

C O M M E N T

# ANALYSIS OF ENVIRONMENTAL LAW SCHOLARSHIP 2018-2019

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The *Environmental Law and Policy Annual Review* (ELPAR) is published by the Environmental Law Institute's (ELI's) *Environmental Law Reporter* in partnership with Vanderbilt University Law School. ELPAR provides a forum for the presentation and discussion of some of the most creative and feasible environmental law and policy proposals from the legal academic literature each year. The pool of articles that are considered includes all environmental law articles published during the previous academic year. The law journal articles that are re-published and discussed are selected by Vanderbilt University Law School students with input from their course instructors and an outside advisory committee of experts.

The purpose of this article is to highlight the results of the ELPAR article selection process and to report on the environmental legal scholarship for the 2018-2019 academic year, including the number of environmental law articles published in general law reviews versus environmental law journals, and the topics covered in the articles. We also present the top 20 articles that met ELPAR's criteria of persuasiveness, impact, feasibility, and creativity, from which five articles were selected to re-publish in shortened form, some of them with commentaries from leading practitioners and policymakers. Thus, the goal of this article is to provide an empirical snapshot of the environmental legal literature during the past academic year, as well as provide information on the top articles chosen by ELPAR.

## I. Methodology

A detailed description of the methodology is posted on the Vanderbilt University Law School and Environmental Law Institute ELPAR websites.<sup>1</sup> In brief, the initial search for

articles that qualify for ELPAR review is limited to articles published from August 1 of the prior year to July 31 of the current year, roughly corresponding to the academic year. The search is conducted in law reviews from the top 100 law schools, as ranked by *U.S. News and World Report* in its most recent report, counting only articles from the first 100 schools ranked for data purposes (i.e., if there is a tie and over 100 schools are considered top 100, those that fall in the first 100 alphabetically are counted). Additionally, journals listed in the "Environment, Natural Resources and Land Use" subject area of the most recent rankings compiled by Washington & Lee University School of Law are searched,<sup>2</sup> with certain modifications.

The ELPAR Editorial Board and Staff start with a keyword search for "environment!" in an electronic legal scholarship database.<sup>3</sup> Articles without a connection to the natural environment (e.g., "work environment" or "political environment") are removed, as are book reviews, eulo-

mental-law-policy-annual-review/online-supplements.php [https://perma.cc/7H5A-VVUN] (last visited Apr. 6, 2020).

2. *W&L Law Journal Rankings: Ranking Methodology*, WASH. & LEE SCH. OF L., <https://managementtools4.wlu.edu/LawJournals/Default3.aspx> [https://perma.cc/PDL6-7ZM8] (last visited Apr. 6, 2020).
3. ELPAR members conduct a search in the spring semester of articles published between August 1 and December 31 of the previous year. In the fall semester, members search each journal for articles published earlier that year, between the days of January 1 and July 31. The exact date of access for each journal varies according to when each individual ELPAR member performed the searches on their assigned journals, but the spring searches were performed in the 4th week of January, 2019, and the fall searches were performed in the 5th week of August, 2019. In order to collect articles from "embargoed" journals, which are only available on Westlaw after a delay, as well as articles from journals that are published after their official publication date, we set up a Westlaw Alert system to notify us when an article meeting our search criteria was uploaded to Westlaw after ELPAR members conducted their initial searches. A Westlaw Alert was set up for the spring search on January 25, 2019, and ran until September 1, 2019. An alert was set up for the fall search on September 4, 2019, and ran until September 11, 2019. Articles caught by the Westlaw Alert system were subsequently considered for selection by ELPAR and added to our data analysis. Law reviews of schools added to the *U.S. News and World Report* Top 100 are searched for the entire year in the fall, and schools removed from the top 100 after the spring search are not considered for trends data.

1. *Environmental Law and Policy Annual Review Publications*, ENVTL. L. INST., <https://www.eli.org/environmental-law-policy-annual-review/publications> [https://perma.cc/2TMW-8T5G] (last visited Apr. 6, 2020); *Environmental Law & Policy Annual Review Online Supplements*, VAND. L. SCH., <http://law.vanderbilt.edu/academics/academic-programs/environmental-law/enviro->

gies, non-substantive symposia introductions, case studies, presentation transcripts, and editors' notes. Student scholarship is excluded if the piece is published as a note or comment by a student who is a member of the staff of the publishing journal. We recognize that all ranking systems have shortcomings and that only examining top journals imposes limitations on the value of our results. Nevertheless, this approach provides a useful glimpse of leading scholarship in the field.

For purposes of tracking trends in environmental scholarship, the next step is to cull the list generated from the initial search in an effort to ensure that the list contains only those articles that qualify as "environmental law articles." Determining whether an article qualifies as an environmental law article is more of an art than a science, and our conclusions should be interpreted in that light. However, we have attempted to use a rigorous, transparent process. Specifically, an article is considered an "environmental law article" if environmental law and policy are a substantial focus of the article. The article need not focus exclusively on environmental law, but environmental topics should be given more than incidental treatment and should be integral to the main thrust of the article. Many articles in the initial pool, for example, address subjects that influence environmental law, including administrative law topics (e.g., executive power and standing), or tort law topics (e.g., punitive damages). Although these articles may be considered for inclusion in ELPAR and appear in our selection of top articles, they are not included for purposes of tracking environmental law scholarship since environmental law is not the main thrust of these articles.

Each article in the data set is categorized by environmental topic to allow for tracking of scholarship by topic area. The 10 topic categories are adopted from the *Environmental Law Reporter* subject matter index and are: air, climate change, energy, governance, land use, natural resources, toxic substances, waste, water, and wildlife.<sup>4</sup> ELPAR students assign each article a primary topic category and, if appropriate, a secondary category. This year, ELPAR students assigned each article a sub-category as well.<sup>5</sup> Figure 3 shows the breakdown of governance articles, which was the largest category this year.

The ELPAR Editorial Board and Staff work in consultation with the course instructors, Prof. Michael P. Vandenberg and ELI Senior Attorney Linda K. Breggin, to determine whether articles should be considered environ-

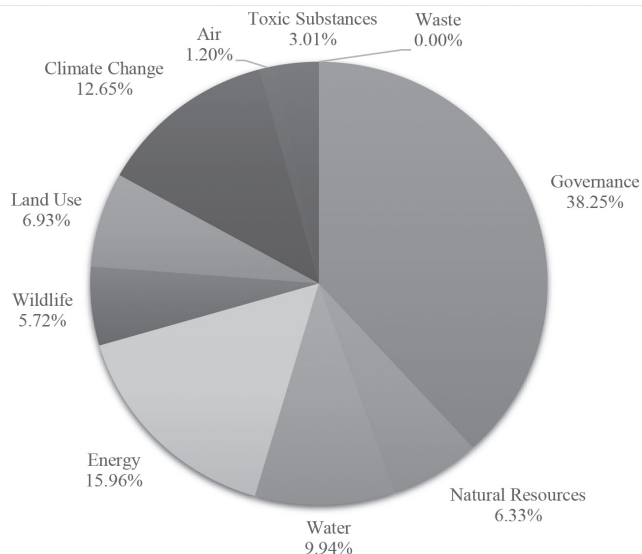
mental law articles and how to categorize the article by environmental topic for purposes of tracking scholarship. The articles included in the total for each year are identified on lists posted on the Vanderbilt University Law School website.<sup>6</sup>

## II. Data Analysis on Environmental Legal Scholarship

For the 2018-2019 ELPAR review period (August 1, 2018 to July 31, 2019), we identified 332 environmental articles published in top law reviews and environmental law journals. Two hundred and fifteen (64.76%) of these articles were published in journals that focus on environmental law, and 117 (35.24%) were published in general law reviews.

The primary topics of the 332 environmental articles published in 2018-2019 were as follows (see Figure 1): 127 governance articles (38.25%), 53 energy articles (15.96%), 42 climate change articles (12.65%), 33 water articles (9.94%), 23 land use articles (6.93%), 21 natural resource articles (6.33%), 19 wildlife articles (5.72%), 10 toxic substance articles (3.01%), 4 air articles (1.20%), and 0 waste articles (0.00%). Two hundred and three articles were also identified as including a secondary topic, categorized as follows (see Figure 2): 122 governance articles, 23 climate change articles, 15 land use articles, 12 natural resources articles, 9 energy articles, 10 water articles, 5 wildlife articles, 3 waste articles, 3 toxic substances articles, and 1 air article. Accordingly, the most common topic category was governance, followed by energy and climate change.

**Figure 1. 2018-2019 Articles Categorized by Primary Topic**

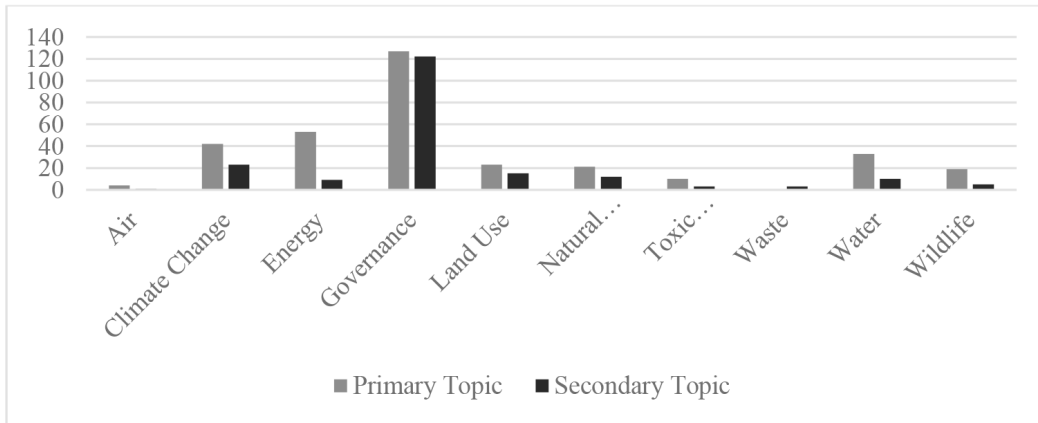


4. Subject Matter Index, *Envl. L. Rep.*, <http://www.elr.info/subject-matter-index> [<https://perma.cc/9RWZ-2RXP>] (last visited Apr. 6, 2020).

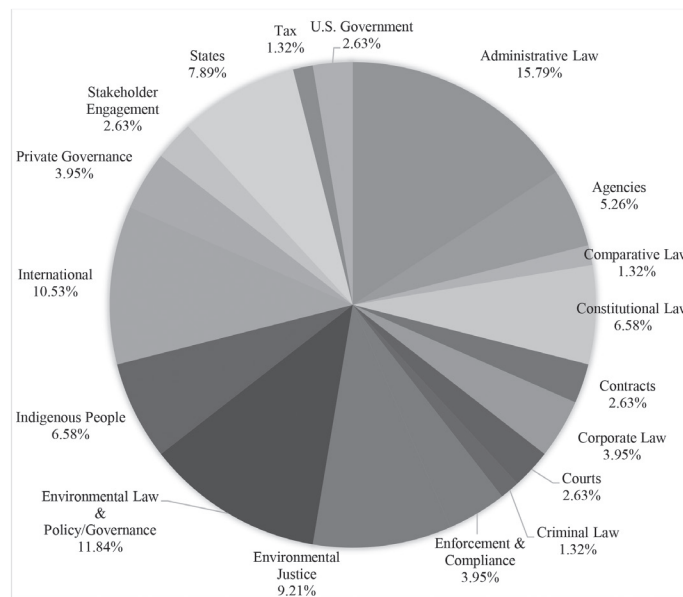
5. ELR subject matter index includes subtopics for each topic. For example, subtopics for the governance topic include: administrative law, Administrative Procedure Act, agencies, bankruptcy, civil procedure, comparative law, constitutional law, contracts, corporate law, courts, criminal law, enforcement and compliance, environmental justice, environmental law and policy, Equal Access to Justice Act, False Claims Act, Federal Advisory Committee Act, federal facilities, federal jurisdiction, Freedom of Information Act, human rights, indigenous people, infrastructure, institutional controls, insurance, international, public health, public participation, risk assessment, states, tax, tort law, trade, tribes, and U.S. government. For a list of all the subtopics in each topic, please see the following ELR link. Subject Matter Index, *Envl. L. Rep.*, <http://www.elr.info/subject-matter-index> [<https://perma.cc/9RWZ-2RXP>] (last visited Apr. 6, 2020).

6. *Environmental Law & Policy Annual Review Online Supplements*, VAND. L. SCH., <http://law.vanderbilt.edu/academics/academic-programs/environmental-law/environmental-law-policy-annual-review/online-supplements> [<https://perma.cc/7H5A-VVUN>] (last visited Apr. 6, 2020).

**Figure 2. 2018-2019 Articles Categorized by Primary and Secondary Topic**



**Figure 3. 2018-2019 Governance Articles Categorized by Sub-Category**



### III. Top 20 Articles Analysis

The top 20 articles chosen from the pool of eligible environmental law and policy-related articles published during the 2018-2019 academic year can be found in Table 1. Of the top 20 outlined below, four articles called for action by state and local governments as part of their proposal. Thirteen articles called for action by the federal government, whether executive agencies, the legislative branch, or the judicial branch. Six articles called for updates to federal or international law, and two articles advocated for private governance measures. Many article proposals incorporated federal, state and local, and private entity actions.

Primary topics identified in the top 20 articles were as follows: seven governance articles, five land use articles, four climate change articles, three energy articles, and one

wildlife article. Secondary topics were also identified for several articles: six governance, two climate change, two energy, two natural resources, and one land use.

This year’s pool of top articles came from both general and environmental law journals. Eight of the top 20 articles were published in environmental law journals. Twelve of the top 20 articles were published in law reviews. The lead authors of the top articles came from a range of law schools and academic backgrounds.

The chart below lists every article included in the top 20, with a brief description of each article’s big idea. The descriptions of the big ideas were drafted by the student editors and reflect the key points they thought made an important contribution to the environmental law and policy literature. Links are provided to the full articles and most of the links contain the author’s abstract.

Author	Title	Citation and URL	Topic	The Big Idea
Bradshaw, Karen	<i>Agency Engagement With Stakeholder Collaborations, In Wildfire Policy and Beyond</i>	51 ARIZ. ST. L.J. 437 <a href="http://arizonastatelawjournal.org/wp-content/uploads/2019/08/01-Bradshaw-Final.pdf">http://arizonastatelawjournal.org/wp-content/uploads/2019/08/01-Bradshaw-Final.pdf</a>	Governance (Administrative Law)/Natural Resources	Implementing best practices for establishing and maintaining stakeholder collaborations will allow government agencies to maximize benefits such as substantively better decisions, greater social acceptance of decisions, a possible reduction in litigation, and further advancement of agency goals.
Britton-Purdy, Jedediah	<i>Whose Lands? Which Public? The Shape of Public-Lands Law and Trump's National Monument Proclamations</i>	45 ECOLOGY L.Q. 921 <a href="https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=2206&amp;context=elq">https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=2206&amp;context=elq</a>	Governance (Courts)/Public Lands	The president should not be able to remove protected lands under the Antiquities Act because the text establishes only a right to "declare" monuments and the larger structure and history of public-lands law supports an asymmetry between the president's power to create and Congress' power to open up public lands to privatization.
Cecot, Caroline	<i>Deregulatory Cost-Benefit Analysis and Regulatory Stability</i>	68 DUKE L.J. 1593 <a href="http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3984&amp;context=dlj">http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3984&amp;context=dlj</a>	Governance (Administrative Law)	Cost-benefit analyses (CBAs) can stabilize environmental regulatory policy despite executive branch turnover; therefore, thorough CBA, as well as additional research into assessment accuracy, would reduce concerns of bias and increase accountability, efficiency, and predictability.
Davis Noll, Bethany A.; Unel, Burcin	<i>Markets, Externalities, and the Federal Power Act: The Federal Energy Regulatory Commission's Authority to Price Carbon Dioxide Emissions</i>	27 N.Y.U. ENVTL. L.J. 1 <a href="https://policyintegrity.org/files/publications/Markets%2C_Externalities%2C_and_the_Federal_Power_Act.pdf">https://policyintegrity.org/files/publications/Markets%2C_Externalities%2C_and_the_Federal_Power_Act.pdf</a>	Energy	Consistent with its embrace of economic efficiency principles, Federal Energy Regulatory Commission should approve wholesale market operators' plans that internalize the costs of CO <sub>2</sub> emissions by setting a carbon price—an action which would be consistent with its authority under the Federal Power Act to correct market failures directly related to wholesale electricity rates.
Fisch, Jill E.	<i>Making Sustainability Disclosure Sustainable</i>	107 GEO. L.J. 923 <a href="https://georgetownlawjournal.org/articles/314/making-sustainability-disclosure-sustainable/pdf">https://georgetownlawjournal.org/articles/314/making-sustainability-disclosure-sustainable/pdf</a>	Governance (Administrative Law)/Climate Change (Sustainability)	The Securities and Exchange Commission should require public companies to provide a sustainability disclosure and analysis section in their annual reports in which they identify the three sustainability issues most significant to their operations, as a first step method of improving the quality and comparability of sustainability disclosure by subjecting sustainability disclosure to the standards applicable to securities reporting and increasing board oversight of key sustainability concerns.
Infranca, John	<i>The New State Zoning: Land Use Preemption Amid a Housing Crisis</i>	60 B.C. L. REV. 823 <a href="https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=3756&amp;context=bclr">https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=3756&amp;context=bclr</a>	Land Use (Smart Growth)	State preemption of overly restrictive local zoning, particularly permitting accessory dwelling units as-of-right and allowing denser development near transit, has the potential to increase affordable housing stock in higher opportunity neighborhoods, slowly encourage acceptance of suburban infill without dramatically affecting neighborhood character, and allow property owners to more easily develop their property to extract value.
Jones, Shana Campbell; Ruppert, Thomas	<i>Roads to Nowhere in Four States: State and Local Governments in the Atlantic Southeast Facing Sea-Level Rise</i>	44 COLUM. J. ENVTL. L. 67 <a href="https://www.flseagrant.org/wp-content/uploads/Jones-et-al_Roads-to-Nowhere_Vol.44.1.pdf">https://www.flseagrant.org/wp-content/uploads/Jones-et-al_Roads-to-Nowhere_Vol.44.1.pdf</a>	Climate Change	To respond to interpretations of existing governmental duties and growing climate adaptation challenges faced by localities, the duties, immunities, and authorities of state and local governments should be reconsidered and states should pass comprehensive statutes that implement: (1) increased sovereign immunity as encouragement for creative decision-making that fulfills a more flexible, "adaptive" duty to maintain considering future conditions and is judged by a resilience standard incorporating the capacity of the system to adapt, and (2) an adaptive authority to abandon.

Lin, Albert	<i>Carbon Dioxide Removal After Paris</i>	45 ECOLOGY L.Q. 533  <a href="https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=2199&amp;context=elq">https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=2199&amp;context=elq</a>	Climate Change	Mitigation alone is unlikely to achieve the Paris Agreement goal of limiting the mean global temperature increase to 2°C and, therefore, policymakers should turn their attention to carbon dioxide removal (CDR) and development of governance approaches, including acknowledging the role of CDR in achieving the 2°C goal, supporting research and development of a range of CDR techniques, establishing interim status under climate regimes for CDR projects, investing in carbon storage, developing carbon accounting mechanisms, and instituting carbon pricing.
Lowenstein, Jody D.; Panarella, Samuel J.	<i>Troubled Water: Building a Bridge to Clean Energy Through Small Hydropower Regulatory Reform</i>	36 UCLA J. ENVTL. L. & POL'Y 231  <a href="https://escholarship.org/uc/item/6bv3h0xc">https://escholarship.org/uc/item/6bv3h0xc</a>	Energy/Natural Resources	Responsible development of low-impact small hydropower projects should be encouraged through regulatory reforms that: (1) distinguish low-impact methods of hydropower generation from more intrusive ones, and (2) streamline and expedite these projects' approval process.
Macey, Joshua C.; Salovaara, Jackson	<i>Bankruptcy as Bailout: Coal Company Insolvency and the Erosion of Federal Law</i>	71 STAN. L. REV. 879  <a href="https://review.law.stanford.edu/wp-content/uploads/sites/3/2019/04/Macey-Salovaara-71-Stan.-L.-Rev.-879.pdf">https://review.law.stanford.edu/wp-content/uploads/sites/3/2019/04/Macey-Salovaara-71-Stan.-L.-Rev.-879.pdf</a>	Governance (Bankruptcy; Enforcement & Compliance)	Coal companies have relied on the Bankruptcy Code to discharge or otherwise evade federally-mandated environmental liabilities designed to internalize coal mining externalities by spinning them off to underfunded subsidiaries, and in response legislative and judicial action should be taken to prevent creditors and debtors from negotiating around federal regulatory programs.
McGarity, Thomas O.; Wagner, Wendy	<i>Deregulation Using Stealth "Science" Strategies</i>	68 DUKE L.J. 1719  <a href="http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3986&amp;context=dlj">http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3986&amp;context=dlj</a>	Governance (Administrative Law)	To encourage the integrity of science in the administrative process and prevent the political manipulation of science, agency staff's scientific analysis should be: firewalled from the input of policymakers and political appointees, subjected to rigorous expert peer review, and published independently and in advance of an agency rule or rule proposal with attribution to the staff authors.
Monast, Jonas J.	<i>Governing Extinction in the Era of Gene Editing</i>	97 N.C. L. REV. 1329  <a href="https://scholarship.law.unc.edu/cgi/viewcontent.cgi?article=6741&amp;context=nclr">https://scholarship.law.unc.edu/cgi/viewcontent.cgi?article=6741&amp;context=nclr</a>	Governance Wildlife (Biotechnology; Endangered Species; ESA)	Gene editing is a powerful tool to support public health and conservation goals, but the technique could allow scientists to bypass long-standing value choices underlying existing conservation laws and, therefore, a new governance framework should be established that would: (1) establish a presumption against the release of genetically modified organisms that could cause species extinction; (2) allow exemptions for specific public health and environmental goals; and (3) update the ESA to clarify oversight of gene editing.
Owen, Dave	<i>Cooperative Subfederalism</i>	9 UC IRVINE L. REV. 177  <a href="https://law.uci.edu/lawreview/vol9/Online_Owen.pdf">https://law.uci.edu/lawreview/vol9/Online_Owen.pdf</a>	Governance (States)	"Cooperative subfederalism" can be a powerful state-local governance model if state and local governments are interactive, states actively support local governance, and the boundary between state and local government is flexible.
Paddock, LeRoy; Rao, Natasha	<i>Green Supply Chain Management: A Perspective on Best Practices in GSCM Design</i>	71 ARK. L. REV. 487  <a href="https://scholarworks.uark.edu/cgi/viewcontent.cgi?article=1051&amp;context=alr">https://scholarworks.uark.edu/cgi/viewcontent.cgi?article=1051&amp;context=alr</a>	Governance (Private Governance)	In an effort to reduce greenhouse gas emissions, companies should implement uniform green supply chain management (GSCM) best practices (including encouraging senior management leadership, transparency, codes of conduct, as well as robust auditing and reporting efforts) and governments can further encourage GSCM through procurement and enforcement processes and public recognition programs.

Prum, Darren A.	<i>Commercial-Property Leases as a Means for Private Environmental Governance</i>	35 GA. ST. U. L. REV. 727  <a href="https://readingroom.law.gsu.edu/cgi/viewcontent.cgi?article=2970&amp;context=gsulr">https://readingroom.law.gsu.edu/cgi/viewcontent.cgi?article=2970&amp;context=gsulr</a>	Governance (Private Governance)/Land Use (Green Buildings)	To increase the effectiveness of environmental terms in commercial property leases as a private environmental governance tool, the government and private organizations should incentivize landlords and tenants to negotiate for green building standards by offering both: (1) financial incentives, such as tax incentives, reduced construction fees, revolving loans, and sustainability grants; and (2) non-financial incentives, such as expedited permit processing and additional density bonuses.
Revesz, Richard L.	<i>Regulation and Distribution</i>	93 N.Y.U. L. REV. 1489  <a href="https://policyintegrity.org/documents/Regulation_and_Distribution.pdf">https://policyintegrity.org/documents/Regulation_and_Distribution.pdf</a>	Governance (Administrative Law)	Despite the influential claims in the academic literature to the contrary, tax policy is ill suited to provide compensation for significant environmental, health, and safety harm; instead, distributional consequences should become a core concern of the regulatory state and should be managed by an interagency working group in coordination with the Office of Information and Regulatory Affairs.
Rossi, Jim; Serkin, Christopher	<i>Energy Exactions</i>	104 CORNELL L. REV. 643  <a href="https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=4792&amp;context=clr">https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=4792&amp;context=clr</a>	Energy/Land Use (Smart Growth)	Local governments can use energy exactions—or fees imposed on developers to offset the costs of development on the energy grid—to force developers to internalize the costs of development, incenting them to invest in low-carbon energy-supply and build more energy efficient residential and commercial structures, while also integrating better information about energy use and community values into energy planning.
Squillace, Mark	<i>Rethinking Public Land Use Planning</i>	43 HARV. ENVTL. L. REV. 415  <a href="https://harvardelr.com/wp-content/uploads/sites/12/2019/08/43.2-Squillace.pdf">https://harvardelr.com/wp-content/uploads/sites/12/2019/08/43.2-Squillace.pdf</a>	Land Use (Public Lands)	To increase agency agility and responsiveness to stakeholders, public land use planning should be shifted to a layered planning approach, starting at a new landscape level plan, then moving to a simplified unit level plan, next shifting to an optional resource or activity level plan, and ending at a project level plan where, in contrast to the current approach, site-specific proposals would exclusively be addressed.
Walters, Daniel E.	<i>Animal Agriculture Liability For Climate Nuisance: A Path Forward for Climate Change Litigation?</i>	44 COLUM. J. ENVTL. L. 299  <a href="https://journals.library.columbia.edu/index.php/cjel/article/view/972">https://journals.library.columbia.edu/index.php/cjel/article/view/972</a>	Climate Change/ Land Use (Agriculture)	Public nuisance lawsuits against animal agricultural producers present an opportunity to reduce greenhouse gas emissions, because courts are unlikely to find that such suits are displaced by federal regulations and litigation may indirectly catalyze government, corporate, and consumer efforts to focus on the problem.
Wyeth, George et al.	<i>The Impact of Citizen Environmental Science in the United States</i>	49 ELR 10237  <a href="https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=203&amp;context=faculty_publications">https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=203&amp;context=faculty_publications</a>	Governance (Administrative Law)	The opportunities presented by citizen science will be more fully realized if: (1) agencies' top management formally embrace citizen science and "meet citizen scientists halfway" by establishing clear submission guidelines, developing protocols, and providing guidance; (2) citizen scientists adopt best practices such as partnering with academic researchers; (3) air programs use citizen-generated data to forward environmental justice by capturing neighborhood-level conditions and pinpointing proper monitor locations; (4) states address unnecessary legal barriers, such as restrictions on the use of certain technologies; and (5) citizen scientists develop a centralized process for validation and sharing of emerging technologies.