Environmental Law and Policy Annual Review (ELPAR) Methodology for Trends in Environmental Legal Scholarship

Overview

The goal of this project is to identify the quantity of environmental law scholarship published in the United States. ELPAR searches through top law reviews and environmental law specialty journals each year to assemble a pool of articles that are candidates for inclusion in ELPAR. The resulting pool of articles, with some adjustments described below, constitutes the data set used to provide a snapshot of the quantity of environmental legal scholarship during the relevant period.

The methodology involved in constructing a data set of environmental law articles involves a number of subjective judgment calls. Accordingly, the numbers reflected in the research represent a rough estimate of the number of environmental law articles published during a given year. We discuss our general process and definitions below at a level of detail that is designed to allow for replication. While acknowledging the possibility for disagreement about the criteria selected or their application to specific articles, our goal is to provide a useful picture of the status and trends of environmental legal scholarship.

Selecting Journals to Search

The initial search for environmental law scholarship is conducted in law reviews from the top 100 law schools based on the most recent rankings by *U.S. News and World Report*[1] and in specialty journals listed in the "Environment, Natural Resources and Land Use" subject area of the most recent rankings compiled by Washington & Lee University

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[1] For example, the 2022 rankings, as compiled and published in summer of 2021, were used for the 2021-2022 data cycle.

School of Law ("W&L").[2] The W&L search is limited to US-based journals. In addition, the following journals are excluded, or partially excluded, from the sample, with the reasons for exclusion in parentheses and further discussed below: *Environmental Justice* (only available through a direct subscription to the journal); *Journal of International Wildlife Law and Policy* (only available through a direct subscription to the journal); *Environmental Claims Journal* (only available through a direct subscription to the journal); *Oil, Gas, and Energy Quarterly* (focus on oil and gas taxation and accounting for practitioners); *Rocky Mountain Mineral Law Foundation Journal ("Foundation")* (articles not previously published and written by academics included, but re-published articles or articles written by non-academics excluded); *Rocky Mountain Mineral Law Foundation Institute Proceedings* ("*Proceedings*") (articles written by non-academics are excluded, articles written by academics are included).

Consistent with the goal of providing a picture of environmental legal scholarship, journals that focus on practice guides and other pieces written primarily for practitioners are excluded, such as *Natural Resources and Environment* published by the American Bar Association. Similarly, the *Proceedings* contain a large number of practitioner-focused articles. Because the *Proceedings* and *Foundation* journals also include articles with an academic focus, articles written by academics are included but practitioner-written articles are excluded.

Furthermore, only journals that are published online with free access or are

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[2] Occasionally there is a tie in the *U.S. News and World Report* rankings that results in more than 100 schools with a rank of 100 or better. In an effort to maintain consistency in the number of journals examined for data purposes, only articles from law reviews of schools in the first 100 listed in the rankings are counted. This may result in one or more top 100 law reviews being excluded because the school's name falls later in alphabetical order than a school with the same rank. Articles from these law reviews are still considered for inclusion in ELPAR, and are excluded only to yield a consistent number of journals and the most accurate trends data possible.

indexed in either Westlaw, Lexis, or HeinOnline are considered to have a broad enough audience to merit inclusion in the ELPAR list. Journals that are not available on any of the major electronic legal scholarship databases and do not provide free access to archived content via their journal websites are excluded because it is very difficult to access the articles and other potential readers face similar barriers.

Identifying Environmental Articles

The ELPAR Editorial Board and Staff start with a key word search for "environment!" in each of the Top 100 law schools' law reviews on Westlaw. The search 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.[3]

For purposes of tracking trends in environmental scholarship, the next step is to cull the pool generated by the initial search down to only those articles that qualify as environmental law articles. Every article published during the time window in each of the W&L environmental law journals is presumed to be an environmental law article. All of these articles are included for the purposes of trends data, unless the journal covers an additional subject area, such as the *Michigan Journal of Environmental and*

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[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 5th week of January, 2021, and the fall searches were performed in the 5th week of August, 2021. 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 February 1, 2021 and ran until August 31, 2021. An alert was set up for the fall search on September 1, 2021 and ran until September 16, 2021. 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.

Administrative Law and the *Minnesota Journal of Law, Science and Technology*, in which case only the environmental law articles (as determined by the criteria set out below) are included. Every article generated by our initial search in each of the top 100 law schools' law reviews is individually examined to determine whether the article is properly considered "environmental." Articles without a connection to the natural environment (e.g., "work environment" or "political environment") are removed. Beyond these easy calls, determining whether an article qualifies as an environmental article is more of an art than a science, but 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 address subjects that influence environmental law, including administrative law topics (e.g., executive power, standing) or tort law topics (e.g., punitive damages). Although these articles may be considered for inclusion in ELPAR, they are not included for purposes of tracking environmental law scholarship because the main thrust of the articles is not environmental law. Each article is reviewed by two students. If both students conclude that an article is not an "environmental law article" that article is removed from the trends data list. If both students conclude that the article is an "environmental law article," it is included for the purposes of trends analysis. If there is disagreement among the students, the article is reviewed by the Board to determine whether it is an "environmental law article." This process is done in both the

fall and spring semesters, with articles from the spring semester being cross-checked the following fall semester.

Classifying Environmental Articles

To allow for tracking of trends by topic area, ELPAR editors categorize each environmental article in the data set by topic area. The ten topic categories are from the *Environmental Law Reporter*'s subject-matter index: air, climate change, energy, governance, land use, natural resources, toxic substances, waste, water, and wildlife.[4] Many articles can feasibly fit into multiple categories, such as an article about how climate change impacts wildlife. In these cases, ELPAR editors give preference to the category that better captures the article's main theme, then assign a secondary category as they see fit.

As with the process for determining whether an article meets the environmental criteria, the classification process is more of an art than a science. Each article is classified by two students. If the two students disagree as to an article's primary or secondary topic, the Board reviews the article and classifies it in consultation with the Editor-in-Chief. If one student lists a secondary topic but the other does not, the listed topic is automatically assigned to the article as a secondary topic.

In an effort to analyze more data, ELPAR members are randomly assigned articles to double check for sub-category accurateness in the "governance" category, which captures 32 sub-categories. This process is done in a group setting, so that articles that are a close call can be debated amongst ELPAR members. The Board then randomly

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[4] *Subject Matter Index,* THE ENVIRONMENTAL LAW REPORTER, https://www.elr.info/subject-matter-index/articles (last visited Jan. 11, 2022).

checks ten percent of the articles for any errors. If an error is found, the Board checks another random ten percent for errors, until no additional errors are found.

Removing Non-Substantive Articles

To achieve our goal of providing an estimate of the quantity of environmental legal scholarship published during the year, we include only substantive articles, which means for our purposes that they include an original thesis or analysis that intends to contribute to the legal scholarship on environmental law. We exclude, for example, most book reviews and eulogies, as well as non-substantive symposia introductions, case summaries, presentation transcripts, and editors' notes. Article length is not determinative of whether an article is substantive. For example, a symposium introduction that is only ten pages but includes original analysis is considered substantive; whereas, a thirty-page symposium introduction that merely summarizes the articles that follow is considered non-substantive. Again, each article is reviewed by two students and any conflicts are resolved by the Board; course instructors are consulted at the discretion of the students on the board.

Excluding Student 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 journal that published the piece. When an author's affiliation is unclear, ELPAR members review past journal mastheads and run an internet search of the author's name and the publishing law school to determine if the author was a student when the piece was accepted for publication. If an author's affiliation is still unclear or the writing was published over a year after the author graduated without indication that it was written or accepted for publication before the

author graduated, the writing is treated as an article for data analysis purposes. A piece written by an author who was a student at a law school unaffiliated with the publishing journal is treated as an article, as are pieces by authors who are pursuing post-graduate degrees other than a J.D. or serving as fellows.

Ensuring Quality of Data

To ensure that the data set comprises substantive environmental articles that are not published as student notes, the final step in constructing the data set is a quality assurance procedure. First, the list of articles is compared to the list of W&L environmental law journals and the top 100 law reviews as ranked by *U.S. News and World Report*. Any articles mistakenly included from other publications are removed, and any articles that were not included, either mistakenly or because they were not yet on Westlaw, are added. Next, a random subsample of ten percent of the articles is double checked using the above criteria. If any improperly classified articles are found, an additional ten percent are double checked to see if the error rate is over one percent. If multiple errors are found or any pattern of concern is identified about a particular reviewer or journal, all articles reviewed by the reviewer or from the journal are double-checked. Additionally, every article in the data set is compared to the previous year's data to ensure that articles are not double counted. The quality assurance procedure continues until researchers are comfortable that the error rate is one percent or lower. A complete list of the articles included in the data set each year under this methodology is available on the Vanderbilt University Law School ELPAR web page.[5]

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[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 Jan. 11, 2022).