



Sixth Annual SRP Sustainability Conference of American Legal Educators

Virtual Event

Friday, May 14, 2021

Beus Center for Law and Society | Phoenix, AZ

ASU Sandra Day O'Connor
College of Law
Arizona State University
Law and Sustainability

Welcome

The Program on Law and Sustainability at Arizona State University's Sandra Day O'Connor College of Law is delighted to welcome you to the Fourth Annual Sustainability Conference of American Legal Educators.

This ambitious conference is our signature contribution to the worldwide sustainability movement—a movement whose influence continues to expand throughout legal academia. As we're all aware, technological advancements over the past century have dramatically improved daily life for countless people across the world. Unfortunately, many of these modern conveniences also deplete or alter the planet's natural resources in ways that could significantly harm future generations. Transitioning cities, nations, and the world toward more environmentally sustainable living has thus emerged as one of humankind's greatest twenty-first century challenges.

Billions of dollars are invested annually into scientific and engineering research aimed at improving the environmental sustainability of modern economies. In contrast, far fewer resources are devoted to the development of creative policy strategies and legal structures tailored to support the valuable sustainability innovations emerging from this global research effort. This conference seeks to help address that imbalance by annually bringing together many of the nation's foremost legal scholars researching in sustainability-related areas. By providing a forum for legal academics to develop new collaborations and share ideas face-to-face, the conference aims to engender greater scholarly discourse on these imperative issues and to ultimately move the needle in humankind's relentless pursuit of a more ecologically sustainable society.

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Richard Morrison

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Speakers

Todd Aagaard

Villanova University Charles Widger School of Law

Karrigan Bork

University of California Davis School of Law

Sara Bronin

University of Connecticut Law School

Carlarne Cinnamon

The Ohio State University

Jane Maslow Cohen

University of Texas School of Law

Robin Craig

University of Utah School of Law

John Dernbach

Widener University Commonwealth Law School

K.K. DuVivier

University of Denver Sturm College of Law

Paolo D. Farah

West Virginia University College of Law

Steven Ferrey

Suffolk University Law School

Victor Flatt

University of Houston Law Center

Sarah Fox

Northern Illinois University College of Law

Jill Fraley

Washington & Lee University School of Law

Andrea Freeman

William S. Richardson School of Law

Josh Galperin

University of Pittsburgh School of Law

Tracy Hester

University of Houston Law Center

Keith Hirokawa

Albany Law School

Virginia Harper Ho

University of Kansas School of Law

Bruce Huber

Notre Dame Law School

Rhett Larson

Arizona State University

Yael Lifshitz

King's College London

Al Lin

University of California Davis School of Law

Michael Livermore

University of Virginia Law

Alistair Lucas

University of Calgary Faculty of Law

Joshua Macey

University of Chicago Law School

Sharon Mascher

University of Calgary Faculty of Law

Nancy McLaughlin

University of Utah SJ Quinney College of Law

Anthony Moffa

University of Maine School of Law

Felix Mormann

Texas A&M University School of Law

Jonathan R. Nash

Emory University School of Law

John Nolon

Pace University Elisabeth Haub School of Law

Uma Outka

University of Kansas School of Law

Dave Owen

University of California, Hastings College of Law

Lee Paddock

The George Washington University Law School

Vanessa Casado Periz

Texas A&M School of Law

Shannon Roesler

Oklahoma City University School of Law

Tracy Roberts

Cumberland School of Law, Samford University

Jonathan Rosenbloom

Vermont Law School

Arden Rowell

University of Illinois College of Law

Irma S. Russell

University of Missouri-Kansas City School of Law

Erin Ryan

Florida State University College of Law

Shelley Saxer

Pepperdine University Caruso School of Law

Melissa Scanlan

University of Wisconsin Law School

Jeff Thaler

University of Maine School of Law

Buzz Thompson

Stanford Law School

Achinthi Vithanage

George Washington University Law School

Daniel Walters

Penn State Law

Gina Warren

University of Houston Law Center

Steven Weissman

University of California Berkeley Goldman School of Public Policy

Hannah Wiseman

Penn State Law

Michael Wolf

University of Florida Levin College of Law

David Wright

University of Calgary Faculty of Law

Sandra Zellmer

University of Montana School of Law

Schedule

8:30 a.m. Introductions and Welcome Remarks

9:00–10:20 a.m. Break-out Session #1

Room 1/ Freestanding Presentations: Sustainability Policy and Climate Change

Sara Bronin (Connecticut), *Law's Disaster: Heritage at Risk*

Felix Mormann (Texas A&M), *Anti-Carbon Capitalism: Nudging Financial Markets*

Cinnamon Carlarne (Ohio State), *Climate Courage*

Jeffrey Thaler (Maine), *Climate Change Litigation Trends and Opportunities: China, the US, and the World*

Room 2/ Freestanding Presentations: Sustainability and Energy Law

Steve Weissman (Berkeley), *Ensuring Better Regulatory Outcomes: The Need for Careful Consideration of Performance-Based Ratemaking Policies*

Uma Outka (Kansas), *Energy Law and the Low-Income Household*

Daniel Walters (Penn State), *Lumpy Goods in Energy Decarbonization*

Al Lin (UC Davis), *Making Net Zero Matter*

Room 3/ Panel: Frontiers in Water Law

Dave Owen (UC Hastings), *Groundwater Recharge and the Law*

Buzz Thompson (Stanford), *CA's Sustainable Ground Water Management Act*

Rhett Larson (ASU), *Overcoming Resistance to Well Metering in the Rural West*

Erin Ryan (Florida State), *The Public Trust Doctrine and the Rights of Nature Movement*

Room 4/ Panel: Sustainability Law and Social Science

Bruce Huber (Notre Dame), *Water Neutrality: Does Renewable Energy Point the Way for Groundwater Conservation?*

Jonathan Nash (Emory) (with remote participation from Cherie Metcalf (Queen's University), *Communicating Risk Across the Political Divide*

Tracey Roberts (Cumberland), *Carbon Dividends and the Political Philosophy of Claims to the Global Commons*

Arden Rowell (Illinois), *Environmental Law and Psychology*

10:30 a.m.–11:50 a.m. Break-out Session #2

Room 1/ Panel: Land Use Policy in the Age of COVID, Racial Justice and Climate Change

John Nolon (Pace), *The Pandemic, Climate Change, and Urban Flight*

Hannah Wiseman (Penn State), *Land Use, Climate and Public Health*

Micael Wolf (Florida), *Zoning Reformed*

Paolo Farah (West Virginia), *Conflict between Property Rights and Mineral Rights in a Comparative Perspective*

Schedule

Room 2/ Mini-Panel: Lawyering as if Future Generations Matter

John Dernbach (Widener), *The Roles of Lawyers and Law Schools in Fostering Sustainable Development*

Irma Russell (UMKC), *Attorneys' Ethical Duties and Climate Change*

Mini-Panel: Sustainability Policy and Market Forces

Todd Aagard (Villanova), *Electricity Capacity Markets*

Virginia Harper Ho (Kansas), *Modernizing ESG Disclosure*

Room 3/ Panel: New Angles in Sustainable Energy Policy

Yael Lifshitz (Columbia), *Energy Cities*

Steven Ferrey (Suffolk), *New Angles in Sustainability Court Decisions*

K.K. Duvivier (Denver), *New Angles on Offshore Oil, Gas & Wind Development*

Melissa Scanlan, (Wisconsin) *Prosperity and the Fossil-Free Economy: How Cooperatives are Designing Sustainable Businesses*

12:00–1:00 p.m.

Main Room/ Lunch Break & Morrison Laureate Address

Morrison Prize Winner: Joshua Macey, Assistant Professor of Law, University of Chicago Law School

Zombie Energy Laws, 73 *Vanderbilt L. Rev.* 1077(2020)

1:10–2:30 p.m.

Break-out Session #3

Room 1/ Panel: Comparative Perspectives on Canada-US Climate Change Law & Policy

Alistair Lucas (Calgary), *Hydrocarbon Energy Overhang*

Sharon Mascher (Calgary), *The Role of Rights-Based Litigation in Shifting the Political Landscape around Climate Change*

David V. Wright (Calgary), *Factoring Climate Change into Project-level Assessments and Decision-making*

Sandra Zellmer (Montana), *Public Lands Decision-Making and Management*

Room 2/ Freestanding Presentations: Sustainability and Legal Governance Structures

Vanessa Casado Perez (Texas A&M), *Natural Legal Transplants*

Joshua Galperin (Pittsburgh), *Environmental Governance at the Edge of Democracy*

Michael Livermore (Virginia), *Where Nature's Rights Go Wrong*

Jill Fraley (Washington & Lee), *Personal Environmental Shaming*

Schedule

Room 3/ Freestanding Presentations: Sustainability, Water and Food

Lee Paddock (George Washington), *Reimagining Environmental Law: Legal Tools to Advance Materials Conservation and a Circular Economy*

Robin Craig (Utah), *Doing Deepwater Aquaculture Right: Sustainable Food Security and Resilient Marine Ecosystems in the US*

Andrea Freeman (Hawaii), *Disrupting Indigenous Foodways: From Colonization to the FDPIR*

Jane Cohen (Texas), *Patchy Braveheart Rescues: Why (and How) Spotty Efforts to Address Mexico City's Water Crisis Still Count*

2:40–4:00 p.m.

Break-out Session #4

Room 1/ Panel: Developing Local Ecosystem Governance

Karrigan Bork (UC-Davis), *Ecosystem Impacts of the Anthropocene Era*

Keith Hirokawa (Albany), *Local Environmental Law & Ecosystem Governance*

Jonathan Rosenbloom (Vermont), *Local Laws for Sustaining Ecosystem Services*

Shannon Roesler (Oklahoma City), *Ecosystem Management and Public Welfare Policies*

Room 2/ Panel: Decarbonization and the Future of Energy Sustainability

Victor Flatt (Houston), *NEPA Decisions Reign in GHG emission Expansion in Energy Infrastructure Buildout*

Gina Warren (Houston), *The Continued Role of Hydropower for a Decarbonized Future*

Tracy Hester (Houston), *Decarbonization through Negative Emissions Technologies*

Anthony Moffa (Maine), *Do Words Count for Something? Empirical Analysis of the Changing Length of Environmental Regulations*

Room 3/ Freestanding Presentations: Sustainability and Land Use

Sarah Fox (Northern Illinois), *Why Localizing Climate Federalism Matters (Even) in a Biden Administration*

Achinthi Vithanage (George Washington), *Community Benefits Agreements for Renewable Energy on Contaminated Lands*

Nancy McLaughlin (Utah), *Conservation Easements: Enlightened Enforcement*

Shelley Saxer (Pepperdine), *Necessity Exceptions to Takings*

Morrison Prize

2021 Morrison Prize Contest Winner

Zombie Energy Laws



Johusa Macey

73 Vanderbilt L. REV. 1077 (2020)

Abstract:

This Article traces the development of three legal rules—cost recovery for vertically integrated utilities, the requirement that regulators assess the financial viability of energy projects before issuing a certificate of public convenience and necessity, and the filed rate doctrine—that emerged out of the view that electric power companies should be shielded from market forces. It argues that important elements of these legal rules have become “zombie energy laws.” Zombie energy laws are statutes, regulations, and judicial precedents that continue to apply after their underlying economic and legal bases dissipate. Zombie energy laws were originally designed to protect consumers by, among other things, preventing utilities from exploiting their market power. Today, however, they protect incumbent fossil fuel generators and have provided the legal basis for invalidating billions of dollars of wind and solar projects. Thus, energy laws that emerged to mitigate market power abuses under the old system of utility rate regulation now entrench incumbent market power and are impeding the transition to a cleaner energy system. In this way, zombie energy laws are protecting incumbent energy companies from traditional tort, contract, and antitrust laws that prevent firms operating in ordinary industries from acting anticompetitively.

This Article concludes by arguing that the Federal Power Act, which instructs the Federal Energy Regulatory Commission to maintain “just and reasonable” wholesale rates, can plausibly be read to mitigate—and, in some cases, eliminate—the market distortions caused by zombie energy laws. The Act’s meaning should be construed to fit the market structure to which it is being applied.

What is the Morrison Prize Contest?

The Morrison Prize is a \$10,000 cash prize awarded to the author(s) of the most impactful sustainability-related legal academic paper published in North America during the previous year. The Morrison Prize Contest bears the name of its funder, Richard N. Morrison, who is also the co-founder of Arizona State University’s Morrison Institute for Public Policy. Mr. Morrison is a successful Arizona attorney and philanthropist who has published multiple law journal articles on water law and environmental law topics and given dozens of presentations in those areas over his distinguished career. The Program on Law and Sustainability wishes to express its deepest appreciation to Mr. Morrison for his generous funding of the contest.



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