

C O M M E N T

Analysis of Environmental Law Scholarship 2016-2017

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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 Comment is to highlight the results of the ELPAR article selection process and to report on the environmental legal scholarship for the 2016-2017 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 16 articles that met ELPAR's criteria of persuasiveness, impact, feasibility, and creativity, from which seven articles were selected to re-publish in shortened form, some of them with commentaries from leading practitioners and policymakers. Thus, the goal of this Comment 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.¹ 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,² with certain modifications.

The ELPAR Editorial Board and Staff start with a keyword search for "environment!" in an electronic legal scholarship database.³ Articles without a connection to the

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.php> (last visited Feb. 28, 2018) [<https://perma.cc/D78E-X5P8>].

2. *Law Journals, Submissions, and Rankings Explained*, WASH. & LEE SCH. OF L., <https://managementtools4.wlu.edu/LawJournals/> (last visited Mar. 13, 2018) [<https://perma.cc/PW5F-LM3U>].

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 3rd week of January, 2017, and the fall searches were performed in the 3rd week of August, 2017. 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 April 4, 2017 and ran until August 24, 2017. An alert was set up for the fall search on August 26, 2017 and ran until September 11, 2017. Articles caught by the Westlaw Alert system were subsequently considered for selection by ELPAR and added to our data analysis. This is the first year ELPAR has implemented the Westlaw Alert system, therefore, our article data in Section II should not be compared to data from prior years. Law reviews of schools added to the *U.S. News and World Report* Top 100 are

1. *Environmental Law and Policy Annual Review Publications*, ENVTL. L. INST., <https://www.eli.org/environmental-law-policy-annual-review/publications> (last visited Feb. 28, 2018) [<https://perma.cc/99JV-W6SS>]; *Environmental*

natural environment (e.g. “work environment” or “political environment”) are removed, as are book reviews, eulogies, 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 journal 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 include: air, climate change, energy, governance, land use, natural resources, toxic substances, waste, water, and wildlife.⁴ ELPAR students assign each article a primary topic category and, if appropriate, a secondary category.

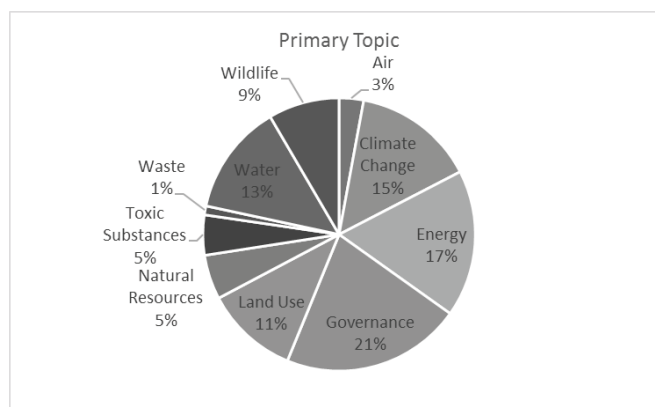
The ELPAR Editorial Board and Staff work in consultation with the course instructors, Professor Michael P. Vandenberg and ELI Senior Attorney Linda K. Breggin, to determine whether articles should be considered environmental law articles and how to categorize the article by environmental topic for purposes of tracking scholarship. The articles included in the total for each year are identified on lists posted on the Vanderbilt University Law School website.⁵

II. Data Analysis on Environmental Legal Scholarship

During the 2017 ELPAR review period, we identified 379 environmental articles published in top law reviews and environmental law journals from August 1, 2016, to July 31, 2017. Three hundred and fifteen (83%) of these articles were published in journals that focus on environmental law, and 64 (17%) were published in general law reviews.

The primary topics of the 379 environmental articles published in 2016-2017 were as follows (see Figure 1): 81 governance⁶ articles (21.4%), 66 energy articles (17.4%), 55 climate change articles (14.5%), 50 water articles (13.2%), 42 land use articles (11.1%), 32 wildlife articles (8.4%), 20 natural resources articles (5.3%), 18 toxic substances articles (4.7%), 11 air articles (2.9%), and 4 waste articles (1.1%). One hundred and seventy-seven articles were also identified as including a secondary topic, categorized as follows (see Figure 2): 97 governance articles, 21 climate change articles, 15 land use articles, 11 water articles, 10 energy articles, 10 natural resources articles, 5 toxic substances articles, 5 wildlife articles, 2 air articles, and 1 waste article. Accordingly, the most common topic category was governance, followed by energy and climate change.

Figure 1. 2016-2017 Articles Categorized by Primary Topic



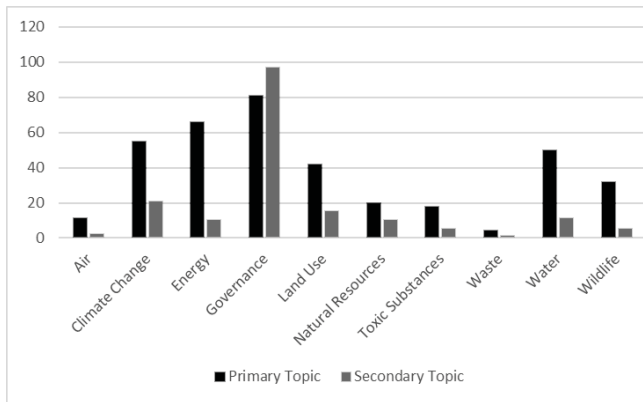
searched for the entire year in the fall, and schools removed from the top 100 after the spring search are not considered for trends data.

4. *Subject Matter Index*, ENVTL. L. REP., <http://www.elr.info/subject-matter-index> (last visited Feb. 12, 2018) [<https://perma.cc/94NK-LZHE>].

5. *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.php> (last visited Feb. 28, 2018) [<https://perma.cc/D78E-X5P8>].

6. *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*, ENVTL. L. REP., <http://www.elr.info/subject-matter-index> (last visited Feb. 12, 2018) [<https://perma.cc/94NK-LZHE>].

Figure 2. 2016-2017 Articles Categorized by Primary and Secondary Topic



III. Top 16 Articles Analysis

The top 16 articles chosen from the pool of eligible environmental law and policy-related articles published during the 2016-2017 academic year can be found in Table 1. Of the top 16 outlined below, eight articles call for action by state and local governments as part of their proposal, four articles call for action by private entities and non-profit groups, and three articles call for federal agency action. Several of the articles include proposals that incorporate federal, state, local, and private entity actions.

Primary topics identified in the top 16 articles were as follows: five climate change articles, five governance articles, three energy articles, two land use articles, and one wildlife article. Secondary topics were also identified for several articles: four governance, one climate change, and one land use.

This year’s pool of top articles came from both general and environmental law journals. Nine of the top 16 articles were published in environmental law journals, including three articles from *Harvard Environmental Law Review* and two articles from *The Environmental Law Reporter News & Analysis*. Seven of the top 16 articles were published in law reviews, including two articles from *N.Y.U. Law Review*.

The lead authors of the top articles came from a range of law schools and academic backgrounds. Two article authors are from Vanderbilt University Law School. While most articles chosen are written by professors, three of the lead authors of the top 16 articles wrote their pieces as J.D. Candidates.

The chart below lists every article included in the top 16, 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.

Table I. Article Overview Chart

Author	Title	Citation and URL	Topic	The Big Idea
Arnold, Zachary	Preventing Industrial Disasters in a Time of Climate Change: A Call for Financial Assurance Mandates	41 HARV. ENVTL. L. REV. 243 http://harvardelr.com/wp-content/uploads/2017/05/Arnold.pdf	Climate Change /Governance	Financial assurance mandates (FAMs), such as insurance requirements, should be a central element of climate adaptation policy, because coastal industries are underinvesting in reducing the risks their operations pose and the most common coastal climate adaptation regulatory approaches—such as zoning, building codes, and adaptation subsidy programs—have serious drawbacks.
Crowder, Patience	Impact Transaction: Lawyering for the Public Good Through Collective Impact Agreements	49 IND. L. REV. 621 https://mckinneylaw.iu.edu/ilr/pdf/vol49p621.pdf	Governance	Nonprofit organizations, public entities (including state and local governments), educational institutions, the private sector, and community representatives should create “impact transactions” that leverage public and private resources to address large-scale societal problems, such as environmental degradation, using new tools, including a collective impact initiative roadmap and an outline for the collective impact contract process that is based on relational contract theory.

Author	Title	Citation and URL	Topic	The Big Idea
Erwin, John	Hybridizing Law: A Policy for Hybridization Under the Endangered Species Act	47 ELR 10615 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2930418	Wildlife	In determining whether hybrid populations should be protected under the Endangered Species Act, the U.S. Fish and Wildlife Service and the National Marine Fisheries Service should adopt a policy that uses a two-factor test that considers whether protection of hybrid organisms: 1) preserves an endangered taxon; and 2) benefits the ecosystem as a whole.
Gaudio, Lynsey	A Billion Grains of Truth: Distributional Impacts of Household-Level Climate Change Tax Subsidies in the United States	18 VT. J. ENVTL. L. 666 http://vjel.vermontlaw.edu/files/2017/06/Gaudio_FP.pdf	Climate Change	Federal and state climate change tax incentives should be structured as refundable credits for renters and owners (of homes, cars, or other energy-efficient technology) so that they are available to low-income taxpayers because more progressive tax incentives are cost-effective, efficient, equitable, and will help increase long-term support for climate change programs.
Hudson, Blake	Relative Administrability, Conservatives, And Environmental Regulatory Reform	68 FLA. L. REV. 1661 http://www.floridalawreview.com/2017/relative-administrability-conservatives-environmental-regulatory-reform/	Land Use	State and local policies that employ geographic delineations or line drawing, such as environmental buffers and growth boundaries, provide opportunities for conservatives to support environmental protection goals while reducing the size, scope, and cost of the federal bureaucracy.
Kisska-Schulze, Kathryn & Darren Prum	States Taxing Carbon: Proposing Flexibility and Harmonization in the Movement Toward Environmental Reform in the U.S.	40-SPG ENVIRONS ENVTL. L. & POL'Y J. 87 https://environs.law.ucdavis.edu/volumes/40/2/articles/Kisska-Schulze-Prum.pdf	Governance/ Climate Change	Unilateral state carbon tax regulations will be more efficient and cost-effective if a Streamlined State Carbon Tax Administration is established and if states: 1) provide businesses with a flexible schedule; 2) offer tax credits to offset price increases; and 3) promote carbon reducing programs and technologies.
Klass, Alexandra & Jim Rossi	Reconstituting the Federalism Battle in Energy Transportation	41 HARV. ENVTL. L. REV. 423 http://harvardelr.com/wp-content/uploads/2017/08/KlassRossi_final.pdf	Energy	Specific procedural reforms that proactively incorporate state and local input earlier in the federal approval processes for energy transport projects can result in more rapid integration of diverse energy resources and implementation of new energy technologies.
Light, Sarah	Precautionary Federalism and the Sharing Economy	66 EMORY L.J. 333 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2760985	Governance	A new "precautionary federalism" principle should be adopted by agencies, courts, and legislatures that allows all levels of government to regulate the sharing economy in the near term, in an effort to garner information on economic and environmental impacts and determine which level(s) of government are best situated to regulate it.
Porter, Elizabeth G. & Kathryn A. Watts	Visual Rulemaking	91 N.Y.U. L. REV. 1183 http://www.nyulawreview.org/sites/default/files/pdf/NYULawReview-91-5-Porter%26Watts_0.pdf	Governance	The use of visuals by agencies and other key stakeholders in the rulemaking process should be encouraged, as well as included as part of the administrative record, in order to democratize the system by promoting transparency, political accountability, and increased public participation.

Author	Title	Citation and URL	Topic	The Big Idea
Revesz, Richard & Burcin Unel	Managing the Future of the Electricity Grid: Distributed Generation and Net Metering	41 HARV. ENVTL. L. REV. 43 http://harvardelr.com/wp-content/uploads/2017/05/Revesz_Unel_updated.pdf	Energy	Until more comprehensive energy reform can be achieved that ensures the efficient integration of all types of distributed energy into the grid, an “Avoided Cost Plus Social Benefit” protocol should be adopted for net metering of distributed energy generation, whereby clean distributed energy is rewarded for its environmental and health benefits and utilities are compensated for the services they provide.
Righetti, Tara	Correlative Rights and Limited Common Property in the Pore Space: A Response to the Challenge of Subsurface Trespass in Carbon Capture and Sequestration	47 ELR 10420 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2961477	Climate Change	State governments should adopt regulations that foster carbon capture and sequestration (CCS) by establishing a limited common property right in the pore space, with rights of proportionate use, as a way to address concerns about subsurface trespass resulting from migration of carbon dioxide and other chemicals from injection projects.
Scrufari, Carrie	Tackling the Tenure Problem: Promoting Land Access for New Farmers as Part of a Climate Change Solution	42 COLUM. J. ENVTL. L. 497 http://www.columbiaenvironmentallaw.org/tackling-the-tenure-problem/	Climate Change / Land Use	Farmers should use legal tools, such as limited liability companies, leases, and conservation easements, in innovative ways to promote land access, preserve farmland, facilitate succession, and ensure equitable and stable tenure arrangements so that civic agriculture can contribute to climate change mitigation.
Serkin, Christopher	Insuring Takings Claims	111 NW. U. L. REV. 75 https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1263&context=nulr	Land Use / Governance	State indemnification or private insurance for takings claims against local governments would increase municipalities’ willingness to regulate land use in ways that promote environmental quality and facilitate climate adaptation, such as converting private property into wetlands.
Simms, Patrice	Leveraging Supplemental Environmental Projects: Toward an Integrated Strategy for Empowering Environmental Justice Communities	47 ELR 10511 https://elr.info/news-analysis/47/10511/leveraging-supplemental-environmental-projects-toward-integrated-strategy-empowering-environmental-justice	Governance	Governments, philanthropies, universities, and nongovernmental organizations should work with marginalized communities to advance environmental justice by leveraging supplemental environmental projects associated with enforcement actions, and using a deliberate strategy that includes identifying opportunities, providing technical assistance, engaging in advocacy, and fostering regional partnerships.
Van de Biezenbos, Kristen	Where Oil Is King	85 FORDHAM L. REV. 1631 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2739172	Energy	With a number of states forbidding local fracking bans and the federal government rolling back environmental regulation, cities and towns should incorporate and enforce existing state environmental laws to minimize harms associated with fracking.
Welton, Shelley	Public Energy	92 N.Y.U. L. REV. 267 http://www.nyulawreview.org/sites/default/files/pdf/Welton—Final.pdf	Climate Change / Governance	Cities should consider reclaiming public ownership or control of private electric utilities as a way to more effectively control energy supplies and achieve their de-carbonization goals.