).

65. DICK MORRIS, *THE NEW PRINCE: MACHIAVELLI UPDATED FOR THE TWENTY-FIRST CENTURY* 71-81 (1999).

66. Robert O. Vos, *Introduction: Competing Approaches to Sustainability: Dimension of Controversy*, in *FLASHPOINTS*, *supra* note 32 (giving examples of partial solutions to critical issues in sustainability.) The eco-cultural linkage has gotten much attention, for example, at the World Economic Forum, *Poverty Breeds Terror, Forum Told*, *THE HERALD* (Miami) Feb. 2, 2002, at 14A.

in the vision of Earth Day.”<sup>67</sup> He looks toward closing the gap between environmental ethics (a general subject) and legal professional conduct if society is to meet the intent of national environmental statutes.<sup>68</sup>

Futrell’s call is for guidance “on how to resolve the conflicting demands of client advocacy and protection of the public interest in environmental protection.”<sup>69</sup> He seeks to bridge environmental ethics with environmental lawyers’ professional responsibility by recognizing a special category of professional responsibility for environmental law. As professional responsibility needs to accept the moral value as set by notable statutory formulations, Futrell would revise the various jurisdictions’ professional responsibility codes governing attorneys to provide for those expressions. He asserts there is a community value that is set and knowable, with an expression of the social value for law being stronger regard for the public interest.<sup>70</sup> He indicates, “Future developments in legal ethics should adopt the vast change in social values of the last twenty-five years as reflected in the development of environmental ethics.”<sup>71</sup> Futrell is seeking to inspire responsive development of the particulars of this ethical guidance.

As expressed by Christopher D. Stone, when he embarks on exploring the frameworks for moral considerateness, the fields of law and morality separate but are related:

we have to disengage more carefully the legal aspects of our inquiry from the moral. While law and morals share common roots, functions, and often subject matter, their emphases are different. In morals, the emphasis is on generating and justifying general standards of conduct. In law, the emphasis is on authoritatively implementing some of the standards for which morality has spoken.<sup>72</sup>

Stone helps describe the separation further: “*How* we arrange our affairs so that the future we choose is the future that becomes the reality: that is the question of social institutions, of [the] *law*.”<sup>73</sup>

There is a larger frustration with the field of professionalism than merely environmental law’s expressions of what it should do but is not yet doing. A postmodern call-to-arms is sounded by Baron and Greenstein’s dissection of the field of lawyers’ professional responsibility. They depict that field today as part of the autonomous discipline of law, separated even from other fields of law, and generally disengaged from moral considerations, in pursuit of client goals. It has become a legalistic construction, the law governing lawyers, the regulation of

67. Futrell, *supra* note 14, at 825.

68. *Id.*

69. *Id.* at 837-38.

70. *Id.* at 839.

71. *Id.* at 838.

72. STONE, *supra* note 2, at 41.

73. *Id.* at 15-16.

lawyers, the disciplinary rules, alternatively named "legal ethics."<sup>74</sup> Baron and Greenstein search for where morality or ordinary ethics intersects this field. Instead of connection, they identify mainly a disconnect. Ethical neutrality is at the heart of the lawyer's craft, they say, under contemporary construction. Yet, they find legal practice decisions result in moral impacts, illustrating with an environmental example of one neighborhood treated positively while a less influential neighborhood has the undesirable land uses shift onto it.<sup>75</sup> The client-serving choices of policy argued during cases haphazardly encode moral positions. Baron and Greenstein end with a rejection of the dominant construction and a plea for "incisive and relentless critique" so that eventually, an alternative construction may emerge.<sup>76</sup> Baron and Greenstein do not offer an alternative construction of legal professional responsibility themselves, but endeavor to point the way by showing the need.<sup>77</sup>

Futrell similarly describes the lawyer's disconnect, and its reasons. Most of the state professional codes of responsibility or conduct are built around the adversarial model, designed to encompass, for instance, a criminal defendants' basically stonewalling the government in order to assert innocence. The underlying premise of professional codes is: "Lawyers should subsume their personal ethical beliefs and moral stances to the positions that zealous advocacy of their clients' interests require."<sup>78</sup> He indicates, "There is little guidance on how legal ethics meshes with environmental ethics."<sup>79</sup> Perhaps a little foray to remind us of how society generally regards environmental ethics is necessary to set up the mesh with legal ethics that we need to construct.

## V. SOCIETY EXPECTS LAW TO BRING ABOUT ITS ENVIRONMENTAL ETHIC

It is not necessary or likely possible to exactly select, or even precisely define, the formulation of society's intent, in order to apply green legal professionalism. Recognizing the existence of a generalized, common expectation of an environmental quality is enough. It is valuable to realize that society has the expectation despite the offered criticism to any particular expression of an environmental ethic. And we can realize that competing formulations such as particularly wholly unrestrained free market are discredited in society and do not represent the intent of society because they could not lead us to a resultant environmental quality acceptable to society. The point is that it is possible in current environmental dialogue to recognize that a community or cultural

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74. Jane B. Baron & Richard K. Greenstein, *Constructing the Field of Professional Responsibility*, 15 NOTRE DAME J.L. ETHICS & PUB. POL'Y 37, 38 (2001).

75. *Id.* at 69.

76. *Id.* at 98.

77. *Id.* at 97-98.

78. Futrell, *supra* note 14, at 835.

79. *Id.* at 836.

standard exists akin to one or another or the sum of the concepts discussed below, and that this community standard addresses and accounts for society's other goals, such as economic ones, as well.

The formulations of intent are at the core, or part of the conscience, of what professionalism must ultimately achieve. Constant reference and comparison to them is made to analyze and remedy errant processes in the legal system. By considering formulation of intent, the distortions of the processes that produce such harmful results for the environment are often apparent.

The following formulations are among the environmental value statements that most people living in technological society have heard about. Their ideas are common currency in our culture, not just among environmental lawyers or persons with active business involvement or higher education. Green professionalism works from the perspective that it is a general overlay under which ecological democratization is applied, and rejects the idea that a pure selfishly-based free market should control environmental decisions in a deliberative democracy. These concepts are the notable prescriptions of society's environmental ethic, which lawyers should weigh in making many professionalism choices in their active practice. They tie into the ecological democratization processes that are described above.

*The Community Value Criteria of General Environmental Ethics.* In popular terms, the environmental ethic of society is frequently expressed as "community value." Usually disciplines evaluating for an environmental ethic select it as an essential term.<sup>80</sup>

For instance, a group of political scientists has evaluated critical problems in environmental sustainability.<sup>81</sup> In their summary, George A. Gonzalez traces the restrictive design of our political system as the explanation for what now chokes efforts for sustainability. That design accords bias. An elevated status for industry (or business) exists in the governmental system. And, that status operates under the principle of free "unremitting" pursuit of self-interest.<sup>82</sup> State behavior (such as industry regulation) is viewed suspiciously. It is characterized as being limited. In classification terms, this is known as Lockean liberalism, or a liberal (rights-based) norm that founds government on the protection of property and wealth gathered by self-interested actions. Its free-market ethic views the marketplace's price signals and technology as the efficient response to resource depletion. This is the traditional view of industries.<sup>83</sup>

In our current system, liberals and conservatives may vary on how unremitting the pursuit is allowed to be, but share in its support in a general sense when their political processes are driven by campaign contributions, lobbyist influences, and the importance of wealth in the system. These make the necessary result of

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80. POLITICS OF THE EARTH, *supra* note 6, at 200.

81. FLASHPOINTS, *supra* note 32.

82. Gonzalez, *supra* note 41, at 341.

83. *Id.* at 342-46.

sustainability very hard to achieve. Pared down to specifics, the group studied six sustainability issues as "flashpoints" to find reasons for failure of sustainability, and to suggest prospects for partial correction in the Lockean liberalism system.<sup>84</sup>

Gonzalez's summary discusses the call for a "competing discourse." The basis is the concept that environmental goals usually need a community-interest basis. This competing discourse of "community interest," must encompass and reconcile with community interests in property rights and reluctance to reconfigure the economy.<sup>85</sup>

Ethicists examining the political and legal system urge the same solution. To Mark Sagoff, market-based policy is indifferent toward value, "an indifference so deep, so studied, and so assured that at first one hesitates to call it by its right name."<sup>86</sup> It is the neutrality of the economist. "Those who are willing to pay the most . . . have the right view; theirs is the more informed opinion, the better aesthetic judgment, and the deeper moral insight."<sup>87</sup> Efficiency, or maximization of wealth, or economic optimization, is the criterion. But issues of public safety and health, social relations and environment, involve matters of knowledge, wisdom, morality, and taste. They also involve other principles. These are "community" or "public" values or philosophy. When instilled with "sensible recognition of economic constraints," they are the "moral function of public law."<sup>88</sup>

Dryzek, like Gonzalez and Sagoff, stresses community value, finding it phrases the ethical standard society espouses. It is probably the most common articulation of society's environmental ethic.<sup>89</sup>

*National Environmental Statutes' Expressions of Intent.* Futrell's assertion that the national environmental statutes give guidance of the ethical intent for a revised code of professional ethics has much backing in the statutes he cites, yet it is open to question. Not all surveyors of those laws, however, agree that there is a coherent approach to be found in those sources. These laws only roughly express what Futrell terms, the "ethical norms agreed on by the majority."<sup>90</sup> They are the product of our political system, and the statements of intent are

84. Gonzalez, *supra* note 41, at 341-43.

85. *Id.* at 341-43 (discussing MATTHEW A. CAHN, ENVIRONMENTAL DECEPTIONS: THE TENSIONS BETWEEN LIBERALISM AND ENVIRONMENTAL POLICYMAKING IN THE UNITED STATES (1995)).

86. Sagoff, *supra* note 63, at 380.

87. *Id.* at 378.

88. *Id.* at 380-81.

89. As Dryzek states, "deliberative authenticity exists to the extent that communication induces reflection on preferences in non-coercive fashion." DELIBERATIVE DEMOCRACY, *supra* note 6, at 76. The "values that can survive authentic democratic debate are those oriented to the interests of the community as a whole." POLITICS OF THE EARTH, *supra* note 6, at 200.

90. Futrell, *supra* note 14, at 839.

often more noble in prose than the accompanying substantive provisions are in content. The particulars of how ethics codes might use these principles is not developed in Futrell's article. Futrell presents the premise that the moral value is in a larger sense fixed for us by these laws. They certainly express the cultural aspiration in a larger sense, famously linking great concepts to resources and needs, like fishable and swimmable waters, or consideration for irretrievable loss or for impact to the human environment.<sup>91</sup>

*Sustainability*: One way our society frames the cultural aspirations is the term sustainability:

The concept of "sustainability" has become a hotly contested domain within public discourse. One critic has even written that "Sustainable development is in real danger of becoming a cliché like 'appropriate technology' — a fashionable phrase that everyone pays homage to but nobody cares to define" (Lele 1991, p. 607). Indeed, the very word "sustainable" can be found in many phrases with starkly different implications: "sustainable growth", "sustainable yield", "sustainable societies", and "sustainable development". The idea of sustainability functions as what Baudrillard (1993) calls a "floating-signifier" in that it masks underlying disagreement, can function differently in varying contexts, and may finally lose relevance to concrete policy choices.

But it would be a mistake to dismiss the idea of sustainability prematurely. There are at least two reasons why the idea of sustainability has proven such a powerful force in shaping discourse about the environment. First, the role of sustainability as a "floating-signifier" provides common ground for parties with deeply opposed interests to search for agreement. Any agreement forged about the content of "sustainability" would offer a powerful benchmark for evaluating difficult policy choices. Second, the notion of sustainability raises crucial issues of intergenerational justice that place environmentalists in a stronger position in relation to the American (Lockean) Liberal tradition (e.g., Gore 1992). At its best, therefore, an expanding discourse of sustainability may lead to a more integrated (in the sense of ecological systems) and long-term view of the environmental problematic.<sup>92</sup>

So we get two outcomes of dealing with environmental issues in terms of sustainability—benchmark and intergenerational consideration.

Sustainability is not a precise ethical standard because it is a floating signifier. An intense search, involving huge studies and millions of dollars, concludes that sustainability is after all, undefinable. "[D]ifferent interests with different substantive concerns" have tried "to stake their claims in the sustainable development territory" because "astute actors recognize that the terms of this discourse should be cast in terms favorable to them."<sup>93</sup> Like Gonzalez, Dryzek sees the discourse as an important concept to be contested politically. He views

91. Futrell, *supra* note 14, at 839-40. See also 33 U.S.C. § 1251(a) (2000); 42 U.S.C. § 4322 (2000).

92. Vos, *supra* note 66, at 3-4.

93. POLITICS OF THE EARTH, *supra* note 6, at 124.

sustainability to be emerging as the primary focus when it comes to (especially global) environmental affairs. It re-conceptualizes the terms of environmental dispute. Collective efforts are required for it to achieve its goals.<sup>94</sup>

And, the variant of the term as “sustainable development” carries forward the aspirations of the Earth Summit (United Nations Conference on Environment and Development) held in Rio de Janeiro in 1992, which are amply known and discussed in law, public policy, and economics. The term has been defined as “human development that is ecologically sustainable” with its aims being “human freedom, opportunity, and higher quality of life.”<sup>95</sup> However, “[i]t is not another name for economic development, although it includes economic development,” and the wide-ranging steps needed to further the many dimensions of sustainable development have been extensively described.<sup>96</sup>

*Theories of Property Law: Green Wood, Norms, Web of Interests.* One of the green property theories is “green wood”, a theory of property law advanced by Robert J. Goldstein grafting environmental ethics and ecology into real property law.<sup>97</sup> Goldstein approaches the “bundle of sticks” concept that real property consists of a set of rights that are divisible, such as the right to exclude others or the right to transfer. Land always relates to neighboring property, such as its need for access, water, adjacent support, fire prevention, light, air, or nuisance prevention. Lockean theory encompasses this concept although emphasizing the economic rights in property. With modern society’s acceptance of the interdependence of properties to sustain the environment, Goldstein essentially takes aim at the mind-set of property law.<sup>98</sup>

Goldstein articulates the respect owed to the “environmental context” of each piece of land.<sup>99</sup> He would view the context as integral to the rights. Impliedly at least, his formulation tells the status of economic value to move over to make room for the status of environmental context. Alteration to land must not disrupt the context. Goldstein’s aim is particularly at common law. His application is to directly instill substantive decisions about property with the responsibility to maintain the environmental context of the land.<sup>100</sup>

In essence, Goldstein takes one step further the NEPA-like approach to identifying the inter-generational or community value. Noting that NEPA is procedural, he extracts the fruit of the procedural inquiry that describes the value or context of the property involved. Rather than leaving that fruit at the disposal of an agency, Goldstein inserts it into the substantive decision. For government

94. POLITICS OF THE EARTH, *supra* note 6, at 125.

95. John C. Dernbach, *Synthesis*, in STUMBLING TOWARD SUSTAINABILITY 1, 5 (John C. Dernbach ed., 2002).

96. *Id.* at 5-6.

97. Goldstein, *supra* note 18.

98. *Id.* at 404-05.

99. *Id.* at 380, 385, 403.

100. *Id.* at 410.

permits and actions, he foresees ready application. The identified environmental context of the property involved must be maintained. His examples are mining or a landfill use adjacent to fragile publicly protected natural areas. Government permissions for context-altering activities would be prevented.<sup>101</sup>

The green wood inquiry adds to the range of issues allowed or required to be addressed. Goldstein presents it as a question for property law's bundle of sticks.<sup>102</sup> But many decisions affecting the environment could be overlaid with a consideration in the nature of a green wood standard of general environmental ethics and ecology.

However, the bundle of sticks approach to property is insecure as a conception of property. Craig Anthony (Tony) Arnold presents a "replacement of the metaphor of property as a bundle of rights with a metaphor of property as a web of interests," viewing interest holders as connected to one another and to the object owned.<sup>103</sup> The conception addresses environmental ethics, and addresses the current understanding of property as a legal topic in metamorphosis, considering property's several attributes (its distinctiveness, interconnectedness, functionality, and context).

Similarly, to address land and water use and ecosystem interactions, revision of traditional property norms has been described by Lynda L. Butler. An adaptive conception of property is proposed, "tak[ing] into account the impact of property use on ecological and other common systems."<sup>104</sup> The "scales of land use" recognizing landowner environmental responsibility would be incorporated into the formula of rights, powers, duties and liabilities for property.<sup>105</sup> These impact on the scope of constitutional rights, assisting the non-economic aspects. There is an effort for judicial recognition of a sustainable and adaptive view of property, and its associated ecological conditions, with spatial and temporal dimensions. As private property piggybacks use of common environmental resources and property norms are redefined, more than nuisance theory should apply.

These proposals are anticipated by what Terry W. Frazier calls Green Property, a name derived from the Green social movement that seeks to change modern culture's interactions with nature.<sup>106</sup> A more or less comprehensive organization of the ideas of property reform, away from classical liberal property

101. Goldstein, *supra* note 18, at 428-29.

102. *Id.* at 430.

103. Craig Anthony (Tony) Arnold, *The Reconstitution of Property: Property as a Web of Interests*, 26 HARV. ENVTL. L. REV. 281, 284 (2002).

104. Lynda L. Butler, *The Pathology of Property Norms: Living Within Nature's Boundaries*, 73 S. CAL. L. REV. 927, 1015 (2000).

105. *Id.*

106. Terry W. Frazier, *The Green Alternative to Classical Liberal Property Theory*, 20 VT. L. REV. 299, 300-03 (1995).



theory, is presented by Frazier, particularly to elicit common themes and interdependent ideas utilizing ecological principles.

Whatever ways real property law may now be evolving, there appears to be theoretical support for having the property rights account for the land's environmental context. Goldstein feels it is society's view already and the common law is willing to accept it.

*Precautionary Principles:* To address the "moral prescription" or embedded ethical framework in the legal responses to environmental issues, Prue Taylor examines the ethics embedded in international provisions addressing climate change.<sup>107</sup> In the "precautionary approach" as defined in Article 3 of the United Nations Framework Convention on Climate Change (FCCC), Taylor finds the approach is laden with economic values when addressing cost-to-benefit analysis, giving economic rationale an absolute dominance.<sup>108</sup> This approach is then starkly contrasted to "precautionary principles" which would base protection of the earth's climate system on scientific factors, erring on the side of caution. The consequence of the FCCC approach is to widely miss the target set by the scientific community for reduction in greenhouse gases by almost twelve times, and to do so twenty years later, perhaps catastrophically.<sup>109</sup>

Why is it that green legal professionalism would accept the precautionary "principles" and reject the precautionary "approach"? As Dryzek explains, democratization by discourse or deliberation seeks to achieve results that persons (without self-interested bias) could accept upon reflection as correct courses of conduct.<sup>110</sup> In the greenhouse gas example, the "approach" would not convince unbiased individuals that it would achieve the social goal.

The analysis sets out, in effect, an exemplary green legal professionalism inquiry. Standard of proof, and burden of proof, and the objective of balancing of factors, are addressed. Taylor urges a broad "scope of analysis," to include both economic and non-economic factors, with health taking precedence over economics, and inquiry to the range of options and their public acceptability.<sup>111</sup>

Taylor points out the burden of proving environmental harm should not be placed on the contesting party. Rather, it must be on the initiator of change, or the policy and decision makers, including "transparent and participatory processes" to make choices.<sup>112</sup>

Like Goldstein's green wood theory, or Butler's property norms, Taylor attacks the notion of immutable property rights, and argues that property rights

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107. Prue Taylor, *Heads in the Sand as the Tide Rises: Environmental Ethics and the Law on Climate Change*, 19 UCLA J. ENVTL. L. & POL'Y 247, 250 (2000/2001).

108. *Id.* at 251-54.

109. *Id.* at 256-59.

110. DELIBERATIVE DEMOCRACY, *supra* note 6, at 1-2.

111. Taylor, *supra* note 107, at 256.

112. *Id.*

must be viewed as having associated ecological responsibilities. Taylor urges public awareness of such limitation of property rights.<sup>113</sup>

*Ecological Science and Perhaps Adaptive Management.* Adaptive management is promoted by A. Daniel Tarlock. As laid out by Tarlock, traditional environmental law uses a value pluralism, switching the argument for a particular regulation to one of several constructs.<sup>114</sup> For instance, some may use a “balance of nature” land ethic. Others may argue for a deep ecology ethic, to view nature and humans with equal moral standing. Still others on the ethical continuum claim an ecological science ethic which views natural resources as finite, and so requiring human intervention to enable the natural systems that support life. For some the alternative is science, as evolved into regulatory science. Although Tarlock does not present science as an ethical expression, ethicists would say accepting scientific principles accepts them as a value, which is an ethical expression.<sup>115</sup>

Tarlock disdains efforts to justify environmental action from an ethical basis when the scientific basis is not sufficient. He looks to science, not ethics, to inform environmental law. He disdains re-casting property rights on a natural rights basis in order to justify environmental law. He describes environmentalism as a breakaway from traditional legal values: it is relatively difficult to integrate environmentalism into the legal system, as it is a product of externalities, and asks for human subordination to future generations and ecosystems. Rather than accord standing to these generations or ecosystems, he impliedly argues against the idea by describing their lack of legal personality and blasts the usual scientific basis of environmental law.<sup>116</sup>

Tarlock’s environmental law would elevate “more hard-edged probabilistic theories of non-equilibrium.”<sup>117</sup> That is, he recognizes that science has changed. Ecosystems are viewed as dynamic, changing, in flux, unbalanced features. Processes are what produce undisturbed systems, so the goal is adaptive management with feedback loops for new information to alter policy. Policy becomes a sort of adjustable experiment, making the probability range estimated, and causing mid-course adjustments while the activities are ongoing. This means decisions have less finality than the legal system (and the static view of ecosystems) traditionally expects.<sup>118</sup>

Tarlock addresses postmodern scientific methods, particularly for ecological science. He takes aim at the static models of early modern scientific responses. He bemoans the growth of regulatory science where usual methods of scientific

113. Taylor, *supra* note 107, at 257.

114. A. Dan Tarlock, *Environmental Law: Ethics or Science?*, 7 DUKE ENVTL. L. & POL’Y F. 193, 195-97 (1996).

115. *See, e.g., id.* at 200 n.29.

116. *Id.* at 215-16.

117. *Id.* at 201.

118. *Id.* at 205-06.

experiment are squashed into a regulatory agenda, timetable and design, foreign to scientific validity. He stresses the need for flexibility as environmental protection is implemented to account for input of new information and the natural variability of ecosystems themselves. He advocates this kind of adaptive management.<sup>119</sup>

Tarlock's ideas<sup>120</sup> on one hand seem to make the most scientific sense, yet they seem also to launch everything into endless argument, which could never be sustained. But basing environmental decisions on science is an important feature to diminishing the influence of politics where objectivity is necessary. As Gonzalez states, the increase of scientific methodologies is a beneficial solution to the problem of political interference with measurement of environmental risk, for example.<sup>121</sup>

*The Spectrum of Green Philosophies:* Most people today do not go about with the self-identity of a particular secular philosophy, such as stoics or epicureans. Most have a religious affiliation. But they would not self-describe as being much more than "animal lovers" or fitting under a general label like "environmentalist." However, there are sets of green philosophies, perhaps constellations of them, almost like there are many varieties of vegetarians. Vegetarians may be easier to explain. Some eat no animal products, some have no genetically modified plants either, others eat dairy and eggs, others eat fish or shellfish, and there are occasional exceptions made by some, or restriction to range-raised or organic sources.

Seemingly every possible permutation and combination of an earth ethic has been extracted from studies made of activists and economic forces. Most earth ethics form both a philosophy and a political discourse. Survivalism, Prometheanism, administrative rationalism, democratic pragmatism, economic rationalism, sustainable development, ecological modernization, green romanticism (such as deep ecology), and green rationalism, among others, are analyzed by John Dryzek.<sup>122</sup>

*Religions' Tenets Regarding Nature:* In keeping with the times, the teachings toward nature of all of the major world religions are being discussed. Most begin with the reminder that nature is God's design and creation. Some urge the portions of teachings instructing humans to conquer nature and others point out how those teachings have been countered, for example, with Biblical narrative about stewardship and point out that some humans-over-nature references

119. Tarlock, *supra* note 114, at 220.

120. Tarlock credits the adaptive management scientific ideas of ecologist, Daniel B. Botkin. See DANIEL B. BOTKIN, *DISCORDANT HARMONIES: A NEW ECOLOGY FOR THE TWENTY-FIRST CENTURY* (1990).

121. FLASHPOINTS, *supra* note 32, at 337.

122. POLITICS OF THE EARTH, *supra* note 6, at Chapters 2-10 (discussing each in turn).

involve excerpts while fuller reading of the passages produces a care-giver message.<sup>123</sup>

## VI. WHY THE PROFESSIONAL CODES ARE UNPRODUCTIVE FOR LEGAL ETHICS PROVISIONS ON THE ENVIRONMENT

The effort to establish an “environmental right” has also eluded professional codes, including legal professional ones. Many professional organizations have ethical codes. For example, the American Society for Public Administration and the International Association of Chiefs of Police both have ethical codes.<sup>124</sup> Agencies are involved with issues like conflicts of interest, bribery, or competitive bidding. Administrative agency ethics consist of three main categories:

- (1) codes of ethics, including laws, professional rules, and whistle-blower statutes;
- (2) what might be called ethics police, with specific responsibilities to oversee ethical standards; and
- (3) cultural strategies, efforts to forge organizational climates conducive to ethical behavior. Though all have proved useful in some respects, none can be considered fully satisfactory, at least not in the sense that it alone can be expected to ensure organizational morality. Codes of ethics need to work hand in hand with proactive managerial strategies, which in turn need to be bolstered by external checks on behavior.<sup>125</sup>

Codes that are “clearly embraced by top agency management and embedded in an ethical organizational culture are more likely to win respect.”<sup>126</sup> They “need to work hand in hand with proactive managerial strategies, which in turn need to be bolstered by external checks on behavior.”<sup>127</sup> Codes, laws, external monitors, and organizational climates all play a role in public administration ethics. However, there is no prospect of a morally perfect organization of human beings. Ethical behavior is of uncertain derivations, it may stem from character, organization, or culture.<sup>128</sup>

Some professional organizations set environmental ethics in their codes of professional conduct, although in generalities. Palmer discusses some excerpts

123. Examples of legal discussion of religious interpretations are found in Chuck D. Barlow, *Why the Christian Right Must Protect the Environment: Theocentricity in the Political Workplace*, 23 B.C. ENVTL. AFF. L. REV. 781 (1996) and Richard H. Hiers, *Reverence for Life and Environmental Ethics in Biblical Law and Covenant*, 13 J.L. & RELIGION 127 (1996-1998), which work carefully through often-quoted passages to show the environmental context of the teachings.

124. See American Society for Public Administration, at <http://www.aspanet.org> (last visited Sept. 8, 2003); International Association of Chiefs of Police, at <http://www.theiacp.org> (last visited Sept. 8, 2003).

125. Mark W. Huddleston & Joseph C. Sands, *Enforcing Administrative Ethics*, 537 ANNALS AM. ACAD. POL. & SOC. SCI. 139 (1995).

126. *Id.* at 143.

127. *Id.* at 149.

128. *Id.* at 140.

from architects and engineers. She expresses surprise that more has not been done with professional codes of conduct.<sup>129</sup> The legal profession is position-neutral in most professional codes, but education and competency intensive. While the legal profession needs to establish an environmental professionalism approach, it should not omit to prod related professions into similar activity. Clients should not avoid lawyer involvement because of its heightened ethical considerations, only to use technical professionals such as engineers or planners preferentially for advice stemming from traditional considerations.

Probably the best known proposal for a revision of industrial ethics are the CERES principles, formerly known as the Valdez principles, as they arose after the Exxon Valdez oil spill.<sup>130</sup> The principles are meant to set the pace for ethical approaches of industries. These are promoted by the Coalition for Environmentally Responsible Economies.<sup>131</sup> The principles recognize corporate responsibility for future generations and touch on contexts like wilderness, biodiversity, health, and finite resources. Significantly, they couple with public records provisions about environmental aspects of industry, linking "an environmental ethic with the idea of freedom of information."<sup>132</sup> The goal is to have specific industries adopt the principles. Palmer recognizes these principles as based on stewardship for future generations.<sup>133</sup>

More general, and including the sustainability concept of future generations, are the International Chamber of Commerce's Business Charter for Sustainable Development. High-ranking among industries is IBM in terms of relatively more specific corporate policies, for reasons of detail and statement of the ethical basis for the policies.<sup>134</sup> However, Palmer cautions that industrial policies may be public relations exploitations, ignored in practice and especially when inconvenient to the overall corporate interests. External control on backsliding is usually lacking. Challenged industries are not likely to be the ones using such approaches, or even if they have such approaches, they have them as "greenwash" and they are not enforced where other company goals are dominant.<sup>135</sup>

While environmental philosopher John S. Dryzek agrees decisions in our political system are driven by the self-interested market, he also notes ecological modernization works economic development and environmental protection together. Some developmental interests have reason to resist environmental harm. It interferes with their production. It defers expenses to cost them more

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129. CLARE PALMER, ENVIRONMENTAL ETHICS 136 (1997).

130. See Coalition for Environmentally Responsible Economies, at <http://www.ceres.org> (last visited Sept. 8, 2004).

131. *Id.*

132. PALMER, *supra* note 129, at 128.

133. *Id.*

134. *Id.* at 133-34.

135. *Id.* at 138-39.

in the future. It affects workers who would produce better by living in a clean environment. It fails to tap the consumer market for green-produced products. So they commit to conservation and economic efficiency.<sup>136</sup> Futrell describes the new profession of environmental management's many techniques to cut even the use of polluting processes.<sup>137</sup> The resultant union of a clean environment and economic success is a familiar theme.

Green legal ethics is really an aspect of legal professionalism, rather than a matter for the subject of "legal ethics." The term legal ethics usually refers to the disciplinary minimum standards of allowed conduct usually called the ethics code. It is ludicrous to expect an ethical rule could require attorneys to protect the environment or embrace any formulation of society's environmental ethic per se.

For that reason, professionalism is the subject matter to address, even though in lay terms it means ethics. A description, for example, is that "[p]rofessionalism is largely a matter of attitude and discussion of the attitudes and values held by modern lawyers is essential if we are to resolve some of the critical issues facing our profession today."<sup>138</sup> "Professionalism differs from ethics in the sense that ethics is a minimum standard . . . while professionalism is a higher standard expected of all lawyers. Professionalism imposes no official sanctions. It offers no official reward. Yet, sanctions and rewards exist unofficially . . ." such as in one's self-respect and sense of right.<sup>139</sup>

Blan Teagle, Director of the Center for Professionalism at the Florida Bar, has his own unofficial version of a definition of professionalism and distinction of legal ethics.<sup>140</sup> Legal ethics addresses the Black Letter rules of compliance, where categories are made and principles stated for conceptual clarity. Legal ethics is often mixed into professionalism, overlapping as in a Venn diagram. It involves substantive rules of practice. However, professionalism does not have fixed categories. Teagle describes it as a process approach to moral decisionmaking, where Black Letter law takes you only so far and then you must decide the matter by applying "community standards" or "community core values," which he believes to exist despite the critics. He looks at legal professionalism as a "community of practice," where an inquiry starts with the legal ethics rules, then letting the rules help frame the issues, and then reach the professionalism application: the thought and feeling of how we should act is a process deserving of time and effort.<sup>141</sup> The topics of traditional legal professionalism are all practice-related ones, such as issues relative to the attorney-client relationship, the

136. POLITICS OF THE EARTH, *supra* note 6, at 142.

137. Futrell, *supra* note 14, at 834.

138. F. Perry Odum, *Professionalism—A Worthwhile Goal for Every Lawyer*, in FLORIDA ENVIRONMENTAL AND LAND USE LAW 2.3-2 (The Florida Bar 2001).

139. *Id.* (quoting Harold G. Clarke, Chief Justice of the Supreme Court of Georgia).

140. Blan Teagle, Remarks to the Florida Bar Continuing Legal Education Committee (Sept. 27, 2002).

141. *Id.*

lawyers' actions relating to the other parties' lawyers, personal conduct within the profession, courtesy, cooperation, adequate preparation, helping those who cannot afford an attorney, fees, and issues like substance abuse among professionals.

The traditional professionalism topics leave out the additional topics environmental law needs addressed, however. But the same concept of professionalism applies: address thought and feeling to how we should act, from application of community standards (here, the broader community of environmental ethics and not only a community of practice).

## VII. APPLICATION TO ENVIRONMENTAL JUSTICE

Another of the flashpoint issues of sustainability identified by the political scientists is the provision for environmental justice.<sup>142</sup> Lack of environmental justice, they indicate, affects the legitimacy of goals of sustainability. They indicate the frequent problem encountered is that failures of environmental justice occur in complex settings, so that case study methods have struggled to produce results. While they note the problem has been resolvable in some superfund financial allocations for example, implementation is still a perplexing issue in need of solutions.<sup>143</sup>

It appears that green legal professionalism methods have a lot to offer to environmental justice. Commentators have noted that consideration of environmental justice is carried to most environmental agency decisions by Executive Order.<sup>144</sup> It can certainly be asserted that it is a part of the formulations of all the environmental ethics our culture accepts, and necessarily within the first part of Dryzek's evaluation for ecological democratization.<sup>145</sup> All of the dimensions of ecological democratization seem to apply well to it. In fact, they almost define what should be done to ensure environmental justice, as they emphasize the inclusiveness and treatment of participants, their range of issues, making information and expertise available, and enabling participants to match the needs of the participation opportunity.

The need for environmental justice and justice of all kinds is a part of professionalism, appropriate for activism by attorneys generally.

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142. See FLASHPOINTS, *supra* note 32, at 155-78.

143. *Id.* at 138.

144. *Id.* at 150, 161-62.

145. Dryzek's franchise dimension of democratization involving "expansion of the number of people capable of participating effectively in collective decision," and enabling their competence. DELIBERATIVE DEMOCRACY, *supra* note 6, at 29.

VIII. WHY GREEN LEGAL PROFESSIONALISM INSTEAD OF AN  
“ENVIRONMENTAL RIGHT”

While there is much achievement in the expansion of interests necessary for status, the expansion falls far short of either standing or a substantive “environmental right” for natural features, wildlife, or ecosystems. The quest for these two features, standing and an environmental right, has occupied much of the legal debate over ethical treatment in the law. It seems this debate is well presented and considered, yet at something of a standstill.<sup>146</sup> Green professionalism may assist the consideration for nature desired by the standing-or-rights concepts, even where no compromised human interest is present.

Professor Stone’s 1972 classic, “Should Trees Have Standing?,” including the foreword to the book edition,<sup>147</sup> is the prototype of a green legal inquiry. He describes “three criteria of a rights-holder” as lacking for natural objects: “They have no standing in their own right; their unique damages do not count in determining [the] outcome; and they are not the beneficiaries of awards.”<sup>148</sup> He reflects on the tortured path that has established franchise for many parties who previously had no standing: corporations and other fictitious persons, various races, national origins, women, elderly, or prisoners. Eventually, courts or constitutions or legislatures recognized their capacity to sue and be sued, where it was once absent.<sup>149</sup> He describes standing based on the derivative of members of organizations, where members have rights impaired, such as recreation, aesthetics, and conservation interests. And, he discusses representational ideas of standing, for instance favoring the concept of non-governmental guardians for natural objects, with the objects holding legal rights.<sup>150</sup> Writing a decade after *Should Trees Have Standing*, Stone reflects how case law rapidly expanded so “the environment’s own standing has become more a matter of theoretical and spiritual interest than a real practical constraint on the bringing of environmental litigation.”<sup>151</sup> Further settlement of the law of standing has finally occurred which confirms Stone’s view, of course. So Stone turns his writing focus toward “the reach of the law and morals generally.”<sup>152</sup>

The search for ways to instill an environmental right into law has been a lengthy struggle. Peter Manus looks at it from the viewpoint of leaders of the

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146. See Manus, *supra* note 64, at 584, 673-74.

147. CHRISTOPHER D. STONE, *SHOULD TREES HAVE STANDING?: TOWARD LEGAL RIGHTS FOR NATURAL OBJECTS* (Oceana Publishing 1996) (1972). This edition reprints the article from the 1972 *Southern California Law Review* with the foreword and appended opinions in *Sierra Club v. Morton*, 405 U.S. 727 (1972).

148. *Id.* at 16.

149. *Id.* at 4.

150. STONE, *supra* note 2, at 10.

151. *Id.* at 10.

152. *Id.* at 11.



environmental movement. He gives a wonderful depiction of the way John Muir and Rachel Carson saw the law address their view of the environment. They endeavored to protect nature for its own sake, and wanted more from the law than the law seems able to give. They, like the environmental philosophers, wanted a right for nature of its own. Manus defines the "environmental right" as "a legal basis for protecting the earth's interests where no human interest has been compromised."<sup>153</sup> That is, where no property right, nuisance or tort claim is protective. He flatly states the "notion" of this environmental right "evades the law."<sup>154</sup> The rights have more substantive components than standing. Such legal rights are held by legal entities, Manus indicates, when analyzed in the Hohfeldian manner. Individuals or collected individuals such as corporations always are required, and then, they are limited to the rights that derive through property or tort constructions. The apparent impossibility of law to evolve an "environmental right" leaves our political and moral choices to be made via "new" tools, such as "societal avenues."<sup>155</sup>

Manus' Hohfeldian analysis finds that the environment ends up an item all are free to enjoy or exploit as a privilege. But it lacks a right, for it is an area of "social concern" destined to unprotected status. "Damnum absque injuria," harmed but without injury in a legal sense, is the category ascribed to nature.<sup>156</sup>

Manus presents the example of the CERCLA program's concept of natural resource damages (NRD). While NRD's implementation has floundered, the concept is notable as Manus' best example of the codification of an environmental right for nature. The privilege to exploit is the dominant construction, and Manus points to Bill McKibben's view that "the law lacks authority where problems are broad or far-reaching." Big environmental problems with "vague and vast" injuries are ones the law does not get its arms around. But there is a basic problem at any level:

The privilege to exploit nature and the status of having no right to prevent nature's destruction are not negatives or omissions from the law, but are instead part of the law, positive interests invoked and enjoyed by the protected class of polluters. Nature is not out there, untouched by the law and ripe for being addressed. By not including nature in the system of legal relations, the law has, in fact, addressed nature, asserting that it is available for exploitation.<sup>157</sup>

Meanwhile, ecological science has moved on to view nature as more of a flexible, disordered collection, much harder to resolve. Regulation endures against backlash against command-and-control. Current culture expresses

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153. Manus, *supra* note 64, at 673-74.

154. *Id.* at 674.

155. *Id.* at 644, 673, 674.

156. *Id.* at 577-78.

157. *Id.* at 653.

“environmentalism must evolve from something coerced to something natural.”<sup>158</sup>

Manus sees some revisions aim for “an evolution in privilege.” He defines privilege as “a simple legal freedom to behave in a particular manner.”<sup>159</sup>

Thus, Manus finds, without declaring it as an ethic, that our system of legal relations contains an approach toward nature. The ethic is one of omission of status or right. The resulting ethic serves nature up for exploitation, by denying it rights in a system where lack of rights is conclusive. Nature’s exploiters have the privileges without the duty of restraint, as part of property freedoms. And law is “anthropocentric” in dealing with nature, so it eventually accords persons with protections but not non-human life or ecosystems.<sup>160</sup>

The dual negatives are: no environmental right, and no status to assert legal claims of non-persons. These persist. If there were a right to a functioning ecosystem and if the ecosystem could secure the right in legal settings, the environment could be protected.

So Manus leaves the ambition to instill an environmental right as an unfulfilled vision. Beyond bits “bootstrapped from property or tort law”, little exists and even CERCLA-type provisions for natural resource damages still sputter for implementation.

Professionalism, a relatively new tool, needs to carry forward the societal expectation into lawyers’ conduct. Both standing for nature, and an environmental right for nature where no compromised human interest is involved, attempt to bring an ethical goal of society into law. As great as those concepts are, they are of limited subject matter, and they carry the social expectation only a certain distance. Even if they were fully adopted, which appears temporally at least some distance off, they do not cover the spectrum of concerns to which professionalism applies.

## IX. CONCLUSION

Those who practice environmental citizen suits probably agree with the remarks of then-Senator David Durenberger, speaking as to their importance in the Clean Air Act: “Citizen resources are an important adjunct to governmental action to assure that these laws are adequately enforced. In a time of limited Government resources, enforcement through court action prompted by citizen suits is a valuable dimension of environmental law.”<sup>161</sup> The rise of deliberative

158. Manus, *supra* note 64, at 667 n.531.

159. *Id.* at 573, 667.

160. *Id.* at 587.

161. Remarks of U.S. Senator David Durenberger, concerning provisions of the Clean Air Act for citizen suits, 136 CONG. REC. S3162-04 (daily ed. Mar. 26, 1990). The Act provided the initial impetus for environmental citizen suits now present in most federal environmental laws. See NANCY CAMISHON BANNER & PETER M. FRIEDMAN, *ELTA CLE HANDBOOK*, POST-

democracy as a political and social process favors citizen suits' role in implementation of environmental aspirations. This role needs to be fostered by legal professionalism.

No version of professionalism will make environmental lawyers uniform in their view of the subject. Citizen suit practitioners should benefit, however, from having the various components of the agenda of green legal professionalism collected into a professionalism theme.

The approach helps address the democracy-crushing weight of SLAPP suits. It helps environmental law fend off the impossible contradictions placed upon the mission of environmental law by radical expropriation compensation proposals in international trade agreements. Professionalism should assist the effort for objective, reviewable decision-making as we implement goals like sustainability. It helps the expertise of government to become more available for citizen litigation, especially in state law cases. It fosters better attorneys fees provisions for prevailing citizens in state law cases who take on the complex challenges of enforcement litigation.

In short, environmental lawyers can justify less and less a detachment from ensuring the process of law implements the ethical goals of society. Omission to bring citizen suits because the process is too daunting will mean we fail to bring about the directives of society. A reconstructed professionalism can assist the deliberative processes necessary for enforcement of environmental law.