ENVIRONMENTAL SCHOLARSHIP AND
THE HARVARD DIFFERENCE

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I. Introduction

The Harvard Environmental Law Review commenced publication during my first year of law school at Harvard in 1976, which once illustrated environmental law’s relative youth, but now more aptly underscores the diminishment of my own. Environmental law was then in its formative stage. Prompted by widespread public demands for environmental protection, Congress had, just a few years earlier, enacted the National Environmental Policy Act of 1969 (“NEPA”)
 and only skeletal versions of the massive Clean Air and Water Acts that fill hundreds of pages of the U.S. Code today. During that first year of law school, Congress enacted a series of sweeping new laws, including the Resource Conservation and Recovery Act, Toxic Substances Control Act, National Forest Management Act, and Federal Land Policy and Management Act. It would be four more years before Congress would pass the most revolutionary law—the Comprehensive Environmental Response, Compensation, and Liability Act.

Today, almost thirty years after NEPA’s enactment, environmental law has become a settled and major aspect of our nation’s laws. Compre-

* Professor of Law, Georgetown University Law Center. Thanks are owed to Jeannette Austin, Hope Babcock, and Lisa Heinzerling who provided comments on an earlier draft. Thanks are also owed to Kristin Pierce, Georgetown University Law Center Class of 2000, for her excellent research assistance on this project as well as the students of both the Harvard Environmental Law Review and Harvard Environmental Law Society who organized the symposium. All data associated with the tables and graphs herein are on file with the author.

hensive environmental protection laws exist at every level of government and are expressed in literally thousands of federal, state, and local statutory and regulatory provisions. The environmental law profession has accordingly thrived during this same time period as parties seeking to enforce, comply, reform, and often simply to comprehend environmental law's complex rules have required the assistance of lawyers expert in the area. Virtually every major law firm, corporation, and city possesses in-house environmental law counsel.\(^{10}\)

Not surprisingly, environmental law's dramatic emergence and subsequent expansion have generated much academic inquiry and legal scholarship. The purpose of this Article is to examine an aspect of environmental law's evolution that has largely escaped independent inquiry: environmental law scholarship itself. The Article explores a series of hypotheses regarding environmental law scholarship based on an empirical review of such scholarship published during the past three decades. The Article examines over a thirty year time horizon such diverse aspects of environmental law scholarship as the sheer amount of scholarship, evolutionary trends in the topics for scholarly inquiry, number of environmental law courses and environmental law professors, proliferation of environmental law journals, relative rates of publication of environmental law scholarship in the nation's most prestigious law reviews, and the identity and relative ranking of those law reviews that published the articles widely viewed as the "best."

No doubt such a number-crunching exercise will strike many as a dubious basis for understanding environmental law scholarship and evaluating its impact. This Article nonetheless explores these issues in response to this law review's open-ended invitation to reflect on trends in legal scholarship in environmental law. I have concluded that important lessons about the nature of environmental law scholarship, its relative significance, and the relationship of environmental law teaching to legal scholarship lurk within these numbers.

The Article's aim is to suggest some of those lessons by making a series of findings and then proffering deliberately provocative, albeit speculative, explanations for them. What begins as a seemingly quantitative undertaking ultimately becomes a more qualitative assessment of legal education and what may be too often missing in current environmental legal scholarship. Whether or not they agree with this assessment, those readers who teach and write about environmental law should at least find the data intriguing.

\(^{10}\) The United States Environmental Protection Agency ("EPA"), which did not commence operations until December 1970 and had only 52 attorneys in 1971, currently employs almost 900 environmental lawyers. See Michael B. Gerrard, Trends in the Supply and Demand for Environmental Lawyers (Oct. 10, 1998) (paper presented to the Annual Fall Meeting Section on Env't, Energy, and Resources, Am. Bar Ass'n, Hilton Head, S.C.).
The Article is, accordingly, divided into three parts. Part II describes the empirical analysis of environmental law scholarship that forms the basis of the Article. This description includes both the dimensions of scholarship that were selected for inquiry and the sources of information upon which each of those dimensions was examined.

Part III sets forth the raw data produced from the empirical undertaking, expressed both in tables and graphs, as well as in a series of narrative “findings” regarding environmental law scholarship based on that data. Perhaps one of the more surprising (or at least unanticipated) findings is that certain prestigious law reviews, most notably the Harvard Law Review and until quite recently the University of Chicago Law Review, have historically published significantly fewer environmental law articles than have their peer law reviews or law reviews in general. The paucity of published scholarship stands in sharp contrast to environmental law’s remarkable and dramatic emergence during that same time period.

Part IV proposes a series of explanatory theories for the varied findings, including the Harvard Law Review’s remarkably low rate of publication of environmental law scholarship. Interestingly, there is reason to believe that the latter phenomenon reflects the Harvard Law School’s implicit signal to its student body about the scholarly value (or lack thereof) through the law school’s curricular offerings and the areas of faculty expertise in teaching and scholarship.

II. DESCRIPTION OF EMPIRICAL ANALYSIS

A. SELECTED DIMENSIONS FOR DATA COLLECTION RELATING TO ENVIRONMENTAL LAW SCHOLARSHIP

The nature of legal scholarship, including that related to environmental law, can plainly be examined from a variety of qualitative and quantitative perspectives. The empirical analysis that forms the basis of this Article examines six different dimensions of environmental law scholarship. Each dimension is examined over a three-decade time horizon (usually 1970-present).

The dimensions selected for study include:

- Amount of scholarship
- Number of environmental law courses and professors
- Number of environmental law specialty journals
- Environmental law scholarly topics
- Number of faculty and student environmental law articles published by the most prestigious law reviews
- Identity and relative ranking of law reviews that published the “best” environmental law articles
Each of these dimensions reflects different perspectives for assessing the nature of environmental law scholarship, its impact, and the forces that play a role in its production. Some, such as the sheer number of articles or law journals, are almost exclusively quantitative in nature. Others, such as identification of the "most prestigious law reviews" or the "best" environmental law articles, are clearly more qualitative.

Each carries its own risks. Quantitative analysis offers the advantage of greater (perceived) objectivity, but it is less likely to serve as an effective touchstone for evaluating what is significant or worthy about much in legal scholarship. Qualitative analysis can be more readily focused on matters such as significance or value, but only by being more subjective in character, which invariably subjects any conclusions drawn to ready challenge by those who dispute the subjective criteria applied.

Notwithstanding the obvious limits of doing so, the empirical analysis that serves as the basis for this Article’s examination of environmental law scholarship deliberately emphasizes objective rather than subjective criteria even in considering the more qualitative dimensions of environmental law scholarship. This is partly for practical reasons. Objective criteria are typically more easily applied and, at least in this instance, they allow for a narrowing of the research base. In addition, the relevant data were more readily available for discovery. And where, as here, the Article aims to examine trends over a thirty year time horizon, more objective criteria lend themselves more readily to the kind of consistent application indispensable for a longer-term temporal analysis.

B. Sources of Raw Data

Described below are the primary sources of raw data for each of the dimensions of environmental law scholarship examined.

1. Amount of Scholarship

The data relevant to the amount of environmental law scholarship from year to year is based on the numbers of pages in the Index to Legal Periodicals devoted to environmental law scholarship for each year from 1967 through the present. Each annual volume covers August of one year to August of the subsequent year. Rather than create unnecessary confusion by referring to each volume as covering two years, the data recorded in this Article just refers to a single year, based on the year of the later August. Because, moreover, the Index was compiled on a triennial basis from 1967 to 1975, the annual figures for those years is calculated based on the total number of pages of articles in those triennial compilations divided by three. This allows for a fair comparison to the numbers of pages of articles in the annual compilations published after 1975.
The number of pages of environmental law articles in a legal index is, of course, a quite rough measure of the amount of scholarship produced. It does not reflect the numbers of pages published in the law reviews themselves. Nor is it based on an actual counting of the numbers of articles. For instance, a mere increase in the length of the titles of law review articles over the years would, in theory, produce an increase in the numbers of pages listing those articles and thereby create the misleading impression that a larger number of articles was being produced.

A rough measure is nonetheless sufficient for the purposes of this dimension of legal scholarship because the increases in scholarly activity evident over time reflect several orders of magnitude that dwarf those marginal issues of possible imprecision. Greater precision in accounting for the numbers of articles would no doubt be required were this Article seeking to identify and analyze increases of five, ten, or even twenty percent. But where the increases are instead more in the nature of one hundred percent, they are revealed with sufficient accuracy by even such an approximate measure as the counting of pages in The Index to Legal Periodicals.

2. Number of Environmental Law Courses and Professors

This information is based on a review most recently undertaken by Professor Robert Percival of the University of Maryland School of Law for the 1998 Fall Section Meeting of the American Bar Association Section on Natural Resources, Energy, and Environmental Law.\textsuperscript{11} Percival’s findings are based on information compiled by the American Association of Law Schools (“AALS”). The AALS derives its information from the questionnaires it sends to law schools and individual law faculty each year in which law schools and faculty identify the courses being taught.

3. Number of Environmental Law Specialty Journals

The information regarding the identity, number, and beginning dates of environmental law specialty journals is based on several sources. The initial source is The Directory of Law Reviews and Scholarly Legal Periodicals, prepared in 1996 by Anderson Publishing Co. Because that publication is not up to date, it is supplemented by an independent search of specialty law reviews. For the purposes of this search, “environmental” includes journals specializing in natural resources and public land law issues, such as ocean and coastal law. The data base, however, is confined

to environmental law journals published by law schools and does not extend to all environmental law publications.

4. Environmental Law Topics for Scholarship

The evolutionary trends in topics that were the subject of environmental law scholarship are discerned in two ways. The first involves a straightforward examination of the proliferation of environmental law-related headings in the Index to Legal Periodicals during the past three decades. The emergence, and sometimes disappearance of headings, reflects the coming and going of different topics. The breakdown of general topics into increasingly specific topic headings is also likely indicative of increased scholarly emphasis. The result is a time-line, somewhat reminiscent of a family tree, with some topic headings starting and stopping, others subdividing into a host of progeny over time, and a few even being resurrected after being eliminated.

The second approach is designed to assess the relative importance of certain topics over the years. The titles of environmental law articles published during the past three decades are reviewed in order to identify substantive trends in legal scholarship related to environmental law. Included are those subjects that have been the most persistent, those that were once "hot" but have since disappeared, and those topics that now appear to be emerging.

5. Number of Environmental Law Articles Published by the Most Prestigious Law Reviews

These data are based on a close examination of the contents of five law reviews during the past three decades, commencing in 1970. The five law reviews selected are those generally considered to be the most prestigious by most law school professors. No doubt several different law reviews might qualify for the fourth and fifth slots, but for the purposes of this analysis, the precise identity of the law reviews selected is less important than maintaining a consistent approach. The five law reviews are those published by Harvard, Yale, Columbia, Stanford, and the University of Chicago law schools. An incidental advantage of these five is that they include law schools from three distinct regions of the country.

The most significant challenge in this undertaking is the development and consistent application of criteria for determining when an article amounts to "environmental law" scholarship. Because the sample of possible articles in only five law reviews is relatively small, greater precision is required for meaningful comparisons between law reviews to be made. Moreover, because of the interdisciplinary nature of environmental law, such a more precise, accurate assessment cannot be fairly based, as it could be in collecting data for other dimensions of environmental law
scholarship, on the topic headings contained in sources such as the Index to Legal Periodicals.

For these reasons, identification of an article as an "environmental law" article is made based on the author's own examination, first, of the table of contents for each volume of each of the five law reviews, commencing in 1970 until the present, and, second, a review of an article's contents for any subject matter potentially touching on environmental law issues. As before, environmental law includes issues of natural resources law and public land law. While the vast majority of articles reviewed are either clearly "environmental" or clearly not, some close calls are necessary, especially because environmental protection issues inevitably intersect with so many other areas of law.

For instance, a general article on matters of constitutional, criminal, property, or administrative law, is not considered "environmental" for the purposes of this review simply because of its relevance to environmental protection issues. Only if the article actually takes the additional step of emphasizing and discussing at some length the relevant issues in an environmental context is it counted as "environmental." Hence, whether an administrative law article on judicial review or on the law of standing counted as an "environmental" article requires a case-by-case examination of the article's actual content. The "regulatory takings" issue is another area where many, but not all, of the articles are counted as environmental based on an individualized assessment of their actual contents.

Finally, this review anticipates the claim that publication rates of environmental law articles in the most prestigious law reviews reveal little about environmental law and just reflect those law review's attitudes towards technical, specialized areas of the law in general. Accordingly, the contents of each of the five law reviews are reviewed not only for their publication rates of environmental law articles. They are also reviewed for their publication rates of articles pertaining to other specialized areas of the law, including antitrust, labor, securities, and tax. Ratios are ultimately compiled comparing publication rates of environmental law articles to combined average publication rates for each of these other topic areas.

6. Identity and Relative Ranking of Law Reviews that Published the "Best" Environmental Law Articles

This analysis requires in the first instance some basis for identifying the "best" environmental law articles. Three different data sources are used. The first is the Land Use and Environmental Law Review. Each year, it publishes those articles that environmental law faculty select as the "best" articles published during the preceding year. The selection process is based on multiple rounds of faculty peer review. In the first round, approximately fifty environmental law faculty review a listing of
all the environmental law articles published that year and vote for those articles they believe to be the best. Those articles receiving the most votes are thereby “nominated” for a second round of faculty review. The second round review is performed by a committee of approximately six faculty who carefully read each nominated article and then vote for the best five. The five articles receiving the most votes are republished in a separately bound annual volume.

The second source of the best law reviews is William Rodgers’ celebrated treatise on environmental law.\textsuperscript{12} In that treatise, Professor Rodgers identifies the twenty-five articles that he believes are the best. His accompanying explanation suggests that his list seeks to reflect a variety of subjects within environmental law and to recognize scholarship that has been especially influential or creative.\textsuperscript{13}

The third source is that supplied by Fred Shapiro in his review of the 100 most cited law review articles.\textsuperscript{14} Although the listing is, not surprisingly, dominated by articles published in more modern times (because of the corresponding proliferation of citations), there are very few (four) environmental law articles in the list. Three are regulatory takings articles: one by Professor Frank Michelman (#12),\textsuperscript{15} which might be more fairly characterized as only incidentally concerned with environmental issues, and two by Professor Joseph Sax (#s 40 and 92).\textsuperscript{16} The fourth is Judge Leventhal’s article (#96) on the role of judicial review in environmental cases.\textsuperscript{17}

Finally, this portion of the empirical analysis requires the construction of a general ranking of law reviews in order to assess the relative ranking of those law reviews publishing the “best” environmental law articles. The categories used are (1) top five; (2) next ten; (3) environmental law specialty reviews; (4) next fifteen; and (5) over thirty. These categories roughly correspond to the ranking used by environmental law faculty in choosing between competing offers for publication of scholarship. There is, of course, unavoidable arbitrariness in the assigning of law reviews to these categories, especially at the borders between categories but even more so at the higher end where the differences between “twenty-five and thirty” and “over thirty” blur into virtual meaninglessness.\textsuperscript{18}

\begin{footnotes}
13. See id. at 47–50.
18. For the purposes of this paper, the following categories were used:
Top Five: Harvard, Yale, Columbia, Stanford, Chicago
Next Ten: Berkeley, Michigan, Virginia, Georgetown, New York University, Penn-
\end{footnotes}
same reason, the precise choices are less important here than consistency, because a slightly different mix would not lead to a significantly different numerical result, if any at all.

III. RESULTS OF EMPIRICAL ANALYSIS AND RELATED FINDINGS

The data collected related to each of the distinct dimensions of environmental legal scholarship identified in the preceding part reveal some intriguing trends and suggest some possible relationships. Several of the more noteworthy trends and relationships are reported as "findings" along with the raw data upon which those findings are based. The findings are grouped into three different substantive categories, including those related to (1) increases in scholarly activity; (2) proliferation of and substantive trends in environmental-related topics; and (3) publication and placement of environmental law articles. The raw data upon which the various findings are based are expressed in tables and graphs that accompany the findings themselves.

A. Findings Related to Increases in Scholarly Activity in Environmental Law

There are several sets of data related to increases in scholarly activity during the past three decades. The first seeks to approximate increases in the actual number of articles themselves. The second and third sets of data provide temporally parallel information regarding trends in related factors, in particular, the number of law school professors and courses specializing in environmental law and the number of environmental law specialty journals.

sylvaniam, Duke, Northwestern, Cornell, Texas
Environmental: Self-Defining
Next Fifteen: Vanderbilt, Minnesota, UCLA, University of Southern California, Boston University, Illinois, Wisconsin, George Washington, Iowa, Indiana, William & Mary, Boston College, Washington University, Oregon/Colorado
Over Thirty: All other law reviews
Table 2: Number of Environmental Law Courses & Professors, 1971-1998
Table 3: Environmental Law Journals, 1966–1996
Table 4: Environmental Law Review Topics
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1. Number of Environmental Law Articles, 1967–1996

The first set of data reports on the number of environmental law articles published each year since 1967.

Table 1—Related Findings

- The number of environmental law articles has rapidly increased during the past three decades with the rate of publication essentially doubling from the 1970s to the 1980s and then doubling again from the 1980s to the 1990s.
- In each decade, a period of accelerated publication is followed by several years of decreased publication.

2. Environmental Law Professors and Courses

The second data set reports on the number of environmental law professors and environmental law courses at law schools each year since 1971. These data can be easily related to the data regarding the amount of scholarship in Table 1.

Table 2—Related Findings

- The fourfold increase in the number of environmental law professors employed and environmental law courses offered during the past three decades roughly parallels the fourfold increase in the number of environmental law articles published during that same time period.
- The mid- to late-1970s, however, witnessed a steady decrease in the amount of environmental law scholarship despite the fact that the number of environmental law professors and courses generally increased during that same time period.

3. Environmental Law Specialty Journals

This final data set related to increases in scholarly activity illustrates the remarkable proliferation of environmental law specialty journals.

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19. According to a recent survey, there are also currently 25 law schools with environmental law clinics (some more active than others), including law schools at Berkeley, Cleveland State, Colorado, Denver, Emory, Florida, Georgetown, Golden Gate, Lewis & Clark, Maryland, Michigan, Nova Southeastern, Oregon, Pace, Rutgers-Newark, Stanford, Texas Southern, Tulane, UCLA, Valparaiso, Vermont, Widener (Wilmington), Widener (Harrisburg), William & Mary, and Yale. See E-mail Correspondence to the Author from Prof. Robert Kuehn, Tulane University (Jan. 14, 1999) (on file with the author).
Table 3—Related Findings

- During the past three decades, the number of environmental law specialty journals has grown from one to almost forty.
- The rate of growth in specialty journals has been both constantly increasing and substantially exceeding the increase in environmental law articles, professors, or courses during that same time period.
- The single largest increase in the number of journals (seven) occurred in 1994.
- The first international environmental law journal did not commence until 1988, the same year that *The Index to Legal Periodicals* first devoted a separate heading to that topic.
- There is no discernible pattern in the identity of law schools that choose to publish an environmental law specialty journal, except to the extent that the first decade was dominated by publications from the top ten law schools.

B. Findings Relating to the Proliferation of and Substantive Trends in Environmental-Related Topics

The findings in this part of the Article relate to trends evident in the topics of scholarly inquiry during the past three decades. Two sets of data are reported. The first is a timeline reporting on the emergence of environmental law topics in the *Index to Legal Periodicals*. The second is based on the author’s assessment of the frequency and intensity of legal scholarship produced on various environmental law topics during the past three decades.

1. Topic Timeline

Table 4—Related Findings

- Before 1970, environmental protection and pollution were not distinct categories of legal scholarship.
- Environmental law did not emerge as a distinct category of legal scholarship until approximately 1973.
- Hazardous waste issues triggered a proliferation of new scholarly topics in the mid- to late 1980s.
- International environmental law issues triggered a major expansion of the scope of scholarly topics beginning in the late 1980s.
- Environmental criminal law issues triggered a significant expansion of the scope of scholarly topics beginning in the early 1990s.
Environmental justice issues triggered a major expansion of the scope of scholarly topics beginning in the early to mid-1990s.

2. Substantive Trends

A review of substantive trends in the topics chosen for environmental law scholarship reveals several categories. There are, first of all, certain topics that have remained constant in the sense that they have dominated much of the scholarly discussion during the past three decades. There are also certain topics that once were the focus of considerable scholarly discussion, but have since largely disappeared from the law reviews. Finally, there are both topics that are “hot” in the sense that they appeared relatively recently and are generating substantial debate, as well as suggestions of new topics that may be emerging. Some of the latter are modern analogues of early topics long missing from law review pages. The specific topics falling within each of these categories are highlighted below.

Persistent Topics

- Federalism and Environmental Law
- Administrative Environmental Law
- Judicial Review of Administrative Agency Action
- Citizen Standing in Environmental Enforcement
- Environmental Law and Economics
- Economic Incentives as a Means of Environmental Control (e.g., tradeable rights, taxes, subsidies)
- Economic Analysis as a Basis for Environmental Controls (e.g., cost-benefit analysis, comparative risk assessment)
- Private and Public Property Rights and Environmental Law
- Regulatory Takings
- Public Trust Doctrine

Disappearing Topics

- Nuclear Power
- NEPA
- Acid Rain
- Noise Pollution
- National Land Use Planning
- Energy and Environmental Law
- Environmental Courts
- Constitutional Rights to Environmental Protection
- Pesticides
- Federal Common Law of Environmental Protection
“Hot” Topics
- Environmental Justice
- International Environmental Law
- Biodiversity

Emerging Topics
- Native American Sovereignty and Environmental Law
- Toxic Torts
- Water Quality and Nonpoint Sources
- Clean Air and Transportation Control Planning
- Energy Deregulation and Environmental Protection

C. Publication and Placement of Environmental Law Articles

There are two sets of data related to the publication and placement of environmental law articles. The first set focuses on the “best” law reviews and the second focuses on the “best” environmental law articles.

1. The “Top Tier” Law Reviews and Their Rates of Publishing Environmental Law Articles

The data collected from the “top tier” law reviews are broken down into several categories. Student and faculty articles are counted separately. In addition, both the total number of articles is counted along with the total number of articles published in other highly specialized areas of law (antitrust, labor, securities, and tax)\(^{20}\) during those same years.

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\(^{20}\) These areas were also chosen because, like environmental law, they can be highly technical, complex, and dense.
Table 5: Faculty Articles by Year

Table 6: Student Articles by Year
Table 7: Total Environmental Articles by Law Review

<table>
<thead>
<tr>
<th>Law Review</th>
<th>Faculty Articles</th>
<th>Student Articles</th>
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<tbody>
<tr>
<td>University of Chicago</td>
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<td>Stanford</td>
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<td>Columbia</td>
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<td>Yale</td>
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<tr>
<td>Harvard</td>
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![Bar chart showing the number of faculty and student articles published by different law reviews.

Related Findings

- On a relative scale, the Harvard Law Review published far fewer faculty environmental law articles than any other top tier law review by several orders of magnitude.
- On an absolute scale, the Harvard Law Review published almost no environmental law articles between 1970 and the present, notwithstanding that area of law’s dramatic emergence and sweep during that time period and the host of legal issues thereby raised and being discussed in other law reviews.
- The University of Chicago Law Review also published a very low number of environmental law articles, on both an absolute and relative scale, until after 1990, when both numbers increased significantly. If, moreover, one eliminates the four articles published prior to 1990 by Professor David Currie of the Chicago law faculty, the University of Chicago Law Review published no faculty environmental law articles until after 1990 and only four student articles, which is even fewer than published by the Harvard Law Review.
- The Columbia Law Review has published significantly more faculty environmental law articles than any of the other top tier law reviews.

The Yale Law Journal has published more student environmental law articles than any other top tier law review, followed by the Columbia Law Review and then by the Harvard Law Review.

Table 8: Ratio of Faculty Environmental Law Articles to Antitrust, Labor, Securities and Tax Articles

\[
\text{Ratio} = \frac{\text{Environmental}}{(\text{Antitrust} + \text{Labor} + \text{Securities} + \text{Tax})/4}
\]

Related Findings

- The top tier law reviews did not publish faculty environmental law articles at a rate roughly proportional to other comparable areas of law until the late 1980s, notwithstanding environmental law’s emergence on a massive scale during the 1970s and 1980s.
- The Harvard Law Review’s rate of publication of faculty environmental law articles compared to its rate of publication of other comparable specialty areas of law is substantially and dramatically lower than the corresponding rates for any of the other top tier law reviews.

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22. The graph only shows ratios up to a maximum of four.
Prior to 1985, no top tier law review published faculty environmental law articles at a rate at least equal to that for other comparable specialty areas of law, notwithstanding that environmental law and the environmental legal profession during those first fifteen years was growing exponentially.

The Yale, Columbia, and Stanford law reviews have published a significant number of faculty environmental law review articles since the late 1980s and at a rate exceeding that for the publication of other comparable areas of law.

Table 9: Ratio of Student Environmental Law Articles to Antitrust, Labor, Securities and Tax Articles

\[
\text{Ratio} = \frac{\text{Environmental}}{(\text{Antitrust} + \text{Labor} + \text{Securities} + \text{Tax})/4}
\]

Related Findings

Since 1970, the Stanford Law Review has published student environmental law articles at a rate substantially exceeding the rate for other specialty areas of law in a majority of time periods.

23. See supra note 22.
• Since 1970, both the Stanford Law Review and Yale Law Journal have published student environmental law articles at rates at least roughly equivalent to those for the publication of other specialty areas of law during every time period except one.

• The Columbia Law Review rate of publication of student environmental law articles is significantly lower than its rate of publication of faculty environmental law articles, compared to other specialty areas, while the Harvard Law Review’s publication rate for student environmental law articles is significantly higher, and the University of Chicago Law Review’s rate is roughly the same for student and faculty environmental law articles.


Table 10: The “best” environmental law review articles by journal, 1970–1998

<table>
<thead>
<tr>
<th>Journal Name</th>
<th>Rank</th>
<th># of Articles (in Land Use &amp; Environmental Law)</th>
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<tbody>
<tr>
<td>Ecology Law Quarterly</td>
<td>1</td>
<td>18</td>
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<td>Yale Law Journal</td>
<td>2</td>
<td>13</td>
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<tr>
<td>Michigan Law Review</td>
<td>3</td>
<td>11</td>
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<tr>
<td>Harvard Environmental Law Review</td>
<td>4</td>
<td>10</td>
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<tr>
<td>Virginia Law Review</td>
<td>4</td>
<td>10</td>
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<tr>
<td>Columbia Law Review</td>
<td>6</td>
<td>9</td>
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<tr>
<td>Cornell Law Review</td>
<td>6</td>
<td>9</td>
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<tr>
<td>Environmental Law</td>
<td>6</td>
<td>9</td>
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<tr>
<td>Stanford Law Review</td>
<td>6</td>
<td>9</td>
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<tr>
<td>Natural Resources Journal</td>
<td>10</td>
<td>8</td>
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<tr>
<td>University of Pennsylvania Law Review</td>
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<td>Top 5</td>
<td>43</td>
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<tr>
<td>Next 10</td>
<td>71</td>
<td>3</td>
<td>1</td>
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<tr>
<td>Environmental Law Journals</td>
<td>68</td>
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<td>0</td>
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<td>Next 15</td>
<td>50</td>
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<td>Over 30</td>
<td>80</td>
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Related Findings

- The top tier law reviews have published a disproportionately high number of those articles considered to be the best environmental law articles published since 1970 in light of the relatively few environmental law articles published.
- The top fifteen law reviews have similarly published a disproportionately high number of those articles considered to be the best environmental law articles published since 1970.
- The environmental law specialty journals have published a substantial number of the articles considered to be the best environmental law articles published since 1970, which is clearly less surprising given the large number of articles those journals have published.
- The Ecology Law Quarterly has published significantly more of the “best” environmental law articles than any other law review, including both top tier and environmental law specialty journals.

IV. Analysis of Findings—Speculation, Hypotheses, and Provocation

Many of the findings described in the preceding part raise interesting issues and suggest some intriguing hypotheses about the nature of environmental law scholarship. This Article, however, focuses only on a few of the issues raised by the data and leaves the exploration of the rest for another day and for other commentators. The few discussed here are

24. To comment briefly, the reason why environmental law articles that are published in the top law reviews are so highly rated (see supra Table 10) could be because those articles are in fact much better, but it is also plausible that it is so relatively unusual to see an environmental article in a top journal that the article receives an especially large prestige boost from placement alone. There are also possible explanations for why the Ecology Law Quarterly (“ELQ”) has published so many of the highly rated law review articles (see supra Table 10). Simple longevity obviously has played some role. ELQ is one of the oldest environmental law publications and therefore has published more articles than most others. But age alone is not a sufficient explanation. Another likely significant factor is ELQ’s association with Berkeley: a law school with an excellent, well-rounded environmental law faculty that has promoted publication in that law review. Finally, ELQ has long held itself out as more theoretical and less practical in its focus than other specialty environmental law journals, including the Harvard Environmental Law Review, which was initially founded for the express purpose of reporting on recent developments in a manner more practically useful to the legal profession. See Introduction, 1 HARV. ENVTL. L. REV. xix (1976) (“The rapid and complex nature of environmental legal developments underscores the need for a comprehensive reference tool to which attorneys, judges, educators, students, businesses, public interest groups, administrators, and legislators can turn to find the major developments, to find useful and reliable discussions and critiques, and to be
some of the more provocative. The analysis is organized around several general hypotheses suggested by the data.

A. Why More Environmental Law Articles Are Not Published in the Top Tier Law Reviews (Or at Least Why Those Reviews Took So Long to Do So)

One can easily imagine several causes for the relatively low and slow rate of publication of environmental law articles in the top tier law reviews. Environmental law articles could be disproportionately of lower quality than those submitted in other areas of law. If true, it would not be surprising that few such articles are selected by law review editors who choose only the very best articles for publication in their journals.

However distasteful that explanation (at least for those of us who like to dub ourselves environmental law scholars), there may nonetheless be something within it worth exploring. Casting aside the pejorative characterization of environmental law articles being of “lower quality,” what does seem clear is that there has been a mismatch between what environmental law scholars have been doing and writing and what many top tier law review editors have perceived as excellent scholarship worthy of publication. The challenge is to identify the causes of that mismatch.

The reasons are likely twofold. Some relate to the nature of the articles being submitted, while others probably derive from the nature of the criteria being applied by those law review editors making the placement decisions.

One possible explanation, for instance, is that environmental law faculty are disproportionately otherwise engaged in environmental law-making outside the writing of formal law review articles. An empirical analysis is not necessary to posit that many, if not most, environmental law faculty harbor environmentalist tendencies and generally favor more rather than less environmental protection. Certainly, the pressures on environmental law faculty to engage in extra-scholarly law reform activities that promote environmental protection are great. Environmental activists regularly turn to environmental law faculty for assistance in their efforts. Faculty experts in antitrust, securities, tax, law and economics, or federal jurisdiction, by contrast, are less likely to be subject to the same pressures to engage in pro bono law reform activities.

The law reform activities of environmental law scholars such as Joseph Sax, William Rodgers, and Gerald Torres are typical of those performed by many environmental law faculty. The impact on scholarly out-

"directed to the cases and the primary and secondary sources which could further elucidate the issues involved. This, at the broadest level, is the purpose of the Harvard Environmental Law Review . . . . No previous publication, however, has combined comprehensive coverage of current developments with systematic analysis of their implications."
put can be substantial. Environmental law in particular has during the past three decades been subject to ongoing and rapid law reform at a faster pace than law review article preparation and publication. It can therefore be especially difficult for environmental law faculty seeking to participate in law reform activities to justify, let alone find, the substantial hours necessary for major law review scholarship. Part of the explanation therefore may be that some of the best environmental law scholars are spending their time elsewhere.

Even more fundamentally, however, there are significant reasons why top law review editors fail to select excellent environmental law scholarship for publication even when it is produced. Simply put, so long as the top law schools lacked an environmental law curriculum, which was true for many of those schools throughout the 1970s and much of 1980s, the student articles editors likely lacked even the rudimentary understanding of the issues necessary to evaluate the environmental scholarship under submission. For this reason, it is not surprising that the very few environmental articles selected for publication emphasize broader cross-cutting legal issues such as federalism, judicial review, standing, or property rights. Only such cross-cutting legal themes touched on issues that the student editors were capable of evaluating and recognizing as important.

For this same reason, it is also not surprising that student editors at some top tier law reviews did not start publishing environmental law scholarship until a job market stimulus kicked in during the late 1980s (in response to hazardous waste liability), which prompted greater law school curricular emphasis and faculty hiring in environmental law. More students, then, had the grounding necessary to recognize and appreciate excellence in environmental law scholarship. In addition, law schools’ new emphasis on environmental law through curricular reform and faculty hiring conveyed a message to students about the relative importance and potential significance of environmental scholarship.

B. Why the Harvard Law Review has Published So Few Environmental Law Articles

The remarkable phenomenon of the Harvard Law Review’s systematic underpublication of environmental law scholarship confirms the hypotheses just proffered about top tier law reviews. Even after most other top law schools commenced publishing environmental scholarship at significant rates by the mid- to late 1980s, the Harvard Law Review did not do so. A likely cause is that the Harvard Law School, unlike almost all other top law schools, failed either to emphasize environmental law
issues in its curriculum or to add significant environmental law scholars to its faculty.\textsuperscript{25}

Law review editors either consciously or subconsciously take their cues regarding the relative worth of submitted academic scholarship from their own law school's curricular emphasis and (not coincidentally) their own faculty's scholarly emphasis. During the mid- to late 1980s, Harvard's peer institutions have, through faculty hiring and curricular reform, conveyed to the student body a message of the relative importance of environmental law. Such efforts are invariably followed by a substantial increase in the number of environmental law articles published by those schools' main law reviews. Stanford and Yale began to emphasize their environmental programs, with a concomitant increase in the environmental scholarship by faculty and students published in their main law reviews.\textsuperscript{26} Columbia added a significant component to its mandatory first year curriculum on environmental issues in the late 1980s and once again a perceptible increase in the publication rate of environmental law articles followed.\textsuperscript{27}

There is likely no better evidence of the potential relationship between a law review's publication decision and its home law school's curricular emphasis and in-house faculty scholarship than that supplied by the University of Chicago. Before the very late 1980s, Chicago's curriculum and law review were essentially silent on environmental issues. But then Professor Cass Sunstein began teaching the survey environmental law class. The student response in the University of Chicago Law

\textsuperscript{25} The Harvard Law Review's record also cannot be explained by the presence of the Harvard Environmental Law Review. Other top law schools have both prestigious main law reviews and specialty environmental law journals, including Stanford, Columbia, Berkeley, Virginia, Georgetown, and none has a publication (or nonpublication) rate approximating that of the Harvard Law Review. Nor, as admirable as the Harvard Environmental Law Review may be, is it very plausible to presume that a substantial number, if any, authors have declined publication in the Harvard Law Review (or failed to submit an article likely to be accepted for publication by that journal) in favor of the Harvard Environmental Law Review. Finally, it is doubtful that the Harvard Law Review has a practice of routinely deferring, without its own initial review for possible publication, any articles relating to the variety of topics covered by the law school's specialty journals to these journals, including articles on civil rights, environmental or international law.

\textsuperscript{26} Yale added Professor Don Elliot to the faculty in the early 1980s and Professor Carol Rose a few years later. The law school has also more recently sought to expand its ties to the Yale School of Forestry. At the behest of Professor Barton Thompson, who joined Stanford's law faculty in the mid-1980s, Stanford has established a wide-ranging environmental law program. See Stanford Environmental and Natural Resources Law Program (visited Apr. 27, 1999) <http://lawschool.stanford.edu/program/ENRLP>.

\textsuperscript{27} See E-Mail Correspondence to the Author from Prof. Richard Briffault, Columbia Univ. School of Law (Nov. 4, 1998) (on file with the author); E-Mail Correspondence to the Author from Prof. Bernard Black, Stanford Univ. School of Law (Nov. 4, 1998) (on file with the author). Outside this curricular innovation, however, Columbia's environmental law program may have commenced earlier than most, with Professor Frank Grad's pioneering work, but it has enjoyed relatively little full-time faculty involvement until quite recently.
Review's publication rates of faculty and student environmental law scholarship was immediate and significant.\(^{28}\)

The contrast with Harvard's experience is stark. Just when other top law schools, including Stanford, Yale, Chicago, New York University, Berkeley, and Georgetown, were expanding their programs, Harvard was diminishing the small program it once had. The sole faculty member who included environmental law in his broad scholarly repertoire, Professor Richard Stewart, left Harvard and ultimately joined the New York University Law School where he established its significant environmental law program. Harvard has yet to hire even one full-time, permanent faculty member who has maintained environmental law as a primary area of interest for scholarship or teaching.

Harvard's record is also not likely the result of mere happenstance. It is endemic to the school's culture. Even on those occasions when Harvard has made a hiring effort, the law school's natural tendency is to hire extraordinarily gifted recent law graduates who express an interest in environmental law, but necessarily possess very little background or experience in the area. These young faculty hires understandably lose interest (like many law students in an introductory environmental law survey class) once faced with the sheer density of the material. They may excel as outstanding teachers and scholars but leave their mark outside environmental law.

Nor is Harvard likely to fill the gap by looking to faculty candidates who have been practicing law for a substantial time, although such experience can be a prerequisite for finding someone who both has a mastery of the area of the law and the depth and intensity of interest necessary for staying power within the environmental law field. Like many law schools, Harvard generally views lengthy practical experience as a disqualification in assessing a candidate's potential for significant legal scholarship.\(^{29}\)

Harvard's inability to break out of this pattern can also be explained, notwithstanding longstanding expressions of decanal interest in doing so. For example, it is understandably difficult to be hired at Harvard absent a scholarly record of consistent publication in the top tier law reviews. But, of course, until Harvard's own hiring and curriculum send its students the message of the relative importance of environmental law, such publications are apparently unlikely to occur in the Harvard Law

\(^{28}\) Professor Sunstein's assessment does not purport to be based on any statistical analysis, but just his general impression. See E-mail Correspondence to the Author from Prof. Cass Sunstein, Univ. of Chicago School of Law (Nov. 3, 1998) (on file with the author) ("That's about when I started. I've encouraged them and boy have they responded.").

\(^{29}\) There are, however, some notable exceptions. For instance, Professor Barton Thompson of Stanford was a partner at O'Melveny & Myers before joining that law school's faculty. The University of Virginia School of Law also recently hired Jonathan Cannon, a long-time practitioner of environmental law in both the public and private sectors and most recently General Counsel to the Environmental Protection Agency, to teach environmental law.
Perhaps now, though, that some other top tier law reviews are publishing some environmental law contributions, Harvard will overcome this longstanding hurdle. In addition, Harvard necessarily lacks the kind of pre-existing constituency on the faculty that exists in other areas of the law, like tax or securities law, to which the rest of the faculty can defer when the argument is made that the nature of environmental scholarship, including the sheer density of the material, warrants applying modified hiring criteria.

C. What Explains the Persistence of Certain Scholarly Topics such as Federalism, Administrative Law, Law and Economics, and Property Rights?

Another intriguing finding is the persistence of certain topics in those environmental law articles chosen for publication. The persistent topics include federalism, administrative law, law and economics, and property rights. Here too, there are some fairly obvious first-level explanations relating to the nature of environmental law, but there are also some more subtle reasons more closely linked to the nature of the academy and promotion and tenure criteria.

The most obvious threshold reason is that environmental law unavoidably raises these cross-cutting legal issues. Examples of legal issues include those relating to standards of judicial review in statutory construction and challenge to administrative agency action, citizen standing, the dormant commerce clause, the Tenth Amendment, and the Fifth Amendment regulatory takings issue. Environmental law is the product of a major effort to develop new legal rules substantially regulating human activity that affects environmental quality. These efforts necessarily raise a host of interesting cross-cutting legal issues related both to law-making (between sovereign authorities and between branches of government within any single sovereign authority) and to the disruption of previously settled expectations. The student editors at the more prestigious law reviews are better able to appreciate and evaluate environmental law articles addressing those cross-cutting themes than they can other kinds of environmental law articles. And, for that same reason, they are more likely to select those articles for publication.

Also likely at work here are a variety of incentives and disincentives that prompt environmental law faculty to write on such cross-cutting issues. There are substantial practical and strategic advantages to doing so.

From a practical perspective, such topics are especially attractive because they require less mastery of the intricate details of environmental law. Such mastery is difficult to achieve. It can take years to obtain and requires a huge front-end investment that must be constantly renewed because the environmental laws themselves constantly evolve. That is a difficult investment for many entry-level law professors to make in the
face of pressing publication expectations. Only those relatively few individ-
uals possessing substantial work experience in environmental law are
likely to be able to do so. But, for reasons already discussed, the higher
up the law school pecking order one travels, the less likely one is to find
an individual with such significant background experience. By contrast,
the relevant research base for a cross-cutting issue is narrower, more con-
stant, and far more accessible to a new faculty member seeking to pro-
duce publications at a fairly rapid rate.

There are also distinct strategic advantages that favor a legal aca-
demic addressing the cross-cutting issues implicated by environmental
law. Such topics possess broader audience appeal. Simply because they
appear less practical, they are also often considered "scholarly." They
also more readily engage the scholarship of established legal scholars,
including those outside environmental law. Each of these factors makes
an article potentially more impressive both to student editors making
publication decisions and to more senior faculty assessing a more junior
faculty member's scholarly contributions. 30

V. CONCLUSION

Environmental scholarship and environmental law have undoubtedly
thrived during the past three decades. The absence of top tier law review
involvement has not deterred such scholarship, which has increased ex-
ponentially in recent years. Nor has the striking disengagement of the
Harvard Law Review struck the death knell of environmental law, which
has been the catalyst of one of the more remarkable legal transformations
in the United States during the second half of this century. It is instead more
likely that most scholars were wholly unaware of the odd phenomenon.

The effects on environmental scholarship and environmental law,
however, may not be wholly benign. There remains cause for concern that
some kinds of excellent legal scholarship are currently being lost, under-
valued, unduly chilled, and that certain areas of scholarship are con-
versely being overemphasized. Moreover, the corresponding loss is not
confined to richness in scholarship; it extends to the law's positive evolu-
tion as well.

There is a serious threat of under-representation of scholarship by
those environmental law faculty most engaged in ongoing lawmaking
efforts and most susceptible to pressures to aid parties in discrete envi-
ronmental controversies. The publication criteria applied by the most
influential law reviews leaves little room for those faculty members' in-

30. A non-strategic scholarly contribution, however, may well be to submit a law
review article taking to task one's alma mater for failing to establish an environmental law
program.
volvement in those publications. Part of the reason may simply be the time necessary to produce such scholarship, about which the law reviews can do little short of a dramatic increase in their willingness to include symposia on specific cases or legislative efforts. But there are also broader reasons for concern that there is too little scholarship advocating positive law reform based on a true mastery of environmental law's complexities. Hiring and promotional criteria deter many faculty from spending the time necessary to gain such expertise in the first instance. They also strongly favor academic writing about cross-cutting matters rather than analyzing and advocating more program-specific changes.

There is a corresponding risk that other kinds of scholarship may be disproportionately over-represented, especially in the most prestigious law reviews. In particular, there is the distinct possibility of over-representation of scholarship by those faculty members who are relatively less concerned with environmental protection concerns and more influenced by those lawmakers and policy concerns with which environmental law conflicts. They include many talented, indeed, brilliant scholars. But it is nonetheless significant that they come to environmental law with only a secondary interest in, and appreciation of, the environmental protection concerns that promote the law's development; their primary interest lies instead in broader, theoretical cross-cutting issues.

Finally, the empirical data raises some questions about some of our most prestigious law schools. Leading legal academic institutions like Harvard have historically played a major role in the evolution of the law. They do so through the promotion of legal scholarship and a curriculum that prepares future leaders in the profession. Harvard has had just such a profound and positive impact on many areas of the law during the nineteenth and twentieth centuries. For that same reason, however, Harvard's virtual silence on environmental law during the past three decades is all the more striking. Neither the law school's curriculum nor the scholarship of its faculty or its main law review reflects the massive changes that have occurred in the nation's laws and the legal profession with the emergence of modern environmental protection law. The same can be fairly said about many other prestigious law schools, including those that have only more recently begun to establish more substantial environmental law programs.

A leading academic institution must do just that—lead. It cannot merely follow. Those second and third year law students at Harvard who had the foresight to start this law review, during my first year of law school in 1976, expected the law school to follow their lead. The time for Harvard's doing so is long overdue.

## Appendix: Environmental Law Journals and Beginning Dates

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<tr>
<th>Journal</th>
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<tr>
<td>Land and Water Law Review</td>
<td>1966</td>
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<td>Environmental Law</td>
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<td>Boston College Environmental Affairs Law Review</td>
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<td>Ecology Law Quarterly</td>
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<td>Columbia Journal of Environmental Law</td>
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<td>Harvard Environmental Law Review</td>
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<td>Stanford Environmental Law Journal</td>
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<td>Public Land Law Review</td>
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<td>Virginia Environmental Law Journal</td>
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<td>Journal of Energy, Natural Resources and Environmental Law</td>
<td>1980</td>
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<td>Pace Environmental Law Review</td>
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<td>Temple Environmental Law and Technology Journal</td>
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<td>Journal of Land Use and Environmental Law</td>
<td>1985</td>
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<td>Journal of Natural Resources and Environmental Law</td>
<td>1985</td>
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<td>Journal of Environmental Law and Litigation</td>
<td>1986</td>
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<td>Hofstra Property Law Journal</td>
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<td>Tulane Environmental Law Journal</td>
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<td>UCLA Journal of Environmental Law and Policy</td>
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<td>Villanova Environmental Law Journal</td>
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<td>South Carolina Environmental Law Journal</td>
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<td>University of Baltimore Journal of Environmental Law</td>
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<td>New York University Environmental Law Journal</td>
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<td>Buffalo Environmental Law Journal</td>
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<td>Fordham Environmental Law Journal</td>
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<td>Missouri Environmental Law and Policy Review</td>
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<td>Ocean and Coastal Law Journal</td>
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<td>Environmental Lawyer</td>
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<td>Wisconsin Environmental Law Journal</td>
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<td>West-Northwest</td>
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<td>Touro Environmental Law Journal</td>
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<td>William and Mary Environmental Law and Policy Review</td>
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<td>Albany Law Environmental Outlook</td>
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<td>Econ Notes: Environmental Law and Policy</td>
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<td>Great Plains Natural Resources Journal</td>
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