

C O M M E N T

# Analysis of Environmental Law Scholarship 2017-2018

by Maura Allen, Linda Breggin, Lauren Stern, and Michael Vandenberg

Maura Allen and Lauren Stern are recent graduates of Vanderbilt University Law School. Linda K. Breggin is a Senior Attorney with the Environmental Law Institute and Lecturer in Law, Vanderbilt University Law School. Michael P. Vandenberg is the David Daniels Allen Distinguished Chair of Law and Co-Director of the Energy, Environment, and Land Use Program, Vanderbilt University Law School.

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 2017-2018 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 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.<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 (last visited Apr. 11, 2019) [<https://perma.cc/F572-BEHG>].

2. *Law Journals, Submissions, and Rankings Explained*, WASH. & LEE SCH. OF L., <https://managementtools4.wlu.edu/LawJournals/> (last visited Apr. 11, 2019) [<https://perma.cc/YVV2-JNG7>].

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 2018, and the fall searches were performed in the 5th week of August 2018. 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, 2018, and ran until August 23, 2018. An alert was set up for the fall search on September 4, 2018, and ran until September 10, 2018. 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> (last visited Apr. 11, 2019) [<https://perma.cc/3T37-LCKC>]; *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 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 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.

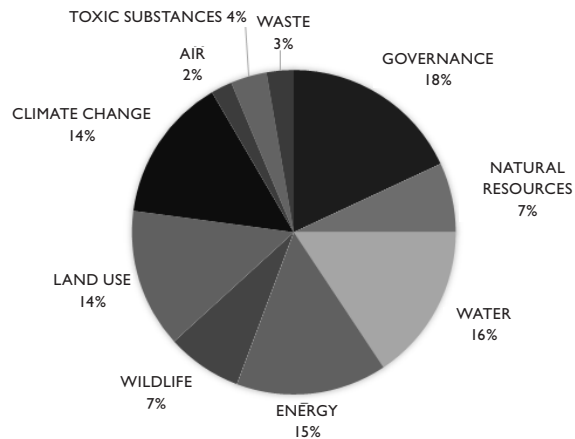
The ELPAR Editorial Board and Staff work in consultation with the course instructors, Prof. Michael P. Vandenbergh and ELI Senior Attorney Linda K. Breggin, to determine whether articles should be considered environmental law articles and how to categorize the article by environmental topic for purposes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

## II. Data Analysis on Environmental Legal Scholarship

During the 2017-2018 ELPAR review period (August 1, 2017, to July 31, 2018), we identified 332 environmental articles published in top law reviews and environmental law journals. Two hundred and fifty-eight (78%) of these articles were published in journals that focus on environmental law, and 74 (22%) were published in general law reviews.

The primary topics of the 332 environmental articles published in 2017-2018 were as follows (see Figure 1): 60 governance<sup>6</sup> articles (18.1%), 52 water articles (15.7%), 50 energy articles (15.1%), 48 climate change articles (14.5%), 46 land use articles (13.9%), 25 wildlife articles (7.5%), 23 natural resources articles (6.9%), 12 toxic substances articles (3.6%), nine waste articles (2.7%), and seven air articles (2.1%). One hundred and thirty-five articles were also identified as including a secondary topic, categorized as follows (see Figure 2): 87 governance articles, 10 climate change articles, 10 energy articles, nine water articles, nine natural resources articles, five land use articles, three toxic substances articles, three waste articles, two wildlife articles, and one air article. Accordingly, the most common topic category was governance, followed by water and energy.

Figure 1. 2017-2018 Articles Categorized by Primary Topic

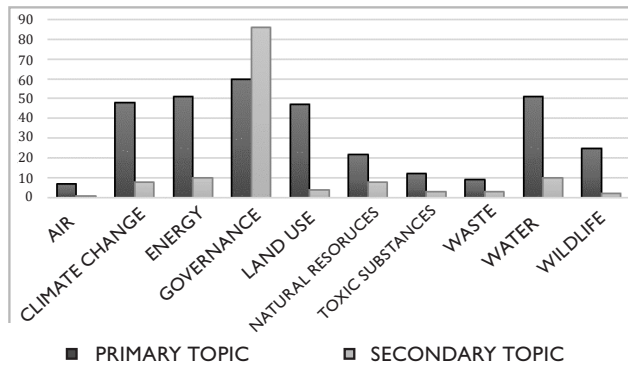


6. *ELR* subject matter index includes subtopics for each topic. For example, subtopics for the governance topic include: administrative law, Administrative Procedure Act, agencies, bankruptcy, civil procedure, comparative law, constitutional law, contracts, corporate law, courts, criminal law, enforcement 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*, *ELR*, <http://www.eli.info/subject-matter-index> (last visited Apr. 11, 2019) [<https://perma.cc/DF66-YSYC>].

4. *Subject Matter Index*, *ELR*, <http://www.eli.info/subject-matter-index> (last visited Apr. 11, 2019) [<https://perma.cc/DF66-YSYC>].

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 Apr. 11, 2019) [<https://perma.cc/F572-BEHG>].

**Figure 2. 2017-2018 Articles Categorized by Primary and Secondary Topic**



### III. Top 20 Articles Analysis

The top 20 articles chosen from the pool of eligible environmental law and policy-related articles published during the 2017-2018 academic year can be found in Table 1. Of the top 20 outlined below, six articles call for action by state and/or local governments as part of their proposal, nine articles call for federal or state agency action, and two

articles call for updates to federal or international law. Several of the articles include proposals that incorporate federal, state, local, and private entity actions.

Primary topics identified in the top 20 articles were as follows: eight governance articles, six energy articles, three land use articles, one climate change article, one water article, and one natural resources article. Secondary topics were also identified for several articles: five governance, two natural resources, two climate change, one energy, and one land use.

This year’s pool of top articles came from both general and environmental law journals. Seven of the top 20 articles were published in environmental law journals, including four articles from *Harvard Environmental Law Review* and two articles from *Columbia Journal of Environmental Law*. Thirteen 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.

**Table 1: Article Overview Chart**

Author	Title	Citation and URL	Topic	The Big Idea
Adelman, David E. & Graeme W. Austin	Trademarks and Private Environmental Governance	93 NOTRE DAME L. REV. 709 <a href="https://papers.ssrn.com/sol3/papers.cfm?abstract_id=303661">https://papers.ssrn.com/sol3/papers.cfm?abstract_id=303661</a>	Governance (Private Governance)	Because green trademarks can overload consumers with information and green certifications can result in a “race to the bottom” on certification standards, trademark law should: (1) prohibit conventional trademarks on ecolabels, create Patent and Trademark Office trademark standards, and/or modify the dilution doctrine to end information overload; and (2) set minimum federal standards for green certifications.
Craig, Robin K.	It's Not Just an Off-shore Wind Farm: Combining Multiple Uses and Multiple Values on the Outer Continental Shelf	39 PUB. LAND & RESOURCES L. REV. 59 <a href="https://dc.law.utah.edu/cgi/viewcontent.cgi?article=1065&amp;context=scholarship">https://dc.law.utah.edu/cgi/viewcontent.cgi?article=1065&amp;context=scholarship</a>	Water/Energy	U.S. federal and state laws and regulations related to off-shore wind farms and marine aquaculture should be linked into one simplified permitting program, thereby allowing the United States to take advantage of Marine Spatial Planning and Planned Multiple Use technologies (such as technology that allows for energy production and aquaculture to exist in the same space) so that the ocean's potential to generate clean energy may be realized while reserving space for ecosystem health.
Eisen, Joel B. & Felix Mormann	Free Trade in Electric Power	2018 UTAH L. REV. 49 <a href="https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2926116">https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2926116</a>	Energy/Governance	State and federal regulators should adopt a new electricity trading ecosystem available to all, that includes: (1) creating state markets structured as platforms similar to Uber and Airbnb, (2) building on existing energy infrastructure, and (3) compensating utilities, to democratize the electrical grid and promote free trade.
Hein, Jayni Foley	Federal Lands and Fossil Fuels: Maximizing Social Welfare in Federal Energy Leasing	42 HARV. ENVTL L. REV. 1 <a href="http://harvardelr.com/wp-content/uploads/2018/03/hein1.pdf">http://harvardelr.com/wp-content/uploads/2018/03/hein1.pdf</a>	Land Use/Natural Resources	To maximize public benefit and social welfare, DOI should, within its broad statutory mandate, update fossil fuel leasing and royalty rates on federal lands by adopting several reforms that will result in less production, fewer GHG emissions, and more revenue than under existing rules.

Author	Title	Citation and URL	Topic	The Big Idea
Keiter, Robert B.	Toward a National Conservation Network Act: Transforming Landscape Conservation on the Public Lands Into Law	42 HARV. ENVTL L. REV. 61 <a href="http://harvardelr.com/wp-content/uploads/2018/03/Keiter.pdf">http://harvardelr.com/wp-content/uploads/2018/03/Keiter.pdf</a>	Land Use/Natural Resources	A National Conservation Network Act should be enacted that would place a statutory umbrella over already-protected federal lands, mandate effective interagency coordination within them, enlist private lands as voluntary “affiliates” in these conservation efforts, and establish new wildlife corridor and restoration area designations.
Lin, Albert C.	Herding Cats: Governing Distributed Innovation	96 N.C. L. REV. 945 <a href="https://scholarship.law.unc.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&amp;httpsredir=1&amp;article=5980&amp;context=nclr">https://scholarship.law.unc.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&amp;httpsredir=1&amp;article=5980&amp;context=nclr</a>	Governance	The environmental risks of distributed innovation, such as ecological disruption by genetically engineered species through Do-It-Yourself Bio (DIY Bio), cannot be effectively regulated through conventional means and instead should be addressed through a combination of big data, big government regulation, private governance by nongovernmental intermediaries, and self-regulation by individuals.
Lininger, Tom	Green Ethics for Judges	86 GEO. WASH. L. REV. 711 <a href="https://www.gwlr.org/wp-content/uploads/2018/07/86-Geo.-Wash.-L.-Rev.-711.pdf">https://www.gwlr.org/wp-content/uploads/2018/07/86-Geo.-Wash.-L.-Rev.-711.pdf</a>	Governance	The ethical rules for judges should be revised using rules of general application to elevate the importance of environmental stewardship, such as by importing the “precautionary principle” and establishing an ethical imperative to find scientific facts accurately.
Meyer, Timothy	Free Trade, Fair Trade, and Selective Enforcement	118 COLUM. L. REV. 491 <a href="https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3050009">https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3050009</a>	Governance (Trade)	Selective enforcement of environmental and other laws distorts trade markets to the detriment of the environment by slowing development of competitive environmental-friendly products; accordingly, the WTO enforcement process should be reformed by (1) creating a centralized enforcement procedure for environmental products, and (2) reforming trade remedies investigations.

Author	Title	Citation and URL	Topic	The Big Idea
Mortazavi, Melissa	Food, Fracking, and Folly	50 ARIZ. ST. L.J. 617 <a href="http://arizonastatelaw-journal.org/wp-content/uploads/2018/08/Mortazavi-Pub.pdf">http://arizonastatelaw-journal.org/wp-content/uploads/2018/08/Mortazavi-Pub.pdf</a>	Energy/ Governance	Natural resource allocation models, land-based administration, and private rights-based legal strategies should be used to synthesize environmental regulation of the agriculture, and fracking industries on an intra-state level.
Posner, Eric A. & Cass R. Sunstein	Moral Commitments in Cost-Benefit Analysis	103 VA. L. REV. 1809 <a href="https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2930450">https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2930450</a>	Governance (Administrative Law)	Regulators should conduct cost-benefit analysis using valuations that reflect how much people are willing to pay to see their moral beliefs vindicated or to reduce the level of psychological harm they feel if those beliefs are not vindicated, in order to more accurately evaluate regulations aimed at reducing hard-to-measure, concrete moral harms, such as injuries to dolphins as a result of tuna harvesting
Revesz, Richard & Burcin Unel	Managing the Future of the Electricity Grid: Energy Storage and Greenhouse Gas Emissions	42 HARV. ENVTL. L. REV. 139 <a href="http://harvardelr.com/wp-content/uploads/2018/03/revesz_unel.pdf">http://harvardelr.com/wp-content/uploads/2018/03/revesz_unel.pdf</a>	Energy/Climate Change	To ensure that energy storage deployment is environmentally beneficial and economically efficient, state and federal regulators should adopt policy reforms that (1) internalize emission externalities, (2) eliminate entry barriers, and (3) modify market rules to guarantee accurate price signals that value the benefits of clean energy storage.
Robbins, Kalyani	Allocating Property Interests in Ecosystem Services: From Chaos to Flowing Rivers	42 HARV. ENVTL. L. REV. 197 <a href="https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3027736">https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3027736</a>	Land Use/Natural Resources	Ecosystem services, or the benefits that humans receive from natural ecosystems, are property rights that have economic value and should be allocated to the receiving land for the sake of both consistency and efficiency, rather than inconsistently assigned, as they are under the current legal framework.
Rossi, Jim	Carbon Taxation by Regulation	102 MINN. L. REV. 277 <a href="https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2937783">https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2937783</a>	Energy/ Governance	Regulators can achieve carbon reductions through “carbon taxation by regulation,” whereby internal subsidies are aligned with principles that inform the optimal design of a carbon tax, namely (1) neutrality, (2) cost spreading, (3) jurisdictional evenhandedness, and (4) fairness and equity

Author	Title	Citation and URL	Topic	The Big Idea
Ruhl, J.B.	Presidential Exit	67 DUKE L.J. 1729 <a href="https://scholarship.law.duke.edu/cgi/viewcontent.cgi?referer=&amp;httpsredir=1&amp;article=3945&amp;context=dlj">https://scholarship.law.duke.edu/cgi/viewcontent.cgi?referer=&amp;httpsredir=1&amp;article=3945&amp;context=dlj</a>	Governance (Administrative Law)	To constrain future presidential exit, Congress and presidents should strategically design direct action by (1) using dictated terms of exit in statutes delegating presidential authority; (2) modifying the timing, subject matter, and authority references in executive orders to boost their lifespan; and (3) tying direct action to external instruments and institutions.
Schragger, Richard C.	The Attack on American Cities	96 TEX. L. REV. 1163 <a href="https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3026142">https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3026142</a>	Governance (States)	The American constitutional system's roots in "anti-urbanism" (in which rural and suburban populations are favored over urban) result in state legislative actions that attempt to reign in "wayward" cities through preemption and hinder municipal action; thus, cities must forge alliances with national interest groups, powerful corporations, and metropolitan area citizens to preserve their power to regulate and promote their interests.
van de Biezenbos, Kristen	Contracted Fracking	92 TUL. L. REV. 587 <a href="http://www.tulanelawreview.org/92-3-vandebiezenbos/">http://www.tulanelawreview.org/92-3-vandebiezenbos/</a>	Energy/ Governance (Private Governance)	Private contracting between local communities and energy companies provides an alternative solution for addressing concerns about fracking, such as water quality, increased congestion, and infrastructure damage, when federal regulations are lacking and local rules are preempted by states.
Weiser, Philip J.	Entrepreneurial Administration	97 B.U. L. REV. 2011 <a href="http://www.bu.edu/bulawreview/files/2018/01/WEISER.pdf">http://www.bu.edu/bulawreview/files/2018/01/WEISER.pdf</a>	Governance (Administrative Law)	Agencies can better address new challenges and achieve regulatory goals more effectively through a model of earned authority created by entrepreneurial leadership, such as policy experimentation and trial-and-error problem solving, than through rulemaking and adjudication.

Author	Title	Citation and URL	Topic	The Big Idea
Welton, Shelley	Grasping for Energy Democracy	116 MICH. L. REV. 581 <a href="https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2935331">https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2935331</a>	Energy/Climate Change	Although advocates often refer to energy democracy as a single idea, there are actually three versions—consumer choice, local control, and access to process—each requiring different regulatory reforms and, if energy democracy is measured by the level of citizen participation in grid-wide energy decisions, the version we should advance is access to process.
Wilson, Augusta	Linking Across Borders: Opportunities and Obstacles for a Joint Regional Greenhouse Gas Initiative-Western Climate Initiative Market	43 COLUM. J. ENVTL. L. 227 <a href="http://www.columbiaenvironmentallaw.org/wp-content/uploads/sites/14/2018/03/Wilson-Article.pdf">http://www.columbiaenvironmentallaw.org/wp-content/uploads/sites/14/2018/03/Wilson-Article.pdf</a>	Climate Change/ Governance	RGGI and WCI should link their regional cap-and-trade markets to promote carbon emissions reduction by lowering the overall and overhead cost of achieving reductions, and this linkage could avoid constitutional pitfalls by, for example, clearly placing the regulatory burden only on the participating states.