

**EYE ON THE HORIZON WITH FEET FIRMLY PLANTED ON  
THE GROUND:  
RICHARD OLIVER BROOKS**

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Sifting through a scholar's lifetime of works to determine which to highlight is a humbling experience, especially when there is so much rich material that warrants attention. Like someone standing on a rocky slope who wants to build cairns to guide hikers, one must select from the array of stones on the ledges and build markers that will create a path for journeyers. The choices reflect the builder's personal and professional expertise and preferences; others might choose different stones and paths over the slope. But all paths lead to acknowledging how the lifelong work of Professor Richard Oliver Brooks has enriched our understanding of the law and life.

This short essay has chosen as its markers several substantial contributions that span Professor Brooks's career. The first is his 1994 book, *New Towns and Communal Values: A Case Study of Columbia, Maryland*.<sup>1</sup> The second is *Law and Ecology: The Rise of the Ecosystem*,<sup>2</sup> a book published in 2002 for which he was lead author. The third encompasses two works that focus on Vermont's Act 250. One is his 1996-97 two-volume tome, *Toward Community Sustainability: Vermont's Act 250*.<sup>3</sup> The other is his 2018 Discussion Draft, *Conserving and Restoring Vermont's Landscape: Reflection on the Goals of Vermont's Act 250*, which provides a retrospective and prospective view of Act 250.<sup>4</sup> These works collectively chart a path that shows how Professor Brooks has kept his eye

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1. RICHARD OLIVER BROOKS, *NEW TOWNS AND COMMUNAL VALUES: A CASE STUDY OF COLUMBIA, MARYLAND* (1974) [hereinafter *NEW TOWNS*].

2. RICHARD OLIVER BROOKS, ROSS JONES AND ROSS A. VIRGINIA, *LAW AND ECOLOGY: THE RISE OF THE ECOSYSTEM REGIME* (2002) [hereinafter *LAW AND ECOLOGY*].

3. RICHARD OLIVER BROOKS WITH K. LEONARD & STUDENT ASSOCIATES, *TOWARDS COMMUNITY SUSTAINABILITY: VERMONT'S ACT 250 VOLUME I: THE CRITERIA FOR SUSTAINABLE DEVELOPMENT* (1996) [hereinafter *VERMONT'S ACT 250 VOL. I*]; RICHARD OLIVER BROOKS WITH K. LEONARD & STUDENT ASSOCIATES, *TOWARDS COMMUNITY SUSTAINABILITY: VERMONT'S ACT 250 VOLUME II: THE HISTORY, PLANS, AND ADMINISTRATION OF ACT 250* (1997) [hereinafter *VERMONT'S ACT 250 VOL. II*].

4. RICHARD OLIVER BROOKS, *CONSERVING AND RESTORING VERMONT'S LANDSCAPE: REFLECTION ON THE GOALS OF VERMONT'S ACT 250* (2018) [hereinafter *REFLECTION*].

on the horizon while planting his feet firmly on the ground. It is a path that can serve all of us well.

#### EYE ON THE HORIZON

All three areas of inquiry explore the unfolding horizons of the law and society—areas that were intellectual frontiers. Professor Brooks wrote *New Towns and Communal Values* at a pivotal point in the evolution of land use planning. Empowered by the United States Supreme Court’s 1926 decision in *Village of Euclid v. Ambler Realty*,<sup>5</sup> municipalities used their land use regulatory powers to grapple with the challenges of directing urban and suburban growth within their boundaries. By mid-century, however, a handful of developers sought to create “new towns.”<sup>6</sup> These towns were not accretions around existing settlements, nor were they governed by longstanding local institutions and residents.<sup>7</sup> They were created from whole cloth, providing extraordinary experiments in the creation of community and the evolution of land use planning. Columbia, Maryland, lying between Baltimore and Washington, D.C., was one of the key examples. Columbia was planned and built during the 1960s.<sup>8</sup> Using Columbia as a case study, Professor Brooks tackled the question of how effectively society can consciously construct a new and satisfying community. As he states in the opening lines of his book:

How successfully can we create, through deliberate planning, local communities that avoid the evils of modern urban life and achieve values that the modern city neglects? Should we seek to recreate these communities? Underlying these questions is an even more significant philosophical question: To what extent can man, through the exercise of his knowledge and art, shape the society to which he belongs?<sup>9</sup>

Those thorny questions are pivotal to evaluating the relative merits of “new” towns and expanding “old” towns and cities as communities. They also yield lessons about the role of law in shaping these communities.

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5. 272 U.S. 365 (1926).

6. See NEW TOWNS *supra* note 1, at 15–20 (discussing history of new towns).

7. *Id.* at 207.

8. *Id.* at 8.

9. *Id.* at 3.

In defining communitarian goals, the Columbia case study considered a range of social values, including respect for nature and the land.<sup>10</sup> In *Law and Ecology*, Professor Brooks and his co-authors from Dartmouth College put both law and science center front. They traced the development of the science of ecology and the law of environmental protection to probe the extent of the relationship between the two. Their goal was “to explore the desirability and feasibility of placing the ecological study of ecosystems at the center of an understanding of environmental policy and law.”<sup>11</sup>

Like *New Towns and Communal Values*, the book marks an important point in time to take the long view. Major environmental protection regimes in the United States and elsewhere focused on specific elements of the environment, such as air quality, water quality, and the protection of endangered species.<sup>12</sup> These regimes provided tangible goals for administratively feasible regulation. But the ecosystem itself is not so neatly compartmentalized, calling into question whether and how the law can or should take a more nuanced approach. When characterizing the development of environmental policy and law, commentators sometimes use generational terms. The first generation brought the major command-and-control statutes of the 1970s, such as the Clean Air Act and the Clean Water Act; the possibility of a new generation of environmental policies emerged late in the 20<sup>th</sup> century, such as market-based instruments and other alternatives to command-and-control regulation.<sup>13</sup>

Writing at the turn of the century, Professor Brooks and his co-authors resisted the allure of turning their attention to the new generation, the proverbial new kids on the block. Setting the evolution of environmental law and the science of ecology in a rich historical context, they instead grappled primarily with how the first generation of environmental and natural resource protection laws can learn to function more effectively by incorporating an ecosystem perspective. *Law and Ecology* does not suggest that new policy instruments cannot play an important role.<sup>14</sup> Rather, it focuses on how important innovations or refinements within the boundaries of existing law can allow environmental and natural resource policy to ripen with the passage of time and the increasingly sophisticated understanding of ecosystem science. For example, the book identifies how

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10. *Id.* at 4.

11. LAW AND ECOLOGY, *supra* note 2, at xi

12. *Id.* at 122.

13. For discussions of the generational evolution, see Richard Stewart, *A New Generation of Environmental Regulation?*, 29 CAP. U. L. REV. 21 (2001), and Robert Stavins & Bradley Whitehead, *Market-Based Environmental Policies in THINKING ECOLOGICALLY THE NEXT GENERATION OF ENVIRONMENTAL POLICY* 105–06 (Marian R. Chertow & Daniel C. Etsy eds., 1997).

14. LAW AND ECOLOGY, *supra* note 2, at 378.

low visibility mechanisms that operate under the statutory surface can link law and ecology, such as plans prepared in the course of the regulatory process, manuals, impact statements, and interagency agreements.<sup>15</sup> It posits that these “bridge documents” can play a key role.<sup>16</sup> In other words, *Law and Ecology* takes now seemingly traditional and still noble legal regimes and explores how those laws in effect are ongoing experiments in the ability to adapt to change as new scientific horizons emerge.<sup>17</sup>

The third area of inquiry highlighted here involves Vermont’s Act 250,<sup>18</sup> a unique state environmental law. Enacted in 1970, Act 250 was an extraordinary legal pioneer at the forefront of federal and state environmental protection efforts. Although it has been amended over time, and its statewide planning component never reached fruition, it remains novel. Act 250 operates through a permitting requirement for developments that meet certain statutory criteria.<sup>19</sup> It applies a wide range of factors that encompass environmental impacts, fiscal impacts, energy conservation, the preservation of compact settlements, and more.<sup>20</sup> Act 250 constitutes environmental protection writ large, striving to preserve the character and landscape of Vermont.

Act 250 has had a long and relatively sturdy history. It is currently undergoing a review commissioned by the Vermont legislature as its 50th anniversary approaches in 2020.<sup>21</sup> Professor Brooks’s works have painted an extremely thorough and thoughtful portrait of Act 250 and its place in environmental protection and land use regulation. His two-volume book, *Toward Community Sustainability: Vermont’s Act 250*, captures its evolution and practice over Act 250’s first three decades by painting the big picture, its technical application, and its strengths and weaknesses. It explores how Act 250 addressed complex challenges over the years, such as: how to define the activities that warrant the heightened regulatory review; how to balance the environmental protection and economic viability; how to integrate local, regional, and state-level planning; how to mesh federal and state regulatory requirements; and what procedures should govern administrative and judicial proceedings. Professor Brooks recently wrote an essay, *Conserving and Restoring Vermont’s Landscape: Reflection on the Goals of Vermont’s Act 250*, in the midst of the pending

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15. *Id.* at ix, 270, 379.

16. *Id.* at 379.

17. Note that *Ecology and the Law* also examines more recent legal regimes, such as international agreements. *Id.* at 325–364.

18. 10 V.S.A. §§ 6001 et seq. (2013).

19. *Id.* § 6001(3)(A).

20. *Id.* § 6086(a).

21. An Act Relating to the Commission on Act 250: The Next 50 Years, Act 47 (2017).

evaluation of Act 250. As a discussion draft, it provides insightful analysis that both looks back over the past five decades and looks forward. Professor Brooks has assessed Vermont and the past, present, and future role of Act 250 with admirable candor. He has offered creative, thoughtful suggestions about how Act 250 might meet the challenges of the coming decades.

Throughout these works, Professor Brooks skillfully sifted through the experiences of the past—the experiment with Columbia, Maryland, the intersection of science and significant environmental statutes, and Vermont’s Act 250 nested among federal laws and local land use regulations—to see how they can inform the future. In some ways, his approach is akin to the environmental concept of adaptive management, which offers the ability to continually learn and refine based on experience. However, pursuit of the horizon drives his works. Professor Brooks has chosen issues that operate at new edges of policy and law. In pursuing those issues, he consistently presses for better ways to reach the horizon, whether that means new policies<sup>22</sup> or additional research that might generate new policies.<sup>23</sup> Yet the pursuit consistently recognizes that the law is but one factor among many. Professor Brooks ultimately seeks to understand and improve how the law interacts with other disciplines to build stronger human and ecological communities.<sup>24</sup> That multidisciplinary goal is a significant horizon in itself.

#### FEET FIRMLY PLANTED ON THE GROUND

In his inquiries, Professor Brooks is keenly aware of the role of geographic place—the setting within which social values and the law come home to roost and shape the ecological landscape and human communities. While his mind engages at a high intellectual and theoretical level, his feet stand firmly in the real, physical settings that give rise to his analysis. The works highlighted in this essay offer three perspectives on the influence of physical settings in society and law.

Professor Brooks’s analysis of Columbia’s bold experiment with creating a new town yielded many worthy conclusions. It explored the complex question of how society creates communities and what community means. But one is particularly significant. His work challenged the assumption that putting people in proximity in a new town will create communal values, an assumption that motivated Columbia. He concluded that the creation of communal values instead requires careful complex

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22. *E.g.*, REFLECTION, *supra* note 4, at 40, 41, 49, 56, 59, 60.

23. *E.g.*, LAW AND ECOLOGY, *supra* note 2, at 391, 392.

24. *E.g.*, *id.* at 385.

planning, including the definition of values and ways to promote them.<sup>25</sup> In his words, “[g]uiding such a planning effort is the faith that a strengthened family, a sense of belonging, a respect for nature and tradition, and a sense of shared values can be maximized through rational planning rather than mistakenly hoped for as the product of the creation of new settlements.”<sup>26</sup> At the same time, he recognized that rational planning will not work in isolation. “The roles of spontaneity, tradition, self-expression, love—components essential to communitarian ideals and not subject to rational planning—will have to intervene and flower along with the results of any planning effort.”<sup>27</sup> But a significant message is clear: communal values will not grow from proximity alone.

While *New Towns and Communal Values* reached the conclusion that putting people in geographic proximity in a new town is not enough to create communal values, Professor Brooks’s analyses of Vermont’s Act 250 moved on to examine a very different setting—the working landscape of Vermont inhabited by longstanding communities. Act 250 was born out of the fear that new mountain resort development would change the character and environment of the state.<sup>28</sup> The law strove to preserve and enhance an existing sense of place. One can think of Professor Brooks’s Act 250 work as another inquiry into communal values and the role of the law in protecting communal values, in particular the shared sense of place and vision.<sup>29</sup> He in effect carried on the inquiries he started with Columbia, Maryland, as he explored how and whether Act 250 protects and builds a sense of place.

In *Law and Ecology*, Professor Brooks and his coauthors also emphasized the importance of the sense of place in the effective merger of ecology and the law. A public commitment to a place can inspire people to enact of protective laws. As they wrote in the concluding chapter of *Law and Ecology* after highlighting the place-based character of ecology and conservation biology:

The natural places are bounded not only by natural but also by human culture.... Since we humans are part of places,...we experience a sense of place.... Our places can become like our extended private property which are expressions of who we are. Once we value our places,

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25. NEW TOWNS, *supra* note 1 at 195.

26. *Id.*

27. *Id.* at 203.

28. REFLECTION, *supra* note 4, at 4.

29. See VERMONT’S ACT 250 VOL. II, *supra* note 3, at 1–2.(discussing how environmental law is developed from the culture of the place).

place poses ethical issues for us. We may seek to resist others' efforts to change our place or interfere with the relationships we have to our place.<sup>30</sup>

In the authors' eyes, "the love of a place or species" promoted the application of an ecosystem perspective in efforts to preserve Mono Lake, the Redwoods, Chesapeake Bay, and Atlantic fish stocks.<sup>31</sup>

That commitment to a specific place rings loud and clear in Professor Brooks's work on Act 250. We each have our own personal preferred sense of place, and we each may take different measures to protect that place. Professor Brooks's love of Vermont is evident, and it has animated his multi-decade commitment to the study of the law and community in Vermont. This is work from which we have benefitted tremendously. As he simply and beautifully stated when he introduced the second volume of *Toward Community Sustainability: Vermont's Act 250*:

For the past eighteen years I have lived, worked and participated in the community life of Vermont. Outside of my office window is a view of the White River, the arc of the Green Mountains, and the South Royalton playground. This is 'my place' and the story of a law that governs it.<sup>32</sup>

As Professor Brooks's words convey, a sense of place is grounded in the physical setting, but it is inextricably entwined with human life.<sup>33</sup> The multi-faceted nature of a community encompasses the ecological setting and human interactions with and within that setting.

The sense of place in Vermont not only motivates Professor Brooks's work, but also is the central goal of Act 250 against which he has measured the law's ultimate success. As he wrote last year, "[i]t is my contention, supported by an extensive study of the history of this law, . . . that this entire law was animated by a pastoral vision of Vermont and the threats originally perceived to the object of that vision."<sup>34</sup> His assessment, however, reached the conclusion that Act 250 and other related laws "have been expanded and obscured by the pursuit of a laundry list of goals and objectives which hide the law's central mission—the preservation and conservation of Vermont's pastoral nature."<sup>35</sup> Among his recommendations, Professor Brooks highlighted the need to consider how the law and economic forces

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30. LAW AND ECOLOGY, *supra* note 2, at 384.

31. *Id.* at 383. The authors also understood that the boundaries of cherished places and the boundaries of legal regimes may not always neatly match. *Id.* at 384.

32. VERMONT'S ACT 250 VOL. II, *supra* note 3, at 3 (footnote omitted).

33. *See also* LAW AND ECOLOGY, *supra* note 2, at 385.

34. REFLECTION, *supra* note 4, at 3.

35. *Id.* at 2.

can better protect major landscape features, such as mountains, villages, forests, farmland, and rivers, that help define Vermont's sense of place.<sup>36</sup>

The question of the role of physical setting in creating and sustaining communities and their values is particularly powerful and timely today. The internet and social media create virtual communities of a new sort that transcend physical boundaries. Commentators speak of the rise of "tribalism" as people seek out those of like mind regardless where they might reside.<sup>37</sup> And yet there is also a thirst for local geographic identity, such as through the "buy local" movement.<sup>38</sup> In the 21st century, what do we mean by communal values, how do we create or maintain them, and what is their role in society? From an environmental perspective, if senses of place move from the physical world into the virtual world, what are the implications for the ecosystems on which we depend? Will people continue to appreciate them, to strive to understand them, and to protect them through law or otherwise? One hopes that the force and magic of the physical and human reality that surrounds us every day will continue to motivate us, just as it has Professor Brooks.

In closing, Professor Brooks has used the power of his mind and pen to improve the understanding of society—the combined human and natural ecosystem and the role of law as one player in that marvelous ecosystem. His analyses have given us many gifts that this essay regrettably cannot cover. To the mind of this colleague, however, perhaps one of Professor Brooks's most lasting contributions is the example he sets as a scholar. He artfully probes the unfolding edges of society and law, recognizes the importance of the complex world around us, and objectively tests the success of the law in that world. He has helped build the law's sense of place as it moves toward new horizons.

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36. *Id.* at 70–72.

37. *E.g.*, George Packer, *A New Report Offers Insights into Tribalism in the Age of Trump*, THE NEW YORKER (Oct. 12, 2018), <https://www.newyorker.com/news/daily-comment/a-new-report-offers-insights-into-tribalism-in-the-age-of-trump>.

38. *See* Steven M. Schnell, *Deliberate Identities: Becoming Local in America in a Global Age*, 30 J. CULTURAL GEOGRAPHY 55, 71, 73 (2013) (discussing examples of buy local campaigns in America).