

# ENVIRONMENTAL LAW

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## ESSAY

- Global Warming and the Problem of Policy Innovation: Lessons From the  
Early Environmental Movement ..... 285

*Christopher H. Schroeder*

When Congress enacted major environmental statutes in the late 1960s and early 1970s, these laws defied the conventional logic of public choice theory, which contends that legislation benefiting the general public against the special interests will seldom succeed. The persistent federal stalemate on environmental policy innovation during many of the intervening years is much more consistent with this public choice logic. Today we are facing the need for significant environmental policy innovation once again, especially with regard to the problem of global warming and climate change. The questions worth asking are whether we can identify the factors that once made policy innovation possible in the late 1960s and early 1970s and if those factors can be produced once again. This Essay identifies the important factors that create conditions conducive to the required policy innovation, and argues that conditions are not yet comparable, although that may change.

## ARTICLES

- Disestablishing Environmentalism ..... 309

*Andrew P. Morriss & Benjamin D. Cramer*

The debate over environmental policy is increasingly conducted in language with strong religious overtones and religious imagery pervades many environmental debates. In this Article, the authors engage in a thought experiment, arguing that there are valuable lessons to be learned from treating environmentalism as if it were subject to the First Amendment's prohibition on laws "respecting the establishment of religion." In particular, the consideration of the economics of the Establishment Clause offers insights into how to structure environmental policies to improve environmental quality.

- The *Rhino* in the *Colonia*: How *Colonias Development Council v. Rhino Environmental Services, Inc.* Set a Substantive State Standard for  
Environmental Justice ..... 397

*Kristina G. Fisher*

This Article examines a recent New Mexico Supreme Court decision holding that the New Mexico Environment Department must consider environmental

justice factors in deciding whether to grant permits to solid waste facilities. This decision, and the revised solid waste regulations that were developed in response to it, offer useful lessons for other states seeking to incorporate environmental justice considerations into their own environmental laws.

Public Outcry: <i>Kelo v. City of New London</i> —A Proposed Solution .....	431
<i>William Woodyard &amp; Glenn Boggs</i>	

This Article focuses on the United States Supreme Court decision in *Kelo v. City of New London*. It discusses the extensive public, political and academic reactions to *Kelo*, and makes suggestions for potential improvement in the jurisprudence of eminent domain law when private property is taken for public use in an economic redevelopment plan.

## COMMENTS

Why Private Remedies for Environmental Torts Under the Alien Tort Statute Should Not be Constrained by the Judicially Created Doctrines of <i>Jus Cogens</i> and Exhaustion .....	451
<i>Mark W. Wilson</i>	

This Comment examines the history of the Alien Tort Statute, a provision of the Federal Judiciary Act of 1789, and demonstrates how it may be used as a jurisdictional tool allowing alien plaintiffs to sue private defendants in federal court for environmental torts occurring abroad when locally available remedies are weak or nonexistent. Over time, application of the Alien Tort Statute has expanded from torts against the person, such as piracy and torture, to its application to a pure environmental tort under customary international law in the ongoing Ninth Circuit case *Sarei v. Rio Tinto, PLC*. The Comment specifically argues that the judicially imposed doctrines of *jus cogens* and exhaustion of remedies lack a historical basis in the Alien Tort Statute, and that the conservation of judicial resources, which is an important objective of these doctrines, could be better addressed by other prudential doctrines.

Trashing the Presumption: Intervention on the Side of the Government ....	481
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The Federal Rules of Civil Procedure allow anyone with a legally protectable interest facing impairment to intervene in existing litigation as a matter of right, subject to whether existing parties in the litigation adequately represent the proposed intervenor's interest. Courts apply a presumption that governmental parties adequately represent the interests of their citizens. When environmental groups petition to intervene on the side of the federal government, application of the presumption leads to inconsistent rulings that vary by court and by time, subject even to the whims of the political process. This Comment argues for an end to the presumption and a return to a liberal intervention standard based on a minimal burden standard.