Global Democracy and Sustainable Jurisprudence: Deliberative Environmental Law

Walter F. Baber and Robert V. Bartlett

The MIT Press Cambridge, Massachusetts London, England © 2009 Massachusetts Institute of Technology

All rights reserved. No part of this book may be reproduced in any form by any electronic or mechanical means (including photocopying, recording, or information storage and retrieval) without permission in writing from the publisher.

For information about special quantity discounts, please email special_sales @mitpress.mit.edu.

This book was set in Sabon by Binghamton Valley Composition. Printed and bound in the United States of America.

Library of Congress Cataloging-in-Publication Data

Baber, Walter F., 1953– Global democracy and sustainable jurisprudence : deliberative environmental law / Walter F. Baber and Robert V. Bartlett. p. cm. Includes bibliographical references and index. ISBN 978-0-262-01302-4 (hardcover : alk. paper)—ISBN 978-0-262-51291-6 (pbk. : alk. paper) 1. Environmental law, International. 2. Environmental policy. I. Bartlett, Robert V. II. Title. K3585.B33 2009 344.04'6—dc22 2008044233

10 9 8 7 6 5 4 3 2 1

Index

- Aarhus Convention, 126 Adjudication, 20, 29-30, 42, 55, 62, 87, 99, 101, 104, 110, 119, 135, 137, 156, 165, 167, 169, 179, 180-181, 183, 192n12 Alpine-Adria Working Group, 65 American Law Institute, 55, 128–129, 130 Anarchism, ix, xi, 31–33, 61–62, 83, 85, 107, 153, 168 Archibugi, Daniele, 3, 64, 67 Arctic Treaty System, 173 Austin, John, 3, 67 Basel Convention, 95 Blackstone, William, 165 Bohman, James 11, 14-16, 55, 66, 70, 73-74, 79, 80-83, 145, 147, 177 Britain, 25, 53, 116, 170, 182 Brundtland Commission. See World Commission on Environment and Development Burke, Edmund, 15 Bush, George W., 27, 179 By the People, 54 Caldwell, Lynton K., 1, 6, 8, 104, 105-108, 110, 121, 132 Canada, 62, 88-90, 92, 171 Chandler, David, 64 Clinton, Bill, 65 Codification, 128–131, 133, 151, 157-159, 163, 166, 192n12
- Collective will formation, 2, 3, 16, 18, 20, 59, 72, 87, 99, 102–105, 114, 119, 135, 141, 174, 176, 178, 180 Commission for Environmental Cooperation, 113
- Commission on Sustainable Development, 156
- Common but differentiated responsibility, 107, 109
- Common law, 3–5, 13, 15, 20–21, 24, 40, 45–48, 51, 55–57, 68, 70–71, 75, 79, 82, 87–90, 107, 109–110, 112, 117–119, 128–129, 132, 137–138, 141, 143, 150, 155–156, 158, 164–165, 172, 181, 184, 189n9, 189–191n10, 192n13, 192n14
- Communitarian, 66, 177, 182
- Consensus, x, 3–6, 10, 13, 15–19, 39, 46, 48–49, 51, 54–57, 70, 76, 80, 82, 99, 102–104, 108, 110, 112, 114–116, 123–124, 130, 141–142, 144–146, 148, 149, 150–154, 157, 161–162, 164, 174, 175–176, 182, 184, 192n13
- Cosmopolitanism, x, 18, 20, 64, 66, 77–80
- Czech Republic Green Parliament, 171
- Davis, Kenneth C., 117–118, 192n12

Deliberative polling, 52, 54, 115–116, 146, 170 (see also Juries, citizen; Juries, policy) Democratic deficit, x, 10–11, 67, 96, 103-104, 110-113, 155, 176, 178 - 179Dewey, John, 35, 37-39, 42-59, 188n4, 188-189n5 Dryzek, John S., 6, 9, 15–16, 18, 37, 81, 171, 174 Earth Summit, 94–95, 124, 173 Ecological consciousness, 7 Ecological democracy, 114 Ecological expertise, 126 Ecological knowledge, 4, 175, 178, 180-181 Ecological management, 126 Ecological problems, 94 Ecological rationality, 102, 125, 153 Ecological science, 10, 20 Ecological sustainability, 102–103 Ecological thinking, 5–6, 9 Ecological understanding, 7 Endangered Species Act, 82 England, 167, 181, 189–191n10 Environmental impact assessment, 82, 132 Environmental justice movement, 148-149, 151, 180 Environmental sciences, 7 Epistemic community, 6, 55, 98 Equity (legal), 89–90, 137, 189-191n10 Ethics, 2, 8, 10, 31, 33, 35, 58, 74, 76, 80, 82, 142–143, 155, 177, 187n3, 189n8 European Environmental Bureau, 173 European Union, 4, 65-66, 68, 78–79, 111–114, 155, 167, 173 European Union Environmental Directorate, 173 Expertise, 2, 7-8, 15, 37, 41, 45-47, 54, 55, 57, 69, 80, 91-92, 97, 116, 122–123, 158–159, 170, 173, 175

Experts Group on Environmental Law, 92 Fascism, 58 Federalist, The, 44, 130, 136 Fishkin, James, 115–116, 146 Framework Convention on Climate Change, 108 Full liberalism, 11, 13–15, 38, 51, 70, 73, 177 General Agreement on Tariffs and Trade, 94 Global Environment Facility, 95 Globalization, 4–5, 54–55, 58, 61, 64, 66, 77, 94, 106, 115, 120, 121-123, 125, 132, 142 Goldsmith, Jack, 101, 164, 166–168 Guinier, Lani, 145, 146-147 Gutmann, Amy, 14-16, 116, 145, 170-172, 177 Habermas, Jürgen, ix, 4–5, 7, 9, 13-14, 16-18, 26, 35-36, 38, 51, 53, 56-57, 70-72, 74, 77-79, 82, 86, 99, 101–104, 114, 141–144, 150, 153, 162, 167, 175–177, 188n3 Hamilton, Alexander, 130, 136–139 Hart, H. L. A., 29-31 Heidegger, Martin, 57 Holmes, Oliver Wendell, Jr., 28, 39, 57, 87–88, 117, 155–156, 189n9 Human nature, 26–27, 31, 33–35, 63 Ideal discourse, 11, 13–14, 18, 38, 51, 70-71,82 Idealism, 24, 34, 59, 85, 87, 185n2 Ideal speech situation, 56, 141, 143 Indigenous peoples, 127, 172 International Joint Commission, 88, 171 International Law Commission, 129, 131, 151–152, 156–158, 160,

161-164

International Whaling Commission, 172

James, Henry, 24 James, William, 14, 24, 39, 50, 55, 70, 73, 79, 82, 177, 186n2 Juries, 53–54, 115–116, 118–119, 130, 135–141, 144, 146, 148, 150, 152, 177, 179, 181–182, 190–191n10, 192n12 citizen, 115–120, 127, 131, 135–136, 138, 152, 162, 170, 179, 180–181 (see also Deliberative polling) policy, 20, 53–54, 156

Kant, Immanuel, 8, 11, 75 Keohane, Robert, 4, 32, 64–65, 67, 69, 107, 155 Knowledge, 2, 6–11, 15, 18–20, 25, 27, 34, 42–43, 45, 47, 49–51, 57, 61–62, 64, 68, 82–83, 121–123, 126, 127, 130, 139, 145, 180, 185–186n2, 187n3 Kyoto Protocol, 108

- Legitimacy, xi, 5, 14, 17–18, 37, 51, 53, 56, 64, 66–73, 78, 82–83, 86, 96, 99, 101–102, 108, 111–114, 117–118, 121–122, 130–131, 145, 147–148, 150, 153, 155, 163–164, 168, 172, 176, 179–180, 192n13 Leiter, Brian, 26–27, 29, 30, 35
- Liberalism, 11, 14, 16, 35, 43–44, 51, 57, 59, 72, 98, 141, 189n7 (*see also* Full liberalism)

interest-group, 37, 39–42, 48, 56, 113, 116–117, 182

- Locke, John, 6, 61
- London Convention, 173
- Lowi, Theodore, 98-99, 117-119
- Maastricht Treaty, 112
- MacNeil/Lehrer Productions, 54
- Majority rule, 16-17, 45, 48
- Mill, John Stuart, 4

Minorities, 44, 53, 73, 79, 140, 145-148 Montreal Protocol, 97–99, 191 Morgenthau, Hans J., 3, 33–34, 63, 189n8 Mouffe, Chantal, 141, 142-143, 148 Multilateral Fund, 97 Multi-member court, 136, 138 National Environmental Policy Act, 132 National Institute for Clinical Excellence, 170 Neorealism, 34–35 Nominalism, 34, 51, 185, 186, 188n3 Nongovernmental organizations (NGOs), 80, 98, 121, 125–126, 156, 172–173 North American Agreement on Environmental Cooperation, 113 North American Free Trade Agreement, 113, 120 Olson, Mancur, 67 Ontology, 25–26, 144 Oregon Health Care Services Commission, 170 Peirce, Charles, 39, 50, 52, 57, 188–189n5 Pluralism, political, 11, 14, 16, 21, 38-39, 41, 43, 70, 73-74, 80, 177, 188n3 Positivism, 25, 31, 62 Posner, Eric, 101, 164, 166-168 Posner, Richard, 28, 87, 137, 167–169, 193n15 Power, 2, 5, 10–11, 32–34, 40–42, 44, 52, 62-63, 65, 68, 71-72, 80, 82, 86, 89, 96, 105, 111-112, 122, 127, 130, 132, 140, 145, 148-149, 153-154, 166, 169, 177, 188n3, 189n8, 190n10 Pragmatism, xi, 20–21, 23, 26–27, 34-37, 38-39, 42, 49-51, 56-59, 138, 142, 153, 175–176, 186n2, 188n3

Precautionary principle, 109 Public reason, 11–17, 38, 70, 79, 172 Putnam, Hilary, 58, 64, 91, 116 Rabkin, Jeremy, 167-168, 179 Rawls, 11-14, 16, 38, 51, 56, 70, 74-79, 81-82, 102, 135, 175, 177, 189n7, 191n12 Realism, xi, 3, 23–25, 28–31, 34–36, 38, 59, 62, 85, 185-186n2, 186-188n3 aesthetic, 24, 185-186n2, 186-188n3 IR (international relations), 23–24, 28, 31-32, 35, 38, 61 legal, 26, 28-31 political, 23-24, 26, 34, 175, 188n3 philosophical, 24, 186n2 Regimes, 97–98, 102, 105, 131–132, 147, 153, 169, 191n11 Regional Seas Programme, 93 Restatement, 128–131, 135, 164, 177, 180, 192n12 Risk, 4–5, 9, 56, 86, 92, 108, 123, 130, 143, 145, 148, 164 Rorty, Richard, 49–50, 57, 59, 145, 186n2 Rotterdam Convention, 95 Science, 6-10, 18-19, 23, 25-26, 35, 41, 45, 50, 52, 69-70, 80, 95, 97, 106, 108, 118, 121-123, 175, 188-189n5 Self-interest, 37, 41, 45-46, 85, 161, 175 Slaughter, Anne-Marie, 10, 55, 62, 65, 67–69, 91, 94, 96–98, 107, 122 Socialism, 58 South African Truth and Reconciliation Commission, 171 Sovereignty, ix, 18, 20, 55, 66, 68, 88, 94, 103, 106, 108, 113, 124, 132, 155-156, 165, 167-169, 172-173 Statism, 21, 31-33, 61-66, 68, 74, 176

Stockholm Convention, 95 Sustainability, xii, 5-6, 20, 83, 85, 92, 95, 98, 109, 121, 123, 127, 131-132, 171 Third World, 109, 124 Thompson, Dennis, 14–16, 116, 170-172, 177 Tocqueville, Alexis de, ix Town hall meeting, 136, 138, 141, 178Trade, 4, 19, 46, 94–95, 126–127, 169, 172 Trail Smelter, 88, 90, 92 Transatlantic Environmental Dialogue, 125 Transnationalism, ix

Truman, David, 37, 39–43, 175, 188n4

UN General Assembly, 93, 129, 152

UN General Assembly, Sixth Committee, 158–160, 163

UN Globally Harmonized System of Classification and Labeling of Chemicals, 95

United Nations Development Programme, 95, 97

United Nations Environment Programme, 92–93, 95, 97

United Nations Industrial Development Organization, 97 Utilitarianism, 31, 33, 61–62, 85

Vienna Convention, 97

Wittgenstein, Ludwig, 141-144, 150

Wolin, Sheldon, ix, 58, 149

World Bank, 94-95, 97

World Commission on Environment and Development, 92

World Trade Organization, 94, 113