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978-0-521-76771-2 - Beyond Environmental Law: Policy Proposals for a Better Environmental Future

Edited by Alyson C. Flournoy and David M. Driesen

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## BEYOND ENVIRONMENTAL LAW

This book offers a vision for the third generation of environmental law designed to enhance its ability to protect our environment. The book presents two core proposals, an Environmental Legacy Act, to preserve a defined environmental legacy for future generations, and an Environmental Competition Statute, to spark movement to new clean technologies. The first proposal would require, for the first time, that the federal government define an environmental legacy that it must preserve for future generations. The second would establish a market competition to maximize environmental protection. The balance of the book provides complementary proposals and analysis. The first generation of environmental law sought broad protection of health and the environment in a fairly fragmented way. The second sought to enhance environmental law's efficiency through cost-benefit analysis and market mechanisms. These proposals seek to create a broader, more creative approach to solving environmental problems.

Alyson C. Flournoy is Professor and Alumni Research Scholar at the University of Florida's Levin College of Law, where she also serves as Director of the Environmental and Land Use Law Program. Her writing focuses on decision-making processes under environmental and natural resource laws, environmental ethics, and the intersection of science and law and has appeared in leading journals including *Columbia Journal of Environmental Law*, *Harvard Environmental Law Review*, *Indiana Law Journal*, and *Texas Law Review*. Flournoy is also a member-scholar of the Center for Progressive Reform.

David M. Driesen is the thirteenth professor in Syracuse University's history to hold the title University Professor, the highest honor available to a faculty member at that institution. His research focuses on the law and economics of environmental law. His book *The Economic Dynamics of Environmental Law* (2003) won a Lynton Keith Caldwell Award for the best book on environmental and technology policy. He has published a textbook, *Environmental Law: A Conceptual and Pragmatic Approach* (2007) (with Robert Adler), and his articles have appeared in leading journals, including *Cornell Law Review*, *Ecology Law Quarterly*, *Harvard Environmental Law Review*, and *Virginia Journal of International Law*. Driesen is also a member-scholar of the Center for Progressive Reform.

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# ***Beyond Environmental Law***

**POLICY PROPOSALS FOR A  
BETTER ENVIRONMENTAL FUTURE**

**Edited by**

**Alyson C. Flournoy**

Levin College of Law, University of Florida

**David M. Driesen**

College of Law, Syracuse University



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*For John*

– *A.C.F.*

*For Kim, Mai, and Mirrah*

– *D.M.D.*

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## About the Contributors

**David E. Adelman** is a Professor at the University of Texas School of Law. Before joining the Texas faculty in 2009, Adelman was an associate professor of law at the James E. Rogers College of Law. Before becoming a law professor, he was a senior attorney for the Natural Resources Defense Council in Washington, D.C., as well as an associate at the Washington office of Covington & Burling. Adelman has authored such articles as “Scientific Activism and Restraint: The Interplay of Statistics, Judgment, and Procedure in Environmental Law” (*Notre Dame Law Review* 2004); “The False Promise of the Genomics Revolution for Environmental Law” (*Harvard Environmental Law Review* 2005); and “A Fallacy of the Commons in Biotech Patent Policy” (*Berkeley Technology Law Journal* 2005). Adelman received his J.D. from Stanford Law School, where he participated in the *Stanford Environmental Law Journal*. Adelman also received his Ph.D. in chemical physics from Stanford University and his B.A. from Reed College.

**Mary Jane Angelo** is an Associate Professor at the University of Florida Levin College of Law. Her teaching and scholarship are focused in the areas of environmental law, water law, administrative law, biotechnology law, dispute resolution, pesticides law, and law and science. Before joining the University of Florida, Angelo served as the senior assistant general counsel at the St. Johns River Water Management District and as an attorney for the U.S. Environmental Protection Agency, in Washington, D.C. Angelo has published several articles on environmental issues, including “The Killing Fields: Reducing the Casualties in the Battle between U.S. Endangered Species and Pesticide Law” (*Harvard Environmental Law Review*

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2008); “Regulating Evolution for Sale: An Evolutionary Biology Model for Regulating the Risks Posed by Genetically Modified Organisms” (*Wake Forest Law Review* 2007); and “Embracing Uncertainty, Complexity and Change to Protect Ecological Integrity: An Eco-Pragmatic Reinvention of a First Generation Environmental Law” (*Ecology Law Quarterly* 2006). Angelo received her J.D. and M.S. from the University of Florida and her B.A. from Rutgers University.

**Thomas T. Ankersen** is a Legal Skills Professor and Director of the Conservation Clinic at the University of Florida Levin College of Law. He is also the Director of the University of Florida/University of Costa Rica Joint Program in Environmental and Land Use Law in Costa Rica. Before joining the University of Florida, Ankersen served as a staff attorney for the Sierra Club National Defense Fund and as a senior litigation associate at Peeples, Earl & Blank. Ankersen has authored many articles and book chapters in the area of environmental law, including “Shared Knowledge; Shared Jurisprudence: Learning to Speak Environmental Law Creole” (*Tulane Law Review* 2003) and “Inside the Polygon: Emerging Community Tenure Systems” and *Forest Resource Extraction in Working Forests in the Tropics: Conservation Through Sustainable Management* (Columbia University Press 2004). Ankersen received his J.D. from the University of Florida and his M.A. and B.A. from the University of South Florida.

**Mark T. Brown** is a Professor in environmental engineering sciences and the Director of the Center for Environmental Policy at the University of Florida. Before becoming a professor, Brown was a research scientist and associate program director with the University of Florida’s Howard T. Odum Center for Wetlands. Brown’s current research includes projects to develop ecological indicators of wetland ecosystem health; the development of indices of success for restored wetlands; the restoration of drastically altered landscapes; and quantitative evaluation of natural capital and environmental services. In addition to his research studies, Brown has coauthored many articles, including “Predicting National Sustainability: The Convergence of Energetic, Economic and Environmental Realities” (*Ecological Modeling* 2009); “Emergy and Ecosystem Complexity” (*Communications in Nonlinear Science and Numerical Simulation* 2009); and “Species Diversity in the Florida Everglades, USA: A Systems Approach to Calculating Biodiversity” (*Aquatic Sciences* 2007). Brown received his Ph.D., M.A., and B.A. from the University of Florida.

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**David M. Driesen** is University Professor at Syracuse University. He has taught environmental law (domestic and international) and constitutional law. Before joining the Syracuse College of Law, Driesen worked in Washington, D.C., as a Senior Project Attorney for the Natural Resources Defense Council, Air and Energy Program. His publications include *The Economic Dynamics of Environmental Law* (MIT Press 2003), *Environmental Law: A Conceptual and Pragmatic Approach* (Aspen 2007) (with Robert Adler), “Is Cost-Benefit Analysis Neutral?” (*Colorado Law Review* 2006), “Standing for Nothing: The Paradox of Demanding Concrete Context for Formalist Adjudication” (*Cornell Law Review* 2004), and “What Is Free Trade? The Real Issue Lurking behind the Trade and Environment Debate” (*Virginia Journal of International Law* 2001). Driesen received his J.D. from the Yale Law School, his M.Mus. from the Yale School of Music, and his B.Mus. from the Oberlin Conservatory.

**Alyson C. Flournoy** is a Professor of Law and Alumni Research Scholar and the Director of the Environmental and Land Use Law Program at the University of Florida Levin College of Law. Flournoy’s teaching and scholarship are focused in the areas of environmental law, property, administrative law, and advanced environmental law and litigation. Before joining the University of Florida, Flournoy served as an associate attorney for Covington & Burling in the Washington, D.C., office. Flournoy has authored several book chapters and articles in the area of environmental law, including “Protecting a Natural Resource Legacy While Promoting Resilience: Can It Be Done?” (*Nebraska Law Review* 2009); “Harnessing the Power of Information to Protect Our Public Natural Resource Legacy” (*Texas Law Review* 2008) (with Heather Halter and Christina Storz); and “Supply, Demand, and Consequences: The Impact of Information Flow on Individual Permitting Decisions under Section 404 of the Clean Water Act” (*Indiana Law Journal* 2008). Flournoy received her J.D. from Harvard Law School and her A.B. from Princeton University.

**Christine A. Klein** is a Chesterfield Smith Professor of Law in the Environmental and Land Use Law Program at the University of Florida Levin College of Law. Klein’s teaching and scholarship are focused in the areas of natural resources law, water law, and property. Before joining the University of Florida, Klein was chair of the Environmental Law Concentration Program and a professor at Michigan State University College of Law. She also served as an assistant attorney general of the Natural Resources Section

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for the State of Colorado. Professor Klein has published articles in her area of practice, including “The Environmental Deficit: Applying Lessons from the Economic Recession” (*Arizona Law Review* 2009), “Modernizing Water Law: The Example of Florida” (*Florida Law Review* 2009) (with Mary Jane Angelo and Richard Hamann), and “Cultural Norms as a Source of Law: The Example of Bottled Water” (*Cardozo Law Review* 2008) (with Ling-Yee Huang). She has also coauthored the book *Natural Resources Law: A Place-Based Book of Problems and Cases* (Aspen Publishers 2nd ed. 2009). Klein received her L.L.M. from Columbia University School of Law, her J.D. from the University of Colorado, and her B.A. from Middlebury College.

**Brian Mayer** is an Assistant Professor in the Department of Sociology and the Department of Epidemiology and Biostatistics at the University of Florida. Mayer’s teaching and scholarship are focused in the areas of environmental sociology, social movements, and medical sociology. He is the author of *Blue-Green Coalitions: Fighting for Safer Workplaces and Healthy Communities* (Cornell University Press 2008). Mayer has also authored several articles and book chapters in the field of environmental sociology, including “Cross-Movement Coalition Formation: Bridging the Labor-Environment Divide” (2009), “School Custodians and Green Cleaners: New Approaches to Labor-Environmental Coalitions” (2007), and “Clearing the Air and Breathing Freely: The Health Politics of Air Pollution and Asthma” (2004). He also sits on the board of several environmental organizations, including the Alliance for a Healthy Tomorrow and the Toward Tomorrow Project, and is a senior Fellow with the Environmental Leadership Program. Mayer received his M.A. and Ph.D. from Brown University and his B.A. from the University of California, Santa Cruz.

**Christine Overdevest** is an Assistant Professor in the Department of Sociology and an affiliate faculty of the School of Natural Resources at the University of Florida. In 2008–2009 she was a visiting researcher at the Institute for International Business at the Stockholm School of Economics. Overdevest’s teaching and scholarship are focused in the areas of environmental governance and economic sociology. Professor Overdevest has published articles in her area of expertise, including a contribution to a special issue on Law and Legitimacy in Transnational Governance called “Comparing Forest Certification Schemes: The Case of Ratcheting Standards in the Forest

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Sector (*Socio-Economic Review* 2010) and “The Experimental Turn in Environmental Sociology: Pragmatism and New Forms of Governance” (Springer 2010). Overdevest received her Ph.D. from the University of Wisconsin-Madison and her M.A. and B.A. from the University of Georgia.

**Kevin E. Regan** is an Associate Attorney in the Seattle office of Earthjustice, a nonprofit public-interest law firm. The views expressed in the chapter that Mr. Regan coauthored are his own and no endorsement by Earthjustice or its clients is intended. Previously, Regan was a trial attorney for the Natural Resources Section of the U.S. Department of Justice. In addition, he clerked for U.S. District Judge Jose E. Martinez in the Southern District of Florida and was an attorney for the U.S. Army Corps of Engineers in Chicago. Regan has published several articles related to environmental and natural resources law, including “The Need for a Comprehensive Approach to Protecting Rare Plants: Florida as a Case Study” (*Natural Resources Journal* 2004) and “Balancing Public Water Supply and Adverse Environmental Impacts under Florida Water Law: From Water Wars towards Adaptive Management” (*Florida Journal of Land Use and Environmental Law* 2003). Regan received his J.D. from the University of Florida and his B.S. from the University of Tennessee–Chattanooga.

**Walter A. Rosenbaum** is Professor Emeritus in political science at the University of Florida, where he served as the interim director of the Bob Graham Center for Public Service. He has recently been a visiting professor of environmental studies at the University of Michigan’s School of Natural Resources and the Environment. Rosenbaum conducts research and writes extensively about issues related to environmental policy, energy policy, and risk management associated with environmental and public health issues. He is the author of the leading text *Environmental Politics and Policy* (7th ed. 2008). He is also the author of *Energy Politics and Public Policy* and numerous articles on environmental and energy policy. He recently completed an assessment of the environmental impact of the National Flood Insurance Program as a consultant to the Federal Emergency Management Agency and, earlier, another commission by the Center for Public Policy and Philanthropy at the University of Southern California. He has also served as a consultant to the U.S. Department of Energy, the South Florida (Everglades) Ecosystem Restoration Project, and the U.S. Environmental Protection Agency.

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## ABOUT THE CONTRIBUTORS

**Sidney Shapiro** is the Associate Dean for Research and Development and Distinguished Chair in Law at the Wake Forest University School of Law. Before joining the faculty at Wake Forest, Shapiro taught for twenty-five years at the University of Kansas School of Law. In addition, Shapiro was a trial attorney with the Federal Trade Commission and deputy legal counsel for the Department of Health, Education, and Welfare. He is a founding board member of the Center for Progressive Reform, a nonprofit research and educational organization of university-affiliated academics with expertise in the legal, economic, and scientific issues related to regulation of health, safety, and the environment. Shapiro teaches and writes about administrative procedure and regulatory policy. He is the coauthor of law school textbooks on administrative law and regulatory law and policy and has authored a one-volume administrative law treatise. His most recent coauthored book is *The People's Agents and the Battle to Protect the American Public: Special Interests, Government, and Threats to Health, Safety and the Environment* (University of Chicago 2010). Shapiro earned his law degree from the University of Pennsylvania and his B.S. from the University of Pennsylvania.

**Rena Steinzor** is Professor of Law at the University of Maryland School of Law and President of the Center for Progressive Reform. She teaches courses in administrative law, risk assessment, critical issues in law and science, and a survey of environmental law. Steinzor is the author of several books, including *Mother Earth and Uncle Sam: How Pollution and Hollow Government Hurt Our Kids* (University of Texas 2007); the coauthor (with Sidney Shapiro) of *The People's Agents and the Battle to Protect the American Public: Special Interests, Government, and Threats to Health, Safety and the Environment* (University of Chicago 2010); and coeditor (with Wendy Wagner) of *Rescuing Science from Politics: Regulation and the Distortion of Scientific Research* (2006). She has also written many articles on the topic of environmental regulation in the United States, including "Devolution and the Public Health" (*Harvard Environmental Law Review* 2000) and "The Legislation of Unintended Consequences" (*Duke Environmental Law and Policy Forum* 1998). Steinzor received her J.D. from Columbia University and her B.A. from the University of Wisconsin.

**Joseph P. Tomain** is a Dean Emeritus and Wilbert and Helen Ziegler Professor of Law at the University of Cincinnati College of Law. Tomain taught

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at Drake University School of Law and served as visiting professor at the University of Texas School of Law. He joined the University of Cincinnati law faculty in 1987 and served as dean of the College of Law for fifteen years. Before beginning a career in legal education, Tomain practiced law in New Jersey. He is chair of the Board of the Knowledge Works Education Foundation, the founder and principal of the Justice Institute for the Legal Profession, and a board member of the Greater Cincinnati Foundation. Tomain has published several books, including *Energy Law in a Nutshell* (West Group 2004), *Regulatory Law and Policy* (LexisNexis 3d ed. 2003), and *Energy Law and Policy for the 21st Century* (Rocky Mountain Mineral Law Institute 2000). Tomain received his J.D. from George Washington University and his B.A. from University of Notre Dame.

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## Preface

This book sets forth concrete proposals and ideas to guide the next generation of environmental law. The first generation of environmental law aimed to fully protect public health and the environment. It did so mostly through very detailed statutes and accompanying standards. This generation of law succeeded in meeting some of its goals and sparked significant progress toward meeting the rest. But it spawned an extraordinarily complex system that proved more difficult to implement than its creators had anticipated. Moreover, most of these statutes required that agencies prove harm before regulating, and many natural resource management statutes gave agencies broad discretion to balance competing values. Uncertainty and the broad discretion accorded agencies limited these statutes' success in achieving their stated goals.

We are nearing the end of a second generation of environmental law. This second generation carried out regulatory reforms ostensibly guided by a desire for economic efficiency. These reforms included greater reliance on cost-benefit analysis (CBA) to choose the goals of environmental law and market-based mechanisms as methods for achieving those goals. Although this approach enjoyed some successes, the CBA part of the agenda proved disastrous. By taking an insufficiently precautionary approach, the United States failed to act in a timely manner on global warming, which proved a much greater menace than economists and opponents of action had anticipated. CBA, while ostensibly aimed at rationalizing environmental law, usually simply provided a cover that allowed regulated polluters and ideologues favoring their interests to paralyze regulation.

The next generation of environmental law should build on the positive aspects of both of the previous generations of reform. It should embrace the

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precautionary approach of the first generation while embracing the second generation's goal of stimulating private markets to protect the environment. But we must address the shortcomings of the first generation and choose reforms that promise more vigorous protection of the environment, not less.

This book contains two parts. Part I focuses on a proposal to conserve public natural resources through the "National Environmental Legacy Act." Part II focuses on a proposal to stimulate positive technological changes through an "Environmental Competition Statute." Both parts explore related ideas and information to aid appreciation for how we can conserve our environment and stimulate appropriate technological progress. We see these two parts as complementary, since society needs both conservation of the good and progress toward something better.

Part I begins with a chapter describing its centerpiece proposal: the National Environmental Legacy Act (the Legacy Act). This statute would require us to define in concrete terms for the first time the environmental legacy we wish to leave to future generations and would provide a mechanism for systematically evaluating whether important decisions regarding public resources are consistent with preserving that legacy. At the same time, it would achieve the desirable goal of improving our ability to assess how our decisions are affecting our own future and whether they are consistent with our goals and priorities. As such, the statute would provide a tool to help us achieve the goal of sustainable use of our resources that is embodied in many of our current statutes but honored most often in the breach.

The Legacy Act concept draws on the lessons learned in more than thirty years of experience under the National Environmental Policy Act and the many other statutes by which we have sought to conserve both the quality and the quantity of our natural resources. A central lesson has emerged consistently from our experience under these statutes, and this lesson forms the cornerstone of the Legacy Act: we cannot reliably protect a natural resource legacy without a strong and enforceable substantive mandate. The chapter demonstrates how the Legacy Act would overcome the problems that have plagued our effort to achieve sustainable use of resources to date. The remaining chapters of Part I describe important ideas that undergird or support the Legacy Act concept or challenges that the Legacy Act must address.

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Professor Shapiro focuses on administrative process and the key role it plays in our efforts to achieve sustainability. The chapter emphasizes the historical successes of citizen enforcement and describes three obstacles to enforcement by regulatory beneficiaries. Professor Shapiro describes the limitations that the courts' interpretations of standing and ripeness doctrines, as well as the courts' treatment of agency inaction, have imposed on that success. He then suggests legislative strategies to overcome these limitations in the design of the Legacy Act and argues that the Supreme Court should revisit and reverse recent and unwarranted interpretations of both standing and ripeness requirements.

Professor Ankersen and Kevin Regan write about the "shifting-baselines phenomenon," which both demonstrates the need for the Legacy Act and suggests a pitfall that it must help us to avoid. Humans' perception of normal or baseline environmental conditions can shift dramatically over time, and successive generations may not appreciate the degraded state of what they perceive as pristine and functional ecosystems. Ankersen and Regan explore the shifting-baselines phenomenon and the potential contours of the Legacy Act in terms of the ecologies of restoration, resilience, and reconciliation. They argue that the Legacy Act must encourage the restoration of already-degraded resources and ensure ecosystem resilience in the face of reasonably anticipated anthropogenic change. They also suggest that it is necessary to coordinate the Legacy Act's goals with broader landscape-level conservation efforts, including the accommodation of ecosystem functions, processes, and services on private lands. The chapter emphasizes the importance of restoring human ecological knowledge to prevent intergenerational ecological amnesia and to ensure the transfer of an environmental legacy.

Professors Brown and Angelo focus on an approach to analyzing the impact of decisions on natural ecosystems that could be applied as a central analytic tool to implement the Legacy Act's goals – emergy synthesis. Emergy synthesis is a quantitative method of valuation that relies on the intrinsic value of a resource or the services it provides. A core strength of the emergy approach is that, although it is quantitative, it does not require assigning an economic value to natural resources, which have both quantifiable and hard-to-quantify values. The latter are notoriously difficult to measure using standard economic techniques that rely primarily on determining

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consumer willingness to pay for the resource. Emergy analysis focuses on the energy embodied in the resource rather than trying to quantify the monetary value of the resource based on consumer preferences. Although emergy may not offer a complete picture of the value of the resources, it illustrates one promising technique that may play an important role in developing a more comprehensive method for assessing the value of natural resources to replace the outdated and inadequate cost-benefit framework. Thus, this chapter also illustrates more broadly the value of exploring some of the many newer approaches to analyzing environmental impacts and synthesizing available information.

Professors Overdevest and Mayer's chapter offers suggestions on how to design the information collection and dissemination components of the Legacy Act. They use a case study of bucket brigades – community-based air-quality monitoring and diffusion organizations that have developed across the country – to illustrate how the power of information is enhanced by creating incentives that engage both government and civil society in the process of collecting and sharing information. The case study suggests how engaging nongovernmental organizations and citizens with government oversight and monitoring can enhance both the information available and accountability. The authors' analysis suggests that an approach that collects and diffuses information at multiple administrative levels is more adaptive and functions more robustly in a climate where complexity and dynamism render complete information impractical. It also highlights areas in which further research is needed to fully understand the institutional dynamics.

Professor Rosenbaum also looks at information dissemination and offers recommendations on how the Legacy Act could ensure that the most effective use is made of information collected. The chapter begins by discussing three issues in the design and implementation of the Legacy Act that are of fundamental importance to achieving this goal: the process used to establish substantive standards, the treatment of uncertainty, and the selection of environmental indicators for baselines and monitoring. Professor Rosenbaum emphasizes that data collected under the Legacy Act must have policy relevance and be publicly accessible. The chapter also explores how the Legacy Act can both inform conservation efforts at the state and local levels and how those designing the Act can learn from these other levels of government. Professor Rosenbaum concludes by articulating

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the double standard of scientific appropriateness and policy relevance that information generated under the Legacy Act must meet.

Professor Steinzor argues for establishing a broader constitutional foundation for federal conservation efforts and details how a broader foundation may enhance the credibility and respect accorded a statute such as the Legacy Act. Although a broader constitutional foundation may not be essential to the Legacy Act, it may permit the statute to address a broader range of activities. The Property Clause of the Constitution provides a firm basis for regulating activities affecting the many natural resources found on federal lands, but this chapter explores the basis for conserving the quality of resources, such as air, water, wetlands, and endangered species that cannot be protected solely by regulating activities on publicly owned lands. The chapter outlines the impact of relying on the Commerce Clause as the sole basis for federal environmental protection. Professor Steinzor traces the evolution of Commerce Clause jurisprudence and its implications for environmental protection. She then traces constitutional foundations of the federal power to protect the public health, safety, and welfare. On the basis of this history, Professor Steinzor presents the core argument for relying on the Constitution's General Welfare Clause as affirmative constitutional authority for environmental, health, and safety legislation.

Part II begins with a discussion of its centerpiece proposal, an Environmental Competition Statute. This proposal seeks to promote competition among firms to maximize environmental protection. It seeks to emulate the dynamics of continuous improvement that characterize some highly competitive markets rather than the hypothetical efficiency that economists attribute to free markets to facilitate modeling exercises. It also seeks to relieve regulators of the responsibility to determine the limits of feasible protection by using the best performance from polluters as the benchmark others must meet to escape liability. The timidity of regulators has usually limited the efficacy of both traditional regulation and emissions trading approaches. This timidity also limits the efficacy of pollution taxes, as government officials must choose tax rates. The Environmental Competition Statute seeks to engage the creativity of the private sector directly rather than rely on government officials to set standards and tax rates.

An Environmental Competition Statute accomplishes this in a fairly simple way. It provides that anybody who makes an environmental improvement may collect the cost of making this improvement from competitors

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that pollute more, plus a premium preset by statute. This sets up a competition, a race to the top, in which those who perform best collect money and those who perform worse pay their cleaner competitors. This mimics the dynamics of markets, in which firms that innovate may capture market share from competitors so that they, in effect, take money from their less innovative competitors. This approach makes the achievements of the most environmentally capable firms rather than the timid actions of government bureaucrats the driver of environmental improvement. The discussion of the Environmental Competition Statute also explains why emissions trading and pollution taxes have proved fairly weak stimulators of environmental innovation and why such innovation is important. The remaining chapters provide additional justifications for the Environmental Competition Statute and champion some policies that will complement it in the next generation of environmental law.

Professor Adelman discusses a key premise of the Environmental Competition Statute – promoting technological innovation. The Environmental Competition Statute, of course, is premised on the notion that the private sector has great unused capacity to advance environmental technology, and it seeks to use competition to improve the environment as a means of bringing that capacity to the fore. Professor Adelman explores the level of government at which an Environmental Competition Statute can be most effectively implemented. He demonstrates that promoting innovation is a distinct regulatory end that is itself subject to a market failure – technology spillovers. Using efforts to address climate change as an illustration, Professor Adelman shows how failure to recognize technological innovation as a distinct regulatory end often leads policy makers to overlook the value of state and local regulation to complement federal regulatory efforts. The chapter then examines in detail the market dynamics that affect technological innovation and concludes that both state and federal governments can effectively implement a statute, such as an Environmental Competition Statute.

Professor Tomain offers a metaphor and vision for a transformation of the electric utility industry – the iUtility – and illustrates how an Environmental Competition Statute would be congruent with this vision. The chapter begins by describing today's electric utility industry, its history of regulation and deregulation, the critical function played by rate making, and the adverse consequences of this approach. Then Professor Tomain sets out a

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vision for a new regulatory compact based on the core ideas that animate the Environmental Competition Statute. He describes how a new approach to rate making and renewable portfolio standards can transform the industry and promote innovation.

In the concluding chapter, Professor Klein identifies a unified values framework that draws on values strongly associated with America's history and national character to support environmental sustainability and technological innovation. The chapter begins by describing the deep connection between patriotism and Americans' connection to the land. Professor Klein then surveys the evolution of environmental law, illustrating how both the first and second generations of environmental law embody the core American values of optimism, strength, and thrift. Building on this common foundation, Professor Klein dubs this framework "environmental patriotism." The chapter explores relevant metaphors associated with the values framework that can be used to support reforms that advance sustainability and examines how and why these metaphors are a critical tool in helping the public to understand the broad and profound implications of the decisions we make about the environment. Professor Klein details how the values framework and associated metaphors can help to educate the public about the meaning of both the Environmental Legacy Act and the Environmental Competition Statute, enrich public debate about the proposed statutes, and enlist a broad base of allies to support these two legislative initiatives.

We offer these two key reforms, the National Environmental Legacy Act and the Environmental Competition Statute, as cornerstones for the next generation of environmental law. They represent an attempt to grapple honestly with both the positive and the negative lessons from the first two generations of environmental law. We hope that these two ideas will receive support. But we also hope that they highlight the need for the next generation of environmental law to more comprehensively conserve our environmental legacy while simultaneously stimulating the deployment of technological advances that both promote conservation and meet our economic development needs. The analysis offered here supports these reforms but may stimulate further ideas. We welcome additional proposals on how the next generation can do better than the previous two in meeting these twin goals.

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Alyson C. Flournoy  
David M. Driesen