

ENVIRONMENTAL LAW, DISRUPTED.

Keith Hirokawa & Jessica Owley, Editors

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Table of Contents

About the Authors.....	xi
Foreword	xv
Introduction: Path Dependency, Disruption, and the Influence of Climate Science on the Law, by Keith Hirokawa & Jessica Owley.....	1
Chapter 1: New Realities Require New Priorities: Heading Off the Climate Dystopia Death Spirals by Re-Prioritizing the Environment and Environmental Law, by Robin Kundis Craig & J.B. Ruhl.....	7
I. Introduction.....	7
II. Recognizing the Beginnings of the Death Spirals: The De-Prioritization of the Environmental Sustainable Development Goals	9
III. Resisting the Impulse to Trade Off the Environment.....	13
IV. Resisting the Coming Deep Tradeoffs as a Result of Climate Change Adaptation With a New Approach to Environmental Law	21
A. Contextualizing Adaptation Demand Curves.....	24
B. Preparing for Nonlinear and Shock Adaptation.....	26
V. Conclusion.....	30
Chapter 2: Landscapes of Inequality: Racial Segregation and Environmental Injustice, by Shannon Roesler.....	33
I. Line-Drawing: How Law and Policy Inscribes Inequality Into Physical Space	35
II. The Landscape of Inequality: Environmental Injustice as a Consequence of De Jure Discrimination	40

- III. Law’s Challenge Today: The Problem of Structural Racism 42
 - A. Equal Protection 43
 - B. The Fair Housing Act..... 46
 - C. Title VI 48
 - D. Roadblocks to Equal Opportunity: Formalistic Equality Norms and Resource Constraints 50
- IV. Disruptions in the Supreme Court’s Equality Jurisprudence 53
- V. Conclusion..... 56

- Chapter 3: Aggressive Solutions to Disrupt Biodiversity Loss, by David Takacs 59

- Chapter 4: Whose Water? Corporatization of a Common Good, by Vanessa Casado Perez..... 79
 - I. Introduction..... 79
 - II. Water Markets 83
 - III. Community Externalities of Water Markets 86
 - A. Levels of Governance 87
 - B. Externalities or Protectionism? 89
 - IV. Internalizing Water Markets’ Externalities 93
 - V. Conclusion..... 99

- Chapter 5: Professional Responsibility and the Corporate Hoodwink: Using the Climate Disinformation Campaign to Examine the Ethical Responsibilities of Attorneys When Corporate Clients Mislead the Public to Avoid Government Regulation, by Lissa Griffin & Katrina F. Kuh..... 101
 - I. Introduction..... 102
 - A. Contours of the Climate Disinformation Campaign 107
 - B. Hypothesizing the Lawyer’s Role in the Climate Disinformation Campaign..... 112

II.	Analyzing the Lawyers' Role in the Climate Disinformation Campaign.....	113
A.	The Special Role of Lawyers and Ethical Prohibitions Against Dishonesty.....	114
1.	A Lawyer May Not Make False Statements in Public.....	115
2.	A Lawyer May Not Assist a Client in Fraudulent or Criminal Conduct	117
3.	Norms of Professionalism May Limit a Lawyer's Role in Public Disinformation	120
III.	Conclusion.....	120
Chapter 6: Private Environmental Action as Disruptive Innovation, by Jessica Owley		
I.	Environmental Disruption	123
II.	Legal Disruption.....	123
III.	Disruption as an Opportunity	126
IV.	Private Environmental Governance as Catalytic Innovation	130
A.	Data Protection and Creation	132
1.	Disappearing Government Information	132
2.	Citizen Science	136
B.	Citizen-Led Environmental Litigation	138
C.	Private Land Conservation	142
V.	Conclusion.....	145
Chapter 7: The Twin Environmental Law Problems of Preemption and Political Scale, by Erin Ryan.....		
I.	Problems of Preemption.....	150
A.	Preemption and Environmental Federalism	151
B.	The Threat of Ceiling Preemption.....	152
1.	The California Waiver.....	156

- C. Savings Clauses and the Presumption Against Preemption 157
- II. Problems of Political Scale..... 159
 - A. Uniform Regional Governance 160
 - 1. A Model Sustainability Code 162
 - B. Coordinated Action Through Private Environmental Governance 167
 - C. Sustainable CC&Rs as Climate Policy 168
- III. Conclusion..... 171

Chapter 8: Take the Power Back: Raging Against the Local Land Use Machine, by Blake Hudson..... 175

- I. Introduction..... 175
- II. Contextualizing the Problem..... 176
- III. Why States Give Up the Power 180
 - A. Decentralization Has Benefits 180
 - B. But Land Use Is Wicked 181
- IV. Why States Should Take the Power Back..... 190
- V. Areas Where States Need to Take the Power Back..... 193
 - A. Coastal Land and Sea-Level Rise..... 193
 - B. 100-Year Floodplains..... 194
 - C. Forest and Agricultural Buffer Zones 196
 - D. NIMBYism, Restrictive Zoning, and Housing Costs 197
- VI. How States Should Take the Power Back..... 199

Chapter 9: Local Variation to Lead the Disruption of Contemporary Environmental Law, by Keith H. Hirokawa & Jonathan Rosenbloom 203

- I. The Race to the Bottom..... 205
- II. The Race for Identity 208

III.	The Local Race.....	215
IV.	Conclusion: The Fallacy of the Race to the Bottom and the Power of Local Innovation.....	222
Chapter 10: <i>Juliana v. United States</i> and the Risk of “Legally Disruptive” Federal Climate Litigation, by Melissa Powers & Juliane L. Fry		
I.	Introduction.....	225
II.	Standing and the Political Question Doctrine During the First Climate Litigation Wave.....	230
A.	Climate Change Standing Since <i>Massachusetts</i>	230
1.	Massachusetts.....	232
a.	The Majority Decision.....	233
b.	The Dissent	236
2.	Post- <i>Massachusetts</i> Climate-Related Standing Decisions	239
a.	<i>Connecticut v. American Electric Power Co.</i>	239
b.	<i>Bellon</i>	242
B.	The Political Question Doctrine	244
III.	The Ninth Circuit’s Standing Ruling in <i>Juliana</i>	246
A.	Injury and Causation.....	247
B.	The Redressability Analysis	248
1.	No Redressability for Declaratory Relief	248
2.	No Redressability for Partial Relief <i>or</i> Comprehensive Remedies	251
a.	No Redressability for Partial Relief	251
b.	No Redressability for Capacious Relief	253
IV.	The Disruptive Implications of <i>Juliana</i>	256
V.	Conclusion.....	258

Chapter 11: Our Climate Moment Is Now! (or How to Change the Story to Save Our World), by Rebecca Bratspies..... 261

- I. Changing the Story: Moving Forward Without the Federal Government..... 264
- II. Technology Is Rapidly Leaving Carbon Behind..... 271
- III. Beyond the United States 273
- IV. Conclusion..... 276

Chapter 12: Environmental Law Disrupted by COVID-19, by Rebecca Bratspies, Vanessa Casado Perez, Robin Kundis Craig, Lissa Griffin, Keith Hirokawa, Sarah Krakoff, Katrina Kuh, Jessica Owley, Melissa Powers, Shannon Roesler, Jonathan Rosenbloom, J.B. Ruhl, Erin Ryan, & David Takacs..... 279

- I. Introduction..... 279
- II. How the Pandemic Revealed Weakness and Lack of Resilience in Our Systems 281
 - A. Supply Chains..... 281
 - B. Energy Protectionism 284
 - C. Health, Economics, and Race 286
- III. Governance in Crisis..... 291
 - A. The Dangers of Politicized and Resource-Starved Agencies..... 292
 - B. The Dangers of Politicized Science 294
- IV. The Implications..... 297
 - A. Reducing Our Regulatory Capacity Reduces Our Ability to Respond to a Crisis 297
 - B. Teaching Us About Federalism..... 298
- V. Ripple Effects and Opportunities..... 302
 - A. Ripple Effects-Nationalism..... 302
 - B. Opportunities for Public Health 303
 - C. Opportunities for Natural Systems..... 305

D. Opportunities for Infrastructure Planning.....	306
E. Opportunity to Stop and Restart.....	307
F. Role of Community.....	309
VI. Conclusion.....	310
Index.....	311

About the Authors

Rebecca M. Bratspies is a Professor of Law at the CUNY School of Law and the founding director of the CUNY Center for Urban Environmental Reform. She has published widely on regulatory policy—with a focus on environmental democracy, regulating new technologies, and corporate responsibility.

Vanessa Casado Pérez is an Associate Professor of Law and Research Associate Professor of Agricultural Economics at Texas A&M University School of Law. Her research focuses on management of natural resources and public property.

Robin Kundis Craig is the Robert C. Packard Trustee Chair in Law at the University of Southern California Gould School of Law. Robin Craig specializes in all things water, including the relationships between climate change and water; the water-energy-food nexus; the Clean Water Act; the intersection of water issues and land issues; ocean and coastal law; marine biodiversity and marine protected areas; water law; ecological resilience and the law; climate change adaptation, and the relationships between environmental law and public health.

Juliane L. Fry is an Associate Professor of Air Quality and Atmospheric Chemistry at Wageningen University and the Amsterdam Institute of Advanced Metropolitan Solutions. Her research focuses on atmospheric and environmental chemistry, specifically on elucidation of interactions between human-produced nitrogen oxides and climate-relevant atmospheric aerosol particles. Julie obtained a master's degree in Environmental Law from Lewis and Clark Law School in 2016.

Lissa Griffin is a Professor of Law and Ian J. Yankwitt Faculty Scholar at Pace University Elisabeth Haub School of Law. She is an expert in criminal procedure, professional ethics, and comparative criminal procedure and has written extensively on the role of counsel, wrongful convictions, and comparative criminal procedure.

Keith Hirokawa is a Associate Dean for Research and Scholarship and Professor of Law at Albany Law School, which he joined in 2009. He teaches courses involving environmental and natural resources law, land use planning, property law, and jurisprudence. His scholarship explores convergences in ecology, ethics, economics, and law, with particular attention given to local environmental law, ecosystem services policy, watershed management, and environmental impact analysis.

Blake Hudson is the Samuel T. Dell Professor of Law at the University of Florida School of Law, where he also serves as Director of the school's Environmental and Land Use Law Program. Blake's recent research has focused on the intersection of land use law, policy, and planning with natural resource management, with particular emphasis on the role of forest management in combatting climate change and the implications of land development for long-term natural resource management.

Sarah Krakoff is on leave from the University of Colorado Law School, where she is the Moses Laskey Professor of Law at the University of Colorado Law School. She teaches and writes about American Indian law, natural resources law, and environmental justice. In 2018, she was awarded the University of Colorado's Hazel Barnes Prize for her distinguished record of research and teaching and the Chase Community Service Award for her pro bono work with low-income communities. She is currently serving as Deputy Solicitor for Parks and Wildlife in the Biden Administration. The views and positions herein are hers individually and not those of the Administration.

Katrina F. Kuh joined the Pace University Elisabeth Haub School of Law faculty as the Haub Distinguished Professor of Environmental Law in 2017. Katrina's scholarship focuses on climate change and sustainability and she has taught Environmental Law, International Environmental Law, Global Climate Change and U.S. Law, Administrative Law, and Torts.

Jessica Owley is a Professor of Law and Faculty Director for the Environmental Law Program at the University of Miami School of Law. She specializes in environmental and property law, with a focus on climate change, and is a leading expert on private land conservation and conservation easements. Her interdisciplinary work explores ways to mitigate and adapt to climate change as well as furthering other environmental goals in the context of drastic change. Her work is cited widely and has received multiple awards,

including most recently the 2019 Morrison Prize for sustainability research. She annually participates as an observer at the annual treaty negotiations for the United Nations Framework Convention on Climate Change.

Melissa Powers is a Jeffrey Bain Faculty Scholar and Professor of Law at Lewis & Clark Law School, and she was a Fulbright-Schuman Scholar in 2014-2015 researching Denmark and Spain's renewable energy laws. Melissa is also the founder and director of the Green Energy Institute at Lewis & Clark Law School, an organization that designs strategies to a transition to a zero-carbon energy system. Melissa's research focuses on energy reform, climate change mitigation, and pollution control.

Shannon Roesler is a Professor of Law at the University of Iowa College of Law. She teaches Environmental Law, Land Use, and Torts. Her scholarship focuses on issues of environmental justice, environmental governance, climate change litigation, and science communication and the law.

Jonathan Rosenbloom is a Professor of Law at Vermont Law School. His scholarship explores issues relevant to local governments and sustainability, with a particular focus on land use. He is the founding director of the Sustainable Development Code, a model land use code providing local governments with the best sustainability practices in land use.

J.B. Ruhl is the David Daniels Allen Distinguished Chair of Law at Vanderbilt University Law School. His research and scholarship focus on the law and policy relating to endangered species, ecosystem management, adaptive governance, ecosystem services, resilience theory, and complex adaptive systems.

Erin Ryan is Elizabeth C. & Clyde W. Atkinson Professor and Associate Dean for Environmental Programs at the Florida State University College of Law. Professor Ryan teaches in the areas of environmental and natural resources law, property and land use, water law, and negotiation. Her research focuses on topics in environmental governance and natural resources management, especially involving water resources, comparative environmental federalism, and intergovernmental bargaining. Prior to law school, Ryan served as a U.S. Forest Service ranger on the Mono Lake District of the Inyo National Forest, east of Yosemite National Park.

David Takacs is Professor of Law at University of California Hastings College of the Law in San Francisco. His scholarly work addresses forest carbon offsetting, biodiversity conservation law, environmental and ecological democracy, rights for nature, and the human right to water.

Foreword

As Jessica Owley and Keith Hirokawa note in their introduction to this book, despite the desire for law to provide stability and certainty, “sometimes law needs to be revisited.” This is certainly the case for environmental law today as we face the triple crisis of climate change, biodiversity loss, and continuing pollution, all of which raise important environmental justice concerns. Environmental law in many countries has produced important advances that have preserved resources, reduced pollution, and saved lives. But saying environmental laws have, in many ways, been successful does not mean that they are adequate to meet the serious challenges we are now facing, challenges that are more global in nature and more threatening in their consequences than the important air, water, and land pollution challenges of an earlier era. As Robin Craig and J.B. Ruhl point out, environmental law needs to be the primary consideration in “sustainable” development, and that “some reimagining of environmental law will be needed to facilitate adaptation actions necessary to protect human health and safety, bearing in mind that promoting ecological resilience will be one of the most important adaptation strategies for that purpose.”

Having just passed the 50th anniversary of what might be considered the modern era of environmental law—the first Earth Day, the founding of the U.S. Environmental Protection Agency, and the enactment of the Clean Air Act and the National Environmental Policy Act—now is a particularly appropriate time to reassess whether our environmental laws are fit for the future. Not surprisingly, in many ways they are not, in significant part due to the fact that, with the exception of the Toxic Substance Control Act amendments, it has been 30 years since the United States has seen any new major environmental law enacted at the federal level. We don’t have, but desperately need, a framework law to address climate change given the almost daily impacts we are seeing from altered climate patterns. Biodiversity loss continues apace diminishing critical ecosystem services, even setting aside the ethical dimensions of this challenge. Pollution, especially toxic pollutants that often have significant, disproportionate impacts on low-income and minority communities, is still too common. And, while recent policy initiatives indicate a strong focus on environmental justice over the next few years, there

is no law that specifically requires justice considerations to be taken into account in environmental decisionmaking.

In 2019, The George Washington University Law School and the Environmental Law Institute convened more than 60 environmental leaders from across the country—from government, the NGO community, and business—at Frank Lloyd Wright's Wingspread Conference Center in Wisconsin and the historic Airlie House outside of Washington, D.C., to “reimagine” environmental law. Editors Jessica Owley and Keith Hirokawa, as well as contributing author J.B. Ruhl, participated in these meetings, and much of what was discussed at these gatherings is reflected in this book. The critical issues discussed at Wingspread and Airlie included:

- addressing climate change via new economywide legislation and aggressive leadership by the private sector (aspects of which are addressed in Melissa Powers' and Juliana Fry's discussion of legally disruptive climate litigation (Chapter 10); Rebecca Bratspies' declaration that our climate moment is now (Chapter 11); Jessica Owley's assessment of private environmental action (Chapter 6); and Lissa Griffin's and Katrina Kuh's analysis of the ethical responsibility of lawyers (Chapter 5));
- assuring no further net loss of ecosystem services (addressed in part by David Takacs in Chapter 3);
- regulating nonpoint source water pollution (Chapter 4, by Vanessa Casado Perez, addresses private water markets, another important aspect of protecting our water resources);
- tackling the neglected but crucial issue of materials conservation as a necessary step to preserve ecosystems and effectively address climate change (Chapter 6, by Jessica Owley, addresses issues related to materials conservation); and
- integrating environmental justice in all aspects of environmental decisionmaking so that the voices of all communities are considered (addressed most directly in Chapter 2, by Shannon Roesler, but advancing environmental justice is a common theme throughout the book).

The ELI/GW Law “Reimagining” effort necessarily limited its scope to these five issues, much of which is discussed here. This book, however, goes on to address other critical areas where disruption is needed to achieve better outcomes, including local land use decisions (see Chapter 8, by Blake Hudson), preemption and political scale (Chapter 7, by Erin Ryan), and the role

of local governments (Chapter 9 by Keith Hirokawa and Jonathan Rosenbloom). Last, all of the authors address COVID-19, which caused disruptions in all aspects of our lives, in the book's closing chapter.

While we should not forget or diminish the environmental progress that has been made over the past 50 years, we must understand that we've been following a map that, for the most part, provided directions to destinations that needed to be reached in the 1980s and 1990s. Today, and for the generations ahead, we need to rely on new instruments—think GPS rather than folding paper maps—to reach new destinations. Disruption is imperative. Old tools cannot be relied upon to solve the modern problems of climate change, biodiversity loss, and residual toxic pollution. And outdated policies cannot assure just environmental outcomes for current and future generations. This book makes important contributions to finding the disruptive instruments that, we hope, will lead to solutions to the unprecedented challenges in front of us.

LeRoy Paddock
Associate Dean for Environmental Law Studies
The George Washington University Law School