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ARTICLES

- Of Fables and Federalism: A Re-Examination of the Historical
Rationale for Federal Environmental Regulation 627
William L. Andreen

This Article responds to recent scholarship questioning the need for environmental statutes that place primary responsibility for regulation in the hands of the federal government. Earlier scholarly work demonstrates that these claims lack credible empirical and historical support with respect to water pollution. This Article will focus on similar arguments with respect to air pollution, the area where critics contend the most extensive data exists supporting their assertions. As this Article will demonstrate, the data upon which these critics have relied is seriously flawed and cannot be relied upon to support the contention that sulfur dioxide and particulate matter pollution were declining in the years before substantial federal regulatory involvement. In fact, additional empirical data reveals that sulfur dioxide pollution was growing much worse during these years.

- Enhancing the Investor Appeal of Renewable Energy 681
Felix Mormann

This Article introduces an investor-oriented framework for the evaluation of renewable energy policy, applies these newly developed criteria to a qualitative comparison of the primary policy instruments, and offers recommendations to enhance the investor appeal of renewable energy in the United States. Public policy must catalyze private investment in renewable energy. Empirical evidence of deployment support for renewables from thirty-five countries reveals enormous differences in policy performance. Remarkably, some policies leverage four times as much investment in renewable energy as others, despite offering only half as much compensation to renewable power project developers. These results point to forces at play other than policy remuneration and generation costs alone. To better understand these forces, this Article develops a framework of criteria to guide the evaluation of deployment policies beyond remuneration. Unlike previous studies, this Article assumes an

investor perspective to explore how investment-based, market-based, and behavioral “soft-cost” factors determine a policy’s ability to spur investment in renewable energy.

Playing without Aces: Offsets and the Limits of Flexibility under Clean Air Act Climate Policy Issue	735
<i>Nathan Richardson</i>	

The United States Environmental Protection Agency (EPA) continues to move ahead with regulation of greenhouse gas emissions under the Clean Air Act (CAA). Previous work has indicated that basic forms of compliance flexibility—trading—appear to be legally permissible under section III of the CAA. This Article takes a close look at more expansive and ambitious types of flexibility: trading between different kinds of sources, biomass co-firing, and above all, offsets. It concludes that most types of such extended flexibility are either legally incompatible with the CAA, or so legally problematic that EPA is unlikely to adopt them. This has important implications for both the costs of the CAA climate policy and the level of environmental benefits that are achievable. It also creates tension between the CAA climate policy and state-level policies, such as California’s, that aim to include various forms of extended flexibility.

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<i>Ricky R. Nelson</i>	

The United States government stands out as one of the worst environmental polluters domestically, and it continues to remediate environmental contamination stemming from its own federal facilities. Not only does contamination at federal sites damage the surrounding environment, but such pollution can gravely injure nearby residents. Historically, these injured parties have been unable to recover compensatory damages from the government for harm to their property or person caused by government violations of the Resource Conservation and Recovery Act (RCRA). When plaintiffs subsequently turned to the Federal Tort Claims Act (FTCA) to seek damages for RCRA violations, their claims were either barred by the discretionary function exception (DFE) or dismissed for attempting to indirectly enforce RCRA using the FTCA. This Chapter profiles *Myers v. United States* and suggests that compensatory damages can be sought from the government for RCRA violations using the FTCA.

Grizzly Bear Recovery, Whitebark Pine, and Adequate Regulatory Mechanisms Under the Endangered Species Act.....	943
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From the brink of extinction to renewed prominence, the iconic Yellowstone grizzlies exemplify the potential for Endangered Species Act (ESA) protections to bring listed species to full recovery. The U.S. Fish and Wildlife Service (FWS) listed grizzlies of the contiguous forty-eight states as threatened in 1975, using the Grizzly Bear Recovery Plan, a cooperative effort among federal and state agencies, to conserve the remaining grizzlies and their habitat. After steady population growth for thirty-two years, the FWS determined that the Yellowstone grizzly population satisfied the plan's criteria for a recovered population. This Chapter argues that, by allowing the FWS to delist grizzlies without legally enforceable mortality limits, the court failed to fulfill the ESA's goal of ensuring legal protections for listed species.

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