

C O M M E N T

ANALYSIS OF ENVIRONMENTAL LAW SCHOLARSHIP 2021-2022

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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 in select law journals during the previous academic year.¹ 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 2021-2022 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 ELI websites.² 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 and Land Use Law" and "Energy and Natural Resources Law" subject areas of the most recent rankings compiled by Washington & Lee University School of Law are searched,³ with certain modifications.⁴

The ELPAR Editorial Board and staff start with a keyword search for "environment!" in an electronic legal scholarship database.⁵ Articles without a connection to the natural environment (e.g., "work environment" or "political environment") are removed, as are book reviews, eulo-

demics/academic-programs/environmental-law/environmental-law-policy-annual-review/online-supplements.php (last visited Mar. 30, 2023).

3. *W&L Law Journal Rankings: Ranking Methodology*, WASH. & LEE SCH. OF L., <https://managementtools4.wlu.edu/LawJournals/> (last visited Mar. 30, 2023).

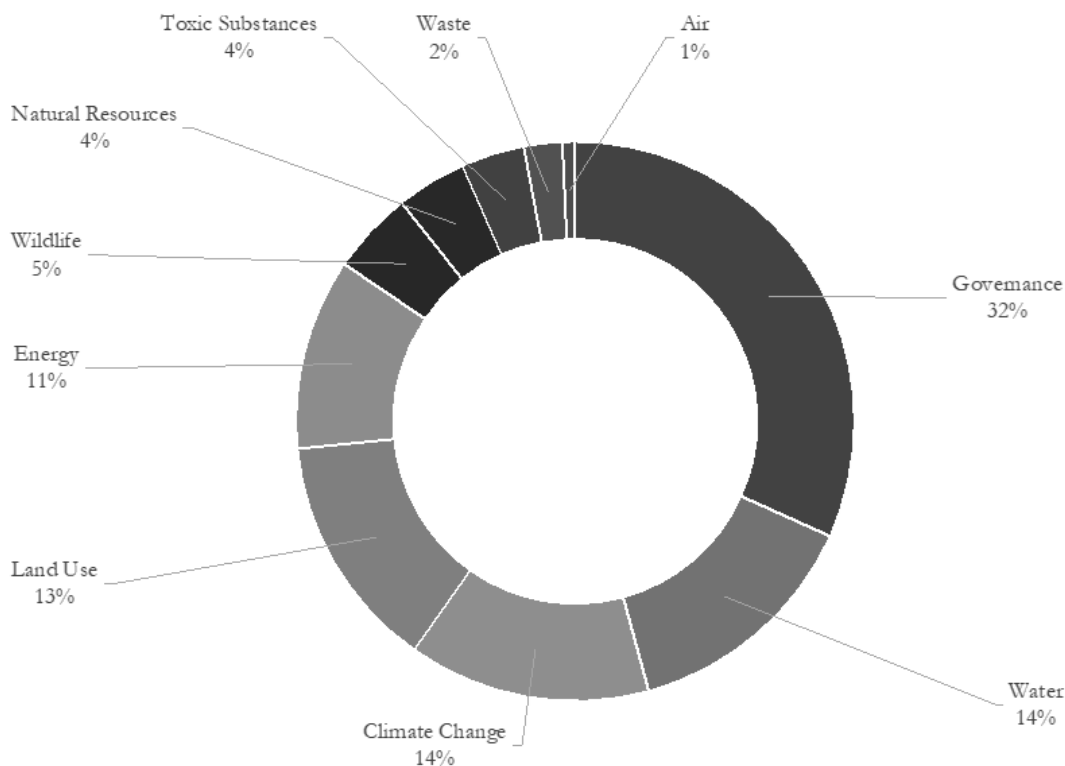
4. See ELPAR Methodology, *supra* note 1.

5. 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 2022, and the fall searches were performed in the fourth week of August 2022. 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, a Westlaw Alert is set up to provide notification when an article meeting ELPAR search criteria is uploaded to Westlaw after ELPAR members conducted initial searches. A Westlaw Alert was set up for the spring search on January 24, 2022, and ran until August 31, 2022. An alert was set up for the fall search on September 1, 2022, and ran until September 13, 2022. Articles caught by the Westlaw Alert system were subsequently considered for selection by ELPAR and added to the 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.

1. See *Environmental Law and Policy Annual Review Publications*, ENV'T L. INST., <https://www.eli.org/environmental-law-policy-annual-review/publications> (last visited Mar. 30, 2023) [hereinafter ELPAR Methodology].

2. ELPAR Methodology, *supra* note 1; *Environmental Law & Policy Annual Review Online Supplements*, VAND. L. SCH., <http://law.vanderbilt.edu/aca>

Figure 1. 2021-2022 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) and 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.⁶ ELPAR students assign each article a primary topic category and, if appropriate, a secondary category. ELPAR students also assign each article a sub-category.⁷

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.⁸

6. *Subject Matter Index*, ELR, <https://www.elr.info/subject-matter-index/articles> (last visited Mar. 30, 2023).

7. *ELR* subject matter index includes subtopics for each topic. For example, subtopics for the governance topic include: administrative law, agencies, bankruptcy, constitutional law, courts, enforcement and compliance, environmental justice, environmental law and policy/governance, infrastructure, institutional controls, insurance, international, liability, private governance, public participation, risk assessment, states, sustainability, tax, 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> (last visited Mar. 30, 2023) [<https://perma.cc/9RWZ-2RXP>].

8. *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. 30, 2023).

Figure 2. 2021-2022 Articles Categorized by Primary and Secondary Topic

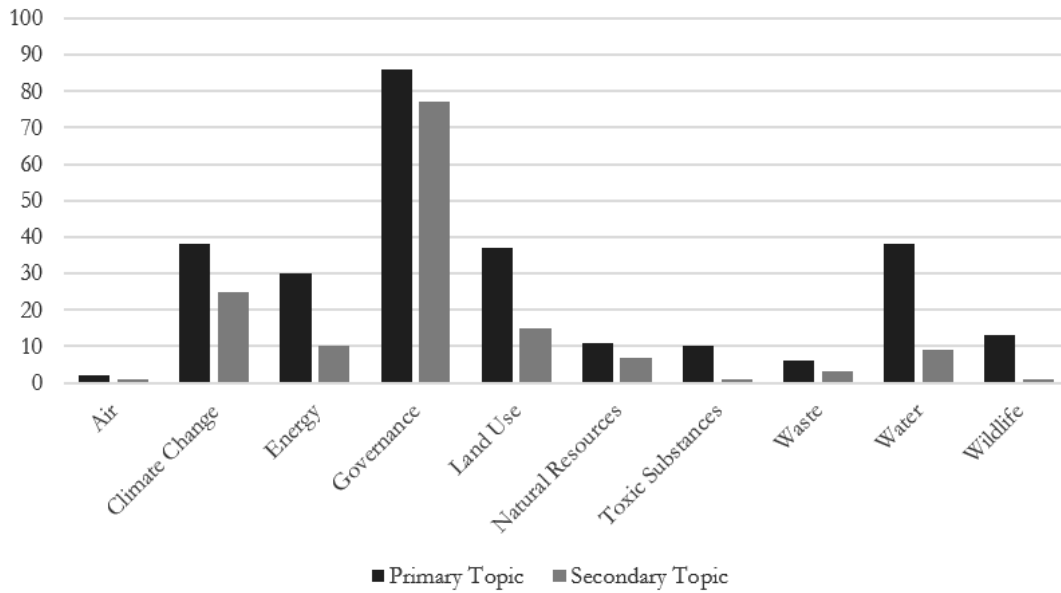
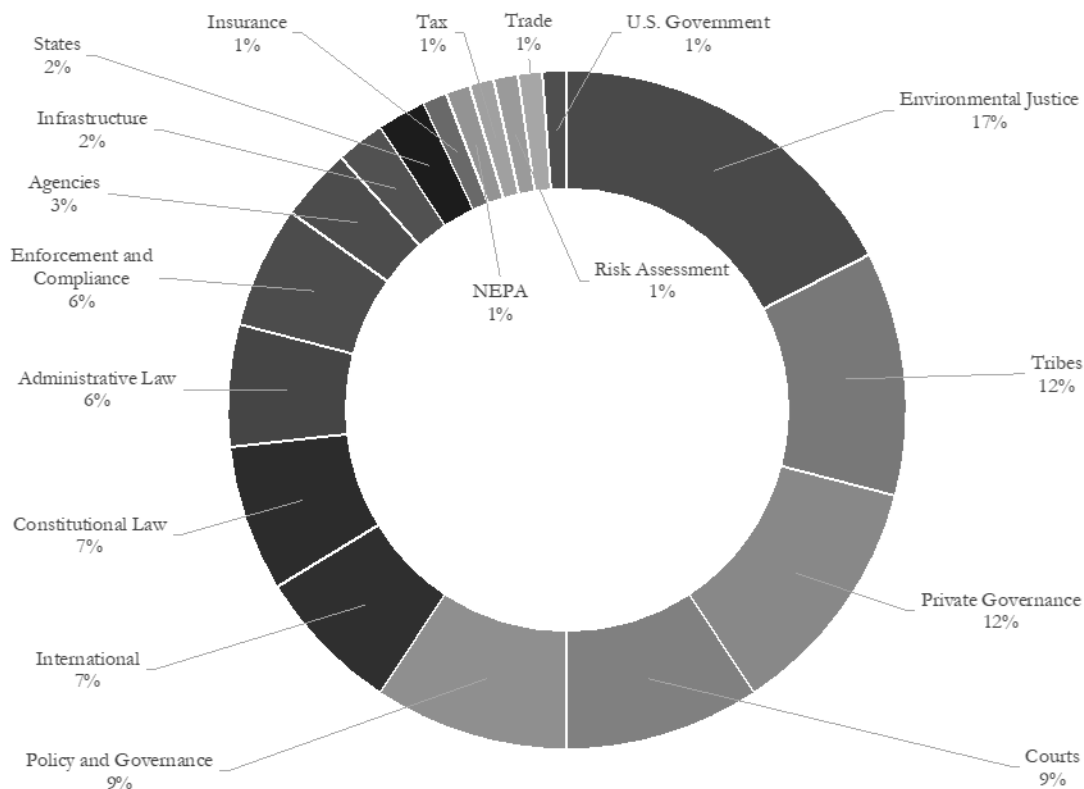


Figure 3. 2021-2022 Governance Articles Categorized by Sub-Topic



II. Data Analysis on Environmental Legal Scholarship

For the 2021-2022 ELPAR review period (August 1, 2021, to July 31, 2022), we identified 271 environmental articles published in top law reviews and environmental law journals. Two hundred of these articles were published

in journals that focus on environmental law, and 71 were published in general law reviews.

The primary topics of the 271 environmental articles published in 2021-2022 were as follows (see Figure 1): 86 governance articles (31.7%), 38 water articles (14.0%), 38 climate change articles (14.0%), 37 land use articles (13.7%), 30 energy articles (11.1%), 13 wildlife articles

(4.8%), 11 natural resource articles (4.1%), 10 toxic substances articles (3.7%), six waste articles (2.2%), and two air articles (.7%). In addition, 149 articles were identified as including a secondary topic, categorized as follows (see Figure 2): 77 governance articles, 25 climate change articles, 15 land use articles, 10 energy articles, nine water articles, seven natural resources articles, three waste articles, one wildlife article, one air article, and one toxic substances article. Accordingly, the most common topic category was governance, followed by water and climate change. Figure 3 shows the breakdown of governance articles by sub-topic, which demonstrates the wide variety of governance subject areas in the pool this year.

III. Top 20 Articles Analysis

The top 20 articles chosen from the pool of eligible environmental law and policy-related articles published during the 2021-2022 academic year can be found in Table 1. Of the top 20 outlined below, 11 articles proposed federal action from agencies and the U.S. Congress, two articles called for changes in judicial interpretation, two articles focused on state or local policy solutions, and five articles

offered private environmental governance solutions. Many article proposals incorporated federal, state and local, and private entity actions.

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

This year’s pool of top articles came from both general and environmental law journals. Six of the top 20 articles were published in environmental law journals. Fourteen 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.

Table 1 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(s)	Title	Citation and URL	Topic	The Big Idea
Arnold, Craig A. (Tony)	<i>Resilience Justice and Urban Water Planning</i>	52 SETON HALL L. REV. 1399 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4167206	Water (safe drinking water)/Governance (environmental justice)	To address the current urban water planning crisis, policymakers, and planners should integrate “resilience justice” into their plans—which focuses on the adaptive capacities and vulnerabilities of marginalized communities—by considering seven questions and implementing a co-governance model whereby local governments partner with residents as “co-policymakers.”
Boyd, William	<i>Climate Liability for Wildfire Emissions From Federal Forests</i>	48 ECOLOGY L.Q. 981 https://www.ecologylaw-quarterly.org/wp-content/uploads/2022/06/48.4_Boyd_Internet.pdf	Natural Resources (forests)/Climate Change	Congress should adopt legislation that creates a new strict liability regime for greenhouse gas emissions from unintentional wildfires on federal public lands (or “federal facilities”) that requires the federal government to pay the social cost of carbon for these emissions as an automatic budgetary obligation into a dedicated fund for forest restoration.
Coleman, James W.	<i>State Energy Cartels</i>	42 CARDOZO L. REV. 2233 http://cardozolawreview.com/wp-content/uploads/2022/01/Website-3_COLEMAN.42.6.8.DONE-.pdf	Energy	States should harness the self-interest of private enterprise to achieve climate goals and to end the current endemic, wasteful, and environmentally destructive practice of natural gas “flaring” by creating state energy cartels that would give oil and gas companies an economic incentive to slow production while also protecting consumers.
Curtis, Quinn Fisch, Jill E. Robertson, Adriana Z.	<i>Do ESG Mutual Funds Deliver on Their Promises?</i>	120 MICH. L. REV. 393 https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=3301&&context=faculty_scholarship	Governance (private governance)	A first-of-its-kind empirical study indicates that environmental, social, and governance (ESG) mutual funds are consistent with their labeling—they offer investors increased ESG exposure, vote their shares differently from non-ESG funds, are more supportive of ESG principles, and do not increase costs or reduce returns—and regulators such as the Securities Exchange Commission (SEC) and the U.S. Department of Labor should adopt a presumption against special regulations for these ESG mutual funds.

<p>DuVivier, K.K.</p>	<p><i>Preventing Wind Waste</i></p>	<p>71 AM. U. L. REV. 1 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3873006</p>	<p>Energy</p>	<p>To encourage the development of virtually untapped offshore wind resources, the federal government should promulgate regulations pursuant to the Outer Continental Shelf Lands Act that draw on lessons learned from common-law waste and state oil and gas waste statutes, as well as federal oil and gas regulations, to maximize the quantity of recoverable resources and avoid the public and private costs of constructing unnecessary harvesting infrastructure.</p>
<p>Ho, Virginia H.</p>	<p><i>Modernizing ESG Disclosure</i></p>	<p>2022 U. ILL. L. REV. 277 https://illinoislawrev.web.illinois.edu/wp-content/uploads/2022/01/Harper-Ho.pdf</p>	<p>Governance (private governance)</p>	<p>The SEC should modernize ESG disclosures by adopting a two-tiered approach that standardizes reporting by building on existing third-party standards and introducing core ESG disclosures on climate-related financial risk, human capital, and related corporate governance matters for all reporting companies (in addition to requiring sector-specific reporting on a comply-or-explain basis)— and Congress should back these measures and consider additional actions such as providing temporary liability exemptions during initial rule implementation.</p>
<p>Klass, Alexandra B. Macey, Joshua Welton, Shelley Wiseman, Hannah</p>	<p><i>Grid Reliability Through Clean Energy</i></p>	<p>74 STAN. L. REV. 969 https://review.law.stanford.edu/wp-content/uploads/sites/3/2022/05/Klass-et-al.-74-Stan.-L.-Rev.-969.pdf</p>	<p>Energy</p>	<p>To achieve the twin aims of reliability and low-carbon energy and shift authority within and among the current regulatory “silos,” nine “broad” and 20 “specific” law and governance reforms should be adopted that address market structure, transmission planning, siting, and financing, reliability regulation, and Regional Transmission Organization governance.</p>
<p>Lin, Albert C.</p>	<p><i>Making Net Zero Matter</i></p>	<p>79 WASH. & LEE L. REV. 679 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3921225</p>	<p>Climate Change/ Governance (private governance)</p>	<p>To foster achievement of net zero goals adopted by dozens of countries and thousands of businesses: (1) private entities should develop uniform disclosure frameworks and benchmarks to standardize net zero commitments to increase transparency; (2) private enforcement should focus on the use of securities fraud litigation, consumer protection suits, and contracts, including loan agreements; and (3) commitments should set distinct targets for carbon mitigation and removal to deter the use of carbon removal in lieu of mitigation.</p>
<p>Marchant, Gary E. Cooper, Zachary Gough-Stone, Philip</p>	<p><i>Bringing Technological Transparency to Tenebrous Markets: The Case for Using Blockchain to Validate Carbon Credit Trading Markets</i></p>	<p>62 NAT. RES. J. 159 https://digitalrepository.unm.edu/cgi/viewcontent.cgi?article=4123&&context=nrj</p>	<p>Climate Change/ Governance (private governance)</p>	<p>Players in the carbon credit markets should be open to experimentation with new blockchain applications and smart contracts should be adopted as an industry standard, because these technologies can address monitoring and transparency shortcomings, such as double counting and fraud, thereby increasing the credibility and veracity of carbon reduction claims.</p>
<p>Pidot, Justin R. Peterson, Ezekiel A.</p>	<p><i>Conservation Rights-of-Way on Public Lands</i></p>	<p>55 U.C. DAVIS L. REV. 89 https://lawreview.law.ucdavis.edu/issues/55/1/articles/files/55-1_Pidot_Peterson.pdf</p>	<p>Land Use (public lands)</p>	<p>To protect ecological systems and resolve the mismatch between conservation policies and active use, the Bureau of Land Management should issue rights-of-way over public lands under Title V of the Federal Land Management & Policy Act for conservation purposes, including land use planning, facilitating wildlife migration, and authorizing mitigation banks.</p>
<p>Righetti, Tara K. Schremmer, Joseph A.</p>	<p><i>Waste and the Governance of Private and Public Property</i></p>	<p>93 U. COLO. L. REV. 609 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3806009</p>	<p>Governance (courts)/Waste</p>	<p>Courts should revitalize the common-law waste doctrine for purposes of environmental and natural resources management, because it: (1) provides an accepted framework that balances competing common interests in land; (2) provides a legal remedy for emerging environmental issues, such as natural gas venting/flaring and per- and poly- fluoroalkyl substances contamination; and (3) can be quickly and universally adopted in the U.S. judicial system.</p>

Rossi, Jim Panfil, Michael	<i>Climate Resilience and Private Law's Duty to Adapt</i>	100 N.C. L. REV. 1135 https://scholarship.law.unc.edu/cgi/viewcontent.cgi?article=6884&&context=nclr	Energy/Climate Change	As climate change-induced extreme weather events create new and often foreseeable risks for the energy grid such as service interruptions, courts should extend the traditional utility "duty to serve" and recognize a new, additional "duty to adapt" that includes accounting for changing conditions in utility operations, planning, and investments.
Ruhl, J.B. Craig, Robin Kundis	4°C	106 MINN. L. REV. 1757 https://libpubsdss.lib.umn.edu/minnesotalawreviewprod/wp-content/uploads/2022/07/2-Stokes_MLR.pdf	Climate Change	The scientific evidence indicates that the planet is well on its way to at least 4°C of warming—a scenario that presents categorically different adaptation challenges including large migrations within U.S. boundaries and suggest that a range of anticipatory governance practices to facilitate "redesign adaptation" should be initiated now, beginning with a new national foresight research program.
Stokes, Danielle	<i>Renewable Energy Federalism</i>	170 U. PA. L. REV. 991 https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=9774&&context=penn_law_review	Energy/Climate	To foster consistent and efficient large-scale renewable energy project siting, Congress, in coordination with state and local governments, should establish a collaborative federalism regime that would only limit state and local authority that "impedes" development and that relies on: (1) coordinated federal zoning and planning guidelines that incorporate place-based nuances; and (2) national or regional centralized siting agencies.
Sunstein, Cass R.	<i>Arbitrariness Review and Climate Change</i>	170 U. PA. L. REV. 991 https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=9774&&context=penn_law_review	Climate Change/ Governance (administrative law)	Federal agencies should develop a social cost of greenhouse gas emissions that will withstand an "arbitrariness" judicial review that contains a "procedural (rather than substantive) hard look" not by "backing out" a social cost of carbon from a specific target, but by using: a global number rather than domestic number; a low discount rate of two percent; reasoned justifications for scientific, economic, and equity-related approaches.
Vail, John P.	<i>The Need for a Sustainability Pledge: Fighting Planned Obsolescence</i>	13 GEO. WASH. J. ENERGY & ENV'T L. 1 https://gwjeel.com/wp-content/uploads/2022/05/JEEL-Vol.-13-Issue-1.pdf	Climate Change/ Governance (administrative law)	Federal agencies should develop a social cost of greenhouse gas emissions that will withstand an "arbitrariness" judicial review that contains a "procedural (rather than substantive) hard look" not by "backing out" a social cost of carbon from a specific target, but by using: a global number rather than domestic number; a low discount rate of two percent; reasoned justifications for scientific, economic, and equity-related approaches.
Washburn, Kevin K.	<i>Facilitating Tribal Co-Management of Federal Public Lands</i>	170 U. PA. L. REV. 991 https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=9774&&context=penn_law_review	Governance (private governance)	Given that businesses are not "sustainable" if they practice "planned obsolescence," whereby their products are designed to become prematurely out-of-date to promote consumption of newer products, companies should adopt a Sustainability Pledge that commits to the following: (1) creating durable products that are reusable or repairable; (2) providing information on the repair process and replacement parts; (3) selling products that are disposable in an environmentally friendly manner; (4) introducing new versions of products only if they meaningfully add benefits to consumers; (5) eliminating software in products that would make them less efficient over time; and (6) planning processes to produce their products that have a "net zero impact" on the planet.
Wright, Claire	<i>Combating Climate Change Through Conservation Easements</i>	23 MINN. J.L. SCI. & TECH. 175 https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1511&&context=mjlst	Climate Change/ Land Use	The U.S. government should modify the Internal Revenue Code to allow owners of fossil fuel resources to take a credit on their federal tax return for the entire value of their operations in exchange for granting a conservation easement that would prohibit future exploitation of those resources.

<p>Zevin, Avi Walsh, Sam Gundlach, Justin Carey, Isabel</p>	<p><i>Building a New Grid Without New Legislation: A Path to Revitalizing Federal Transmission Authorities</i></p>	<p>48 ECOLOGY L.Q. 169 https://www.ecologylaw-quarterly.org/wp-content/uploads/2021/09/48.1_Zevin_Interest.pdf</p>	<p>Energy</p>	<p>Rather than relying on Congress to pass new legislation to proliferate long-distance, high-voltage transmission lines that are needed for effective decarbonization efforts, the Federal Energy Regulatory Commission and the U.S. Department of Energy (DOE) should rely on available authorities under the Federal Power Act and the Energy Policy Act to pursue 20 recommended policy actions that provide significant control to federal agencies to reduce obstacles to transmission, designate transmission corridors, permit transmission projects, enter into partnership projects between DOE and private developers, and explore Power Market Administration transmission projects.</p>
<p>Ziaja, Sonya</p>	<p><i>How Algorithm-Assisted Decisionmaking Is Influencing Environmental Law and Climate Adaptation</i></p>	<p>48 ECOLOGY L.Q. 899 https://scholarworks.law.ubalt.edu/cgi/viewcontent.cgi?article=2171&&context=all_fac</p>	<p>Governance (administrative law)/ Climate Change</p>	<p>To assess the existence of bias and hidden values in algorithm-based decision tools that are increasingly used in the development and implementation of environmental law and regulation, advocates and legal practitioners should employ a six-part framework consisting of a series of concrete interrogatives that assess how effectively an algorithm and its design process address issues of uncertainty, transparency, and stakeholder collaboration.</p>