

C O M M E N T

# ANALYSIS OF ENVIRONMENTAL LAW SCHOLARSHIP 2020-2021

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The *Environmental Law and Policy Annual Review* (ELPAR) is published by the Environmental Law Institute's (ELI) *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 2020-2021 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 four 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 ELI 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 "Environmental and Land Use Law" subject area of the most recent rankings compiled by Washington & Lee University School of Law are searched,<sup>2</sup> with certain modifications.

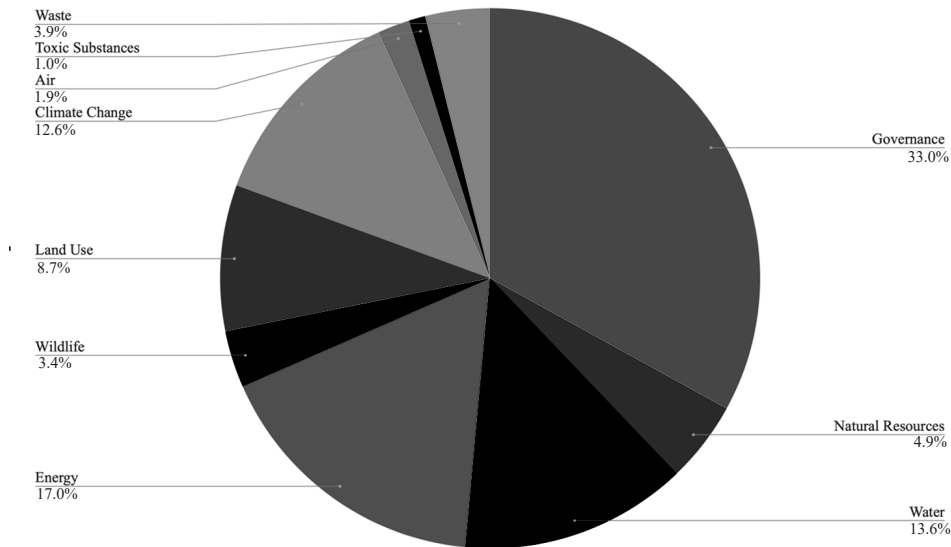
The ELPAR Editorial Board and Staff start with a keyword search for "environment!" in an electronic legal scholarship database.<sup>3</sup> Articles without a connection to the natural environment (e.g., "work environment" or "political environment") are removed, as are book reviews, eulo-

academic-programs/environmental-law/environmental-law-policy-annual-review/online-supplements.php (last visited Mar. 25, 2022).

2. *W&L Law Journal Rankings: Ranking Methodology*, WASH. & LEE SCH. OF L., <https://managementtools4.wlu.edu/LawJournals/> (last visited Mar. 25, 2022).

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.

1. *Environmental Law and Policy Annual Review Publications*, ENVTL. L. INST., <https://www.eli.org/environmental-law-policy-annual-review/publications> (last visited Mar. 25, 2022); *Environmental Law & Policy Annual Review Online Supplements*, VAND. L. SCH., <http://law.vanderbilt.edu/academics/>

**Figure 1. 2020-2021 Articles Categorized by Primary Topic**

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 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: 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.

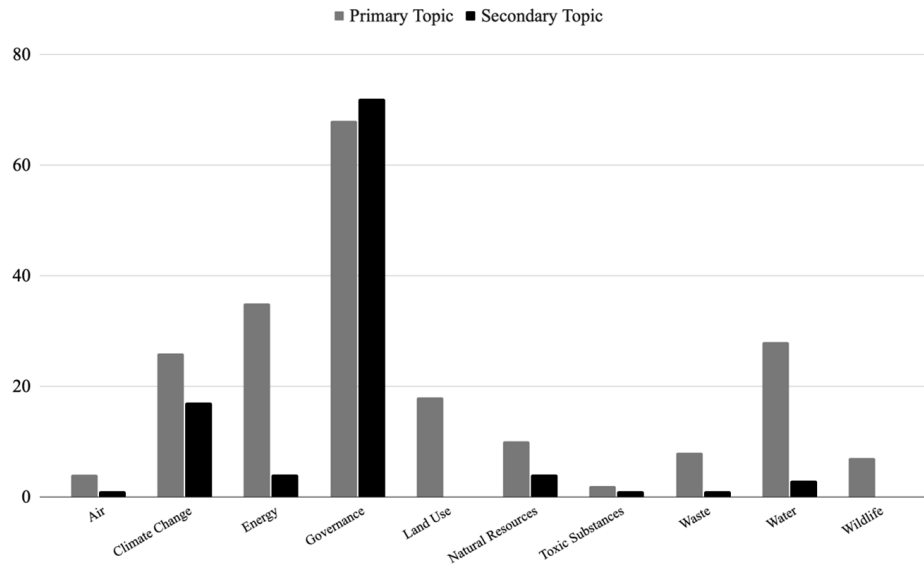
The ELPAR Editorial Board and Staff work in consultation with the course instructors, Prof. Michael P. Vandenberg and ELI Senior Attorney Linda K. Breggin, to determine whether articles should be considered environmental law articles and how to categorize the article by environmental topic for purposes 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>6</sup>

4. *Subject Matter Index*, ELR, <https://www.elr.info/subject-matter-index/articles> (last visited Mar. 25, 2022).

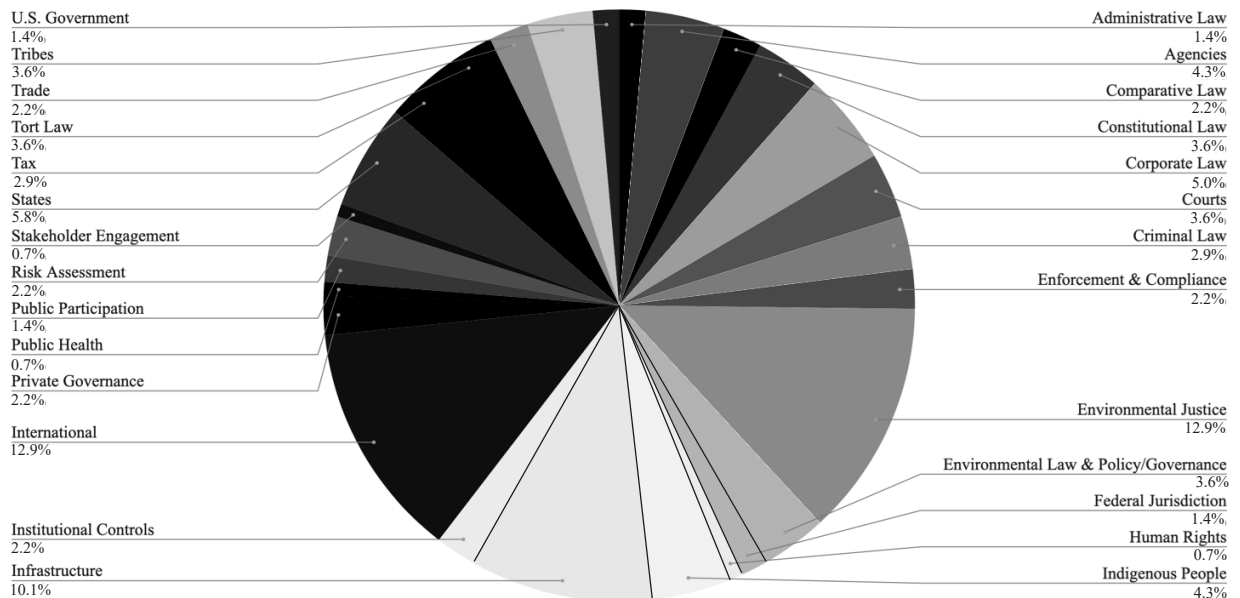
5. *ELR* subject matter index includes subtopics for each topic. For example, subtopics for the governance topic include: administrative law, Administrative Procedure Act, agencies, bankruptcy, civil procedure, comparative law, constitutional law, contracts, corporate law, courts, criminal law, enforcement 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*, ELR, <https://www.elr.info/subject-matter-index/articles> [<https://perma.cc/9RWZ-2RXP>] (last visited Mar. 25, 2022).

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.php> (last visited Mar. 25, 2022).

**Figure 2. 2020-2021 Articles Categorized by Primary and Secondary Topic**



**Figure 3. 2020-2021 Governance Articles Categorized by Sub-Category**



## II. Data Analysis on Environmental Legal Scholarship

For the 2020-2021 ELPAR review period (August 1, 2020, to July 31, 2021), we identified 206 environmental articles published in top law reviews and environmental law journals. 144 of these articles were published in journals that focus on environmental law, and 62 were published in general law reviews. The total of 206 articles is a small reduction from the 224 environmental articles published

in 2019-2020, and a substantial reduction from the 332 published in 2018-2019.

The primary topics of the 206 environmental articles published in 2020-2021 were as follows (see Figure 1): 68 governance articles (33.0%), 35 energy articles (17.0%), 28 water articles (13.6%), 26 climate change articles (12.6%), 18 land use articles (8.7%), 10 natural resource articles (4.9%), 8 waste articles (3.9%), 7 wildlife articles (3.4%), 4 air articles (1.9%), and 2 toxic substances articles (1.0%). 106 articles were also identified as including a secondary

topic, categorized as follows (see Figure 2): 72 governance articles, 17 climate change articles, 4 natural resources articles, 4 energy articles, 3 water articles, 3 wildlife articles, 1 air article, 1 toxic substances article, and 1 waste article. Accordingly, the most common topic category was governance, followed by energy.

### III. Top 20 Articles Analysis

The top 20 articles chosen from the pool of eligible environmental law and policy-related articles published during the 2020-2021 academic year can be found in Table 1. Of the top 20 outlined below, 10 articles called for action by state and local governments as part of their proposal. Five articles called for action by the federal government, whether executive agencies, the legislative branch, or the judicial branch. Four articles called for updates to federal or international law, and one article advocated for private governance measures.

Primary topics identified in the top 20 articles were as follows: eight governance articles, seven energy articles, two land use articles, one water article, one climate change article, and one air article. Secondary topics were also identified for several articles: eight governance, four climate change, one water, one energy, 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 general law reviews. The lead authors of the top articles came from a range of law schools and academic backgrounds.

The chart that follows lists every article included in the top 20, with a brief description of each article’s big idea. Links are provided to the full articles and most of the links contain the author’s abstract.

**Table 1: Article Overview Chart**

Author(s)	Title	Citation and URL	Topic	The Big Idea
Adelman, David E., and Jori Reilly-Diakun	<i>Environmental Citizen Suits and the Inequities of Races to the Top</i>	92 U. COLO. L. REV. 377  <a href="https://lawreview.colorado.edu/printed/environmental-citizen-suits-and-the-inequities-of-races-to-the-top/">https://lawreview.colorado.edu/printed/environmental-citizen-suits-and-the-inequities-of-races-to-the-top/</a>	Governance (enforcement and compliance)	New empirical research demonstrates that citizen suits are filed in a small number of states with strong public support for environmental policies and robust state programs—not in states where policies and enforcement lag; several policies are proposed, both within and outside of the federal government, to mitigate the inequitable distribution of citizen suits and the resource limits that so often limit access to them.
Arnold, Craig A.	<i>Resilience Justice and Community-Based Green and Blue Infrastructure</i>	45 WM. & MARY ENV'T L. & POL'Y REV. 665  <a href="https://bit.ly/3GRo5CN">https://bit.ly/3GRo5CN</a>	Governance (infrastructure/environmental justice)	To ensure more equitable and community-based green and blue infrastructure, co-governance systems of shared decisionmaking authority between government and low-income communities of color should be established and characterized by “resilience justice”—which focuses on community adaptive capacities and vulnerabilities to shocks and changes—and should be effectuated by a set of newly developed design and implementation principles that are based on over 300 studies of community resilience.
Camacho, Alejandro E., and Nicholas Marantz	<i>Beyond Preemption, Toward Metropolitan Governance</i>	39 STAN. ENV'T LJ. 125  <a href="https://www-cdn.law.stanford.edu/wp-content/uploads/2020/11/Metropolitan-Governance-As-Sent-to-Printer.pdf">https://www-cdn.law.stanford.edu/wp-content/uploads/2020/11/Metropolitan-Governance-As-Sent-to-Printer.pdf</a>	Governance (states)/Climate Change/Water	Policymakers can promote more effective metropolitan governance on a range of intractable social problems by: (1) distinguishing the extent authority is centralized from the levels of overlap and coordination; and (2) leveraging targeted reallocations of authority to destabilize existing municipal incentives, simultaneously promoting regional goals while preserving many benefits of local democracy.

Christiansen, Matthew R., and Joshua Macey	<i>Long Live the Federal Power Act's Bright Line</i>	134 HARV. L. REV. 1360 <a href="https://harvardlawreview.org/wp-content/uploads/2021/02/134-Harv.-L.-Rev.-1360.pdf">https://harvardlawreview.org/wp-content/uploads/2021/02/134-Harv.-L.-Rev.-1360.pdf</a>	Energy/ Governance (courts)	Although many have suggested that the Federal Power Act's (FPA's) bright-line division between federal and state jurisdiction is eroding, a trio of recent Supreme Court cases reaffirms that the bright-line construct remains alive and well, providing an organizing principle for resolving jurisdictional disputes under the FPA in a way that accommodates the ongoing transition to the electricity grid of the future.
Flatt, Victor B.	<i>Holding Polluters Accountable in Times of Climate and COVID Risk: The Problems With "Emergency" Enforcement Waivers</i>	12 SAN DIEGO J. CLIMATE & ENERGY L. 1 <a href="https://digital.sandiego.edu/jcel/vol12/iss1/2/">https://digital.sandiego.edu/jcel/vol12/iss1/2/</a>	Governance (enforcement and compliance)	To combat the misuse of emergency enforcement waivers by the Environmental Protection Agency and state governments, which can result in substantial environmental harms, particularly to vulnerable communities, policymakers should: (1) restrict discretion and promulgate rules and/or guidance requiring regulated entities to prepare for disasters; and (2) initiate federal limitations on states' emergency suspension of federal laws.
Griffith, Janice C.	<i>Evolution of Metropolitan Planning Organizations (MPOs) Into Multi-Functional Regional Roles</i>	106 IOWA L. REV. 2241 <a href="https://ilr.law.uiowa.edu/print/volume-106-issue-5/evolution-of-metropolitan-planning-organizations-mpos-into-multi-functional-regional-roles/">https://ilr.law.uiowa.edu/print/volume-106-issue-5/evolution-of-metropolitan-planning-organizations-mpos-into-multi-functional-regional-roles/</a>	Governance (states, infrastructure)/ Climate Change/ Land Use	Metropolitan planning organizations could play a vital role in addressing infrastructure and climate change challenges, provided they are: (1) authorized to engage in and implement multipurpose planning (rather than single-function transportation planning); (2) given an independent funding source; (3) granted some land use powers; and (4) reconstituted to reflect proportional representation and include metropolitan geographic area representatives on their boards.
Hutchins, Todd E.	<i>Crafting an International Legal Framework for Renewable Energy on the High Seas</i>	51 ENV'T L. 485 <a href="https://law.lclark.edu/live/files/32009-51-2-hutchinsfinalpdf">https://law.lclark.edu/live/files/32009-51-2-hutchinsfinalpdf</a>	Governance (international)/ Energy	To realize the clean energy potential of ocean renewable energy (ORE) technologies such as floating wind turbines, wave energy devices, and biomass farms, the United Nations should adopt an internationally binding agreement to govern future ORE development by extending coastal state exclusive economic zones for OREs above the extended continental shelf and creating unitary global authority to manage resources about the deep seabed beyond national jurisdiction.
Jacobs, Sharon B.	<i>Agency Genesis and the Energy Transition</i>	121 COLUM. L. REV. 835 <a href="https://scholar.law.colorado.edu/cgi/viewcontent.cgi?article=2441&amp;context=articles">https://scholar.law.colorado.edu/cgi/viewcontent.cgi?article=2441&amp;context=articles</a>	Energy/ Governance (administrative law, states)	Although creation of new agencies (or "agency genesis") is often embraced by policymakers and politicians, as it signals attention to perceived government failures and typically triggers administrative vitality, the most efficient way to address the transition to decarbonized energy may be to reform existing agencies rather than to create new administrative bodies.
Klass, Alexandra B., and Shantal Pai	<i>The Law of Energy Exports</i>	109 CALIF. L. REV. 733 <a href="https://www.californialawreview.org/print/the-law-of-energy-exports/">https://www.californialawreview.org/print/the-law-of-energy-exports/</a>	Energy/ Governance (courts, states)	An analysis of the newly-identified and evolving "law of energy exports" indicates that states and local governments can prevail in their efforts to reject proposed fossil fuel export facilities under existing dormant Commerce Clause doctrine, provided they: (1) do not favor in-state economic interests and; (2) do point to particular environmental and public health justifications.



Lee, Jaime A.	<i>Turning Participation Into Power: A Water Justice Case Study</i>	28 GEO. MASON L. REV. 1003 <a href="https://scholarworks.law.ubalt.edu/all_fac/1116/">https://scholarworks.law.ubalt.edu/all_fac/1116/</a>	Governance (environmental justice)/Water	A revamped model of participatory governance—the Constituent Empowerment Model—could yield more just water policy by affirmatively shifting power to the voices of marginalized constituents through operationalized (feasibly realized) participation, constituent primacy, and structural accountability, as indicated by a case study of Baltimore’s “Advocate” dispute resolution process.
Mills, Monte, and Martin Nie	<i>Bridges to a New Era: A Report on the Past, Present, and Potential Future of Tribal Co-Management on Federal Public Lands</i>	44 PUB. LAND & RESOURCES L. REV. 49 <a href="https://scholarworks.umt.edu/cgi/viewcontent.i?article=1741&amp;context=pllr">https://scholarworks.umt.edu/cgi/viewcontent.i?article=1741&amp;context=pllr</a>	Land Use/Governance (tribes)	The U.S. can meaningfully connect public land law to the federal government’s long-standing trust-based and treaty-based responsibility to promote the sovereign and cultural interests of Native Nations through a “strategic playbook” that includes numerous executive authorities, such as protocols for tribal involvement in monument designations under the Antiquities Act, as well as potential congressional actions, such as place-based legislation, in order to enhance and engage in a new era of tribal co-management across the federal public land system.
Owen, Dave	<i>Law, Land Use, and Groundwater Recharge</i>	73 STAN. L. REV. 1163 <a href="https://review.law.stanford.edu/wp-content/uploads/sites/3/2021/05/Owen-73-Stan.-L.-Rev.-1163.pdf">https://review.law.stanford.edu/wp-content/uploads/sites/3/2021/05/Owen-73-Stan.-L.-Rev.-1163.pdf</a>	Land Use/Water	While regulatory systems for groundwater appropriately focus on pumping water out of the ground, they also should address the many ways in which human land use decisions influence—positively and negatively—groundwater recharge processes.
Oyewunmi, Tade	<i>An Instrumental Perspective on Power-to-Gas, Hydrogen, and a Spotlight on New York’s Emerging Climate and Energy Policy</i>	38 PACE ENV’T L. REV. 221 <a href="https://digitalcommons.pace.edu/cgi/viewcontent.i?article=1848&amp;context=peir">https://digitalcommons.pace.edu/cgi/viewcontent.i?article=1848&amp;context=peir</a>	Energy	Incentivizing power-to-gas systems and hydrogen-compatible networks within New York’s existing regulatory framework—by amending the definition of a Tier 1 renewable energy credit and by broadening requirements surrounding participation in wholesale capacity and ancillary service markets—would facilitate integration of clean energy into the grid and help New York solve the “energy trilemma” that includes curtailment and energy waste, stranded utility assets, low reliability, and high cost.
Pappas, Michael, and Victor Flatt	<i>Climate Changes Property: Disasters, Decommodification, and Retreat</i>	82 OHIO ST. L.J. 331 <a href="https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3544320">https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3544320</a>	Natural Resources/Governance (insurance)/Climate Change	To address costly, repetitive losses from natural disasters, the concept of adjustment failure costs—costs that arise from difficulties in markets reaching efficiency—should inform federal disaster response policies and, accordingly, the federal government should modify the National Flood Insurance Program to address the moral hazard that perpetuates risky investments, reform the Hazard Mitigation Grant Program to reduce delays, and, along with localities, increase funding and eligibility for buyout programs, tie buyout compensation to pre-flooding property values, and block commodification of properties by, for example, removing parcels from the real estate market.
Peskoe, Ari	<i>Is the Utility Transmission Syndicate Forever?</i>	42 ENERGY L.J. 1 <a href="https://www.eba-net.org/assets/1/6/5_-%5bPeskoe%5d%5b1-66%5d.pdf">https://www.eba-net.org/assets/1/6/5_-%5bPeskoe%5d%5b1-66%5d.pdf</a>	Energy	The Federal Energy Regulatory Commission should revive its efforts to wrest control of the nation’s high-voltage electric transmission lines from investor-owned utilities, who are impeding development of large-scale transmission needed to facilitate the clean energy transition.

<p>Righetti, Tara, Jesse Richardson, Kris Koski, and Sam Taylor</p>	<p><i>The Carbon Storage Future of Public Lands</i></p>	<p>38 PACE ENV'T L. REV. 181 <a href="https://bit.ly/3GMTAhg">https://bit.ly/3GMTAhg</a></p>	<p>Land Use/ Climate Change</p>	<p>Vast federal public lands can provide the carbon-storage space needed to meet Paris commitments if the government: (1) clarifies processes, rules, and regulations regarding federal pore space utilization; (2) creates categorical National Environmental Policy Act exclusions to reduce permitting requirements; (3) settles pore space ownership of split estates; and (4) incorporates geologic storage in resource planning.</p>
<p>Strine Jr., Leo E., Kirby Smith, and Reilly Steel</p>	<p><i>Caremark and ESG, Perfect Together: A Practical Approach to Implementing an Integrated, Efficient, and Effective Caremark and EESG</i></p>	<p>106 IOWA L. REV. 1885 <a href="https://ilr.law.uiowa.edu/assets/Uploads/E2_Strine-Smith-Steel.pdf">https://ilr.law.uiowa.edu/assets/Uploads/E2_Strine-Smith-Steel.pdf</a></p>	<p>Governance (private governance)</p>	<p>Employee, environmental, social, and governance factors (EESG) should be considered an extension of a corporate board's compliance duties under Caremark, and by integrating compliance and EESG, including delegating compliance and EESG oversight to the same board committee and managers, corporations can capitalize on their existing structures and resources to meet the demand for improved corporate citizenship in a cost-effective manner that does not add undue burdens to employees or directors.</p>
<p>Welton, Shelley</p>	<p><i>Rethinking Grid Governance for the Climate Change Era</i></p>	<p>109 CALIF. L. REV. 209 <a href="https://www.californialawreview.org/print/rethinking-grid-governance/">https://www.californialawreview.org/print/rethinking-grid-governance/</a></p>	<p>Energy/ Climate Change</p>	<p>To prevent fossil fuel companies from obstructing the clean energy transition through Regional Transmission Organizations (RTOs), the Federal Energy Regulatory Commission or Congress should consider: (1) reducing RTOs' responsibilities; (2) increasing avenues for state and federal oversight; (3) monitoring corporate agglomeration; and (4) exploring public ownership or control over the grid.</p>
<p>Wiseman, Hannah J.</p>	<p><i>Taxing Local Energy Externalities</i></p>	<p>96 NOTRE DAME L. REV. 563 <a href="https://scholarship.law.nd.edu/ndlr/vol96/iss2/3/">https://scholarship.law.nd.edu/ndlr/vol96/iss2/3/</a></p>	<p>Energy/ Governance (states)</p>	<p>A state-administered, adjustable tax on energy development redistributed largely to municipalities, in combination with incentives such as streamlined regulatory review for strong environmental performers, would fill a governance gap and address negative environmental externalities currently imposed on localities—particularly by energy industries with disproportionately harmful local effects.</p>
<p>Wyeth, George</p>	<p><i>A Framework for Community-Based Action on Air Quality</i></p>	<p>50 ELR 10808 <a href="https://drive.google.com/file/d/19tgtedy0w11Ey86gnMm6pr3s-87N0nsZd/view">https://drive.google.com/file/d/19tgtedy0w11Ey86gnMm6pr3s-87N0nsZd/view</a></p>	<p>Air/ Governance (environmental justice)</p>	<p>To address unusually high air pollution areas, or hotspots, typically in urban areas affected by multiple pollution sources, a new statutory framework should be adopted that identifies these areas and creates a process in which communities and agencies work jointly to develop emissions reduction plans that use all available tools and address many different sources, in a coordinated strategy that has strong community support.</p>