

Volume 58 | Issue 3

2008

Volume 58 Issue 3 (2008)

Case Western Reserve University Law Review

Follow this and additional works at: <https://scholarlycommons.law.case.edu/caselrev>



Part of the [Law Commons](#)

Recommended Citation

Case Western Reserve University Law Review, *Volume 58 Issue 3 (2008)*, 58(3) Case W. Res. L. Rev. Front Matter (2008)
Available at: <https://scholarlycommons.law.case.edu/caselrev/vol58/iss3/2>

This Front Matter is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Law Review by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.



CASE WESTERN RESERVE LAW REVIEW

VOLUME 58

SPRING 2008

NUMBER 3

SYMPOSIUM

COMMON LAW ENVIRONMENTAL PROTECTION

INTRODUCTION	JONATHAN H. ADLER ANDREW P. MORRIS
THE COMMON LAW AND THE ENVIRONMENT	STEVEN J. EAGLE
THE COMMON LAW AND THE ENVIRONMENT IN THE COURTS	STUART BUCK
THE COMMON LAW AND THE ENVIRONMENT IN THE COURTS: DISCUSSION OF CODE LAW AND COMMON LAW	BRUCE YANDLE
ATTACKING BANANAS AND DEFENDING ENVIRONMENTAL COMMON LAW	DENISE ANTOLINI
THE ECONOMIC THEORY OF NUISANCE LAW AND IMPLICATIONS FOR ENVIRONMENTAL REGULATION	KEITH N. HYLTON
A DEFENSE OF COMMON LAW ENVIRONMENTALISM: THE DISCOVERY OF BETTER ENVIRONMENTAL POLICY	HENRY N. BUTLER
MAKING NUISANCE ECOLOGICAL	J.B. RUHL
FROM SWAMP DRAINAGE TO WETLANDS REGULATION TO ECOLOGICAL NUISANCES TO ENVIRONMENTAL ETHICS	JOHN COPELAND NAGLE
BEWARE OF GREENS IN PRAISE OF THE COMMON LAW	JAMES L. HUFFMAN
UNSETTLED EXPECTATIONS: REFLECTIONS ON FOUR VIEWS OF THE COMMON LAW AND THE ENVIRONMENT	DAVID SCHOENBROD

NOTES

THE <i>STARBUCKS</i> DECISION OF THE SHANGHAI NO. 2 INTERMEDIATE PEOPLE'S COURT: A VICTORY LIMITED TO LATTÉS?	MARY K. ALEXANDER
DANGER IN 12,008 A.D.: THE VALIDITY OF THE EPA'S PROPOSED RADIATION PROTECTION STANDARDS FOR THE YUCCA MOUNTAIN NUCLEAR REPOSITORY	KATHERINE J. MIDDLETON

COMMENTS

PENNY WISE, POUND FOOLISH: CHILD WELFARE AGENCIES AS SOCIAL SECURITY REPRESENTATIVE PAYEES FOR FOSTER CHILDREN	EMILY W. MCGILL
THE CONSTITUTIONALITY OF THE NFL PATDOWN POLICY AFTER <i>SHEEHAN AND JOHNSTON</i>	DAVID G. ROBERTS

CWRU LAW LIBRARY

CASE
WESTERN
RESERVE
LAW REVIEW

Volume 58, Number 3
Spring 2008



CASE WESTERN RESERVE
UNIVERSITY

SCHOOL OF LAW

CASE WESTERN RESERVE LAW REVIEW

VOLUME 58

SPRING 2008

NUMBER 3

Managing Editor

JEFFREY D. MOON

Editor in Chief

FRANK ESPOSITO

Publisher

RACHAEL A. REAM

Executive Articles Editor

CARL F. OLSON

Executive Contributing Editor

KYLE CUTTS

Executive Notes Editor

KATHERINE MIDDLETON

Executive Symposium Editor

ADAM GRIFFIN

Associate Coordinator

JAMES HENDERSON

Senior Editors

MARKUS E. APELIS
NIVEDITA BETKERUR
MICHELLE BOGLE
WILLIAM EADIE
IZODUWA EBOSE
TODD EPSTEIN

Contributing Editors

DAVID ROBERTS
EMILY WEIDENHAMER
JOHN W. WHITTLESEY

Senior Editors

ANUP MISRA
CHRISTOPHER RIHA
JENNIFER M. STONE
JOHN WEBER
TRAVIS YONKER

Associates

RANIA ARJA
ASHLEY BUDD
ERIN DE LA MARE
BENJAMIN FALLER
JAMES FARIS
SEAN GANLEY
MICHAEL HALPER
MARTIN HARVEY

KATHLEEN HINES
KELLY JOHNSON
MARY LOMBARDI
KRISTIN MARSTELLAR
JESSICA MATE
JEFFREY MOYLE
GIDEON NEWMARK
RAJIV PRASAD

S. COLIN G. PETRY
BRIAN POLIS
TESSA SCHNEIDER
ERIN SIMMONS
SARA WITT
KARI WHITE

Faculty Advisor

JONATHAN L. ENTIN

CASE WESTERN RESERVE UNIVERSITY
SCHOOL OF LAW FACULTY

Administrative Officers

GARY J. SIMSON, B.A., J.D., *Dean*
SHARONA HOFFMAN, B.A., J.D., LL.M., *Senior Associate Dean for Academic Affairs*
JONATHAN L. ENTIN, A.B., J.D., *Associate Dean for Academic Affairs*
LISA M. MENCINI, B.A., M.B.A., *Associate Dean for Development and Public Affairs*
SARAH MCFARLANE POLLY, B.A., J.D., *Associate Dean for Student Services*

Professors Emeriti

ROBERT P. LAWRY, B.A., J.D., DIP. LAW, *Director, Center for Professional Ethics*
JAMES W. MCELHANEY, A.B., LL.B., *Joseph C. Hostetler Professor Emeritus of Trial Practice and Advocacy*
SIDNEY I. PICKER, JR., A.B., LL.B., LL.M.

Professors of Law

JONATHAN H. ADLER, B.A., J.D.
Co-Director, Center for Business Law and Regulation
ARTHUR D. AUSTIN II, B.S., J.D.
Edgar A. Hahn Professor of Jurisprudence
JESSICA WILEN BERG, B.A., J.D.
Professor of Law and Bioethics, Associate Director, Law-Medicine Center, and Associate Director, Institute for Global Security Law and Policy
LAURA BROWN CHISOLM, B.A., J.D.
RONALD J. COFFEY, A.B., LL.B., LL.M.
GEORGE W. DENT, JR., B.A., J.D., LL.M.
Schott-van den Eynden Professor of Business Organizations Law
MELVYN R. DURCHSLAG, B.S., J.D.
JONATHAN L. ENTIN, A.B., J.D.
Professor of Law and Political Science
SCOTT FINE, B.A., M.B.A.
Professor for the Practice of Banking and Finance Law
LEON GABINET, Ph.B., J.D.
PETER M. GERHART, B.A., J.D.
PAUL C. GIANNELLI, B.A., M.S.F.S., J.D., LL.M.
Albert J. Weatherhead III and Richard W. Weatherhead Professor of Law
KATHERINE M. HESSLER, B.A., J.D., LL.M.
Associate Director, Center for the Interdisciplinary Study of Conflict and Dispute Resolution
SHARONA HOFFMAN, B.A., J.D., LL.M.
Professor of Law and Bioethics and Co-Director, Law-Medicine Center
ERIK M. JENSEN, S.B., M.A., J.D.
David L. Brennan Professor
LEWIS R. KATZ, A.B., J.D.
John C. Hutchins Professor and Director, Graduate Program for Foreign Students in U.S. & Global Legal Studies
HENRY T. KING, JR., B.A., LL.B.
U.S. Director, Canada-U.S. Law Institute
GERALD KORNGOLD, B.A., J.D.
Everett D. and Eugenia S. McCurdy Professor
JULIET P. KOSTRITSKY, A.B., J.D.
John Homer Kapp Professor
RAYMOND SHIH RAY KU, A.B., J.D.
Co-Director, Center for Law, Technology, and the Arts
WILBUR C. LEATHERBERRY, A.B., J.D.
Director, Skills Program and Externships
JACQUELINE D. LIPTON, B.A., LL.B., LL.M., PH.D.
Co-Director, Center for Law, Technology, and the Arts and Associate Director, Frederick K. Cox International Law Center
JUDITH P. LIPTON, B.S., M.S.S.W., J.D.
Co-Director, Milton A. Kramer Law Clinic Center
KENNETH R. MARGOLIS, B.A., J.D.
Co-Director, Milton A. Kramer Law Clinic Center and Director, CaseArc
LOUISE W. MCKINNEY, B.A., J.D.
KEVIN C. MCMUNIGAL, B.A., J.D.
Judge Ben C. Green Professor
MAXWELL J. MEHLMAN, B.A., J.D.
Arthur E. Petersilge Professor, Professor of Bioethics and Director, Law-Medicine Center
DALE A. NANCE, B.A., M.A., J.D.
CRAIG ALLEN NARD, B.A., J.D., LL.M., J.S.D.
Tom J.E. and Bette Lou Walker Professor of Law and Co-Director, Center for Law, Technology, and the Arts
SPENCER NETH, B.A., J.D., LL.M.
MICHAEL P. SCHARF, A.B., J.D.
Director, Frederick K. Cox International Law Center
MORRIS G. SHANKER, B.S.E.E., M.B.A., J.D.
CALVIN WILLIAM SHARPE, B.A., M.A., J.D.
John Deaver Drinko—Baker & Hostetler Professor and Director, Center for the Interdisciplinary Study of Conflict and Dispute Resolution
GARY J. SIMSON, B.A., J.D.
Joseph C. Hostetler—Baker & Hostetler Professor of Law
ANN SOUTHWORTH, B.A., J.D.
THEODORE L. STEINBERG, B.A., PH.D.
Professor of History and Law
ROBERT N. STRASSFELD, B.A., M.A., J.D.
MARTHA WOODMANSEE, B.A., M.A. PH.D.
Professor of English and Law

Associate Professors of Law

CRAIG M. BOISE, B.A., J.D., LL.M., *Associate Director, Center for Business Law and Regulation*
DAVID J. CARNEY, B.A., J.D.
KATHLEEN M. CARRICK, B.A., M.L.S., J.D., *Director of the Law Library*
PETER B. FRIEDMAN, B.A., J.D.
JONATHAN GORDON, B.A., J.D.
RICHARD GORDON, B.A., J.D.
KENNETH F. LEDFORD, B.A., J.D., M.A., PH.D., *Associate Professor of History and Law*
LAURA McNALLY, B.A., J.D.
KATHRYN S. MERCER, A.B., M.S.S.W., J.D., PH.D.
MATTHEW ROSSMAN, B.A., J.D.
ROSALIND SIMSON, B.A., PH.D.

Assistant Professors of Law

TIMOTHY M. CASEY, B.A., J.D., LL.M.
JENNIFER CUPAR, B.S., J.D.
BRIAN K. GRAN, B.A., J.D., PH.D.
B. JESSIE HILL, B.A., J.D.
DANIEL A. JAFFE, B.A., J.D.
D. R. JONES, B.A., J.D., M.L.S., *Adjunct Assistant Professor of Law and Deputy Director of the Law Library*
MAUREEN SHERIDAN KENNY, B.A., J.D.
CASSANDRA B. ROBERTSON, B.A., M.A./M.P. AFF., J.D.
CAROLYN SEYMOUR, B.A., J.D.

The CASE WESTERN RESERVE LAW REVIEW (ISSN 0008-7262), formerly the Western Reserve Law Review, is published quarterly by the students of the Case Western Reserve University School of Law. Periodicals postage paid at Cleveland, Ohio and at additional mailing offices. Editorial and business offices are located at Case Western Reserve University, 11075 East Boulevard, Cleveland, Ohio 44106, telephone (216) 368-3312. POSTMASTER: Send address changes to Case Western Reserve Law Review, 11075 East Boulevard, Cleveland, Ohio 44106. The submission of unsolicited manuscripts is invited. Subscriptions are entered for the entire volume for \$32.00 per year. Subscriptions are automatically renewable. The Review's policy requires that unless a claim for nonreceipt of an issue is received within three months after the mailing date, the Review cannot be held responsible for supplying that issue without charge. Single issues of the current volume are available for \$16.00 each. Back issues from earlier volumes are available from William S. Hein & Co., Inc., 1285 Main Street, Buffalo, New York 14209. Back issues are also available in PDF format through HeinOnline <http://heinonline.org/>. Citations conform to *The Bluebook: A Uniform System of Citation* (18th ed. 2005), copyright by the Columbia Law Review, the Harvard Law Review, the University of Pennsylvania Law Review, and the Yale Law Journal. Style conforms generally to *The Chicago Manual of Style* (15th ed. 2003).

For all photocopy or republication requests, please contact Copyright Clearance Center, Inc. by mail: 222 Rosewood Drive, Danvers, MA 01923, by phone: (978) 646-2600, by fax: (978) 646-8600, by email: infoat@copyright.com, or online: www.copyright.com. This issue went to press in April 2008.

CASE WESTERN RESERVE LAW REVIEW

VOLUME 58

SPRING 2008

NUMBER 3

COPYRIGHT © 2008 BY CASE WESTERN RESERVE LAW REVIEW

SYMPOSIUM COMMON LAW ENVIRONMENTAL PROTECTION

INTRODUCTION

Jonathan H. Adler & Andrew P. Morriss 575

THE COMMON LAW AND THE ENVIRONMENT

Steven J. Eagle 583

THE COMMON LAW AND THE ENVIRONMENT IN THE COURTS

Stuart Buck 621

THE COMMON LAW AND THE ENVIRONMENT IN THE COURTS: DISCUSSION OF CODE LAW AND COMMON LAW

Bruce Yandle 647

ATTACKING BANANAS AND DEFENDING ENVIRONMENTAL COMMON LAW

Denise Antolini 663

THE ECONOMIC THEORY OF NUISANCE LAW AND IMPLICATIONS FOR ENVIRONMENTAL REGULATION

Keith N. Hylton 673

A DEFENSE OF COMMON LAW ENVIRONMENTALISM: THE DISCOVERY OF BETTER ENVIRONMENTAL POLICY

Henry N. Butler 705

MAKING NUISANCE ECOLOGICAL

J.B. Ruhl 753

FROM SWAMP DRAINAGE TO WETLANDS REGULATION TO ECOLOGICAL NUISANCES TO ENVIRONMENTAL ETHICS

John Copeland Nagle 787

50 194 CU 2613
MFG
08/12 00-104-06 OHIO
Group

BEWARE OF GREENS IN PRAISE OF THE COMMON LAW <i>James L. Huffman</i>	813
---	-----

UNSETTLED EXPECTATIONS: REFLECTIONS ON FOUR VIEWS OF THE COMMON LAW AND THE ENVIRONMENT <i>David Schoenbrod</i>	863
---	-----

NOTES

THE <i>STARBUCKS</i> DECISION OF THE SHANGHAI NO. 2 INTERMEDIATE PEOPLE'S COURT: A VICTORY LIMITED TO LATTÉS? <i>Mary K. Alexander</i>	881
--	-----

DANGER IN 12,008 A.D.: THE VALIDITY OF THE EPA'S PROPOSED RADIATION PROTECTION STANDARDS FOR THE YUCCA MOUNTAIN NUCLEAR REPOSITORY <i>Katherine J. Middleton</i>	933
---	-----

COMMENTS

PENNY WISE, POUND FOOLISH: CHILD WELFARE AGENCIES AS SOCIAL SECURITY REPRESENTATIVE PAYEES FOR FOSTER CHILDREN <i>Emily W. McGill</i>	961
---	-----

THE CONSTITUTIONALITY OF THE NFL PATDOWN POLICY AFTER <i>SHEEHAN</i> AND <i>JOHNSTON</i> <i>David G. Roberts</i>	979
--	-----