

C O M M E N T

# ANALYSIS OF ENVIRONMENTAL LAW SCHOLARSHIP 2019-2020

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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 during the previous academic year that match our methodological criteria. The law journal articles that are re-published and discussed are selected by Vanderbilt University Law School students with input from the course instructors as well as an outside advisory committee of environmental law experts.

The goal of this Comment is to highlight the results of the ELPAR article selection process and to report on the environmental legal scholarship for the 2019-2020 academic year, including the number of environmental law articles published in general law reviews versus environmental law journals, and the topics covered in the articles. We also present the Top 20 articles that met ELPAR's criteria of persuasiveness, impact, feasibility, and creativity, from which four articles were selected to re-publish in condensed form with commentaries from leading practitioners and policymakers. Two additional articles received an honorable mention. Thus, this Comment provides an empirical snapshot of the environmental legal literature during the past academic year and 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 Environmental Law

Institute ELPAR websites.<sup>1</sup> In brief, the initial search for articles that qualify for ELPAR review is limited to articles published from August 1 of the prior year to July 31 of the current year, roughly corresponding to the academic year. The search is conducted in law reviews from the top 100 law schools, as ranked by *U.S. News and World Report* in its most recent report, counting only articles from the first 100 schools ranked for data purposes (i.e., if there is a tie and over 100 schools are considered top 100, those that fall in the first 100 alphabetically are counted). Additionally, journals listed in the "Environment, Natural Resources and Land Use" subject area of the most recent rankings compiled by Washington & Lee University School of Law are searched,<sup>2</sup> with certain modifications.

The ELPAR Editorial Board and Staff start with a keyword search for "environment!" in an electronic legal scholarship database.<sup>3</sup> Articles without a connection to the

1. *Environmental Law and Policy Annual Review*, ENVTL. L. INST., [https://www.eli.org/sites/default/files/docs/elpar/elpar\\_methodology\\_2020-2021.pdf](https://www.eli.org/sites/default/files/docs/elpar/elpar_methodology_2020-2021.pdf) (last visited May 3, 2021) [<https://perma.cc/A29L-GLP5>]; *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 May 3, 2021) [<https://perma.cc/9XP3-PJ6H>].
2. *W&L Law Journal Rankings: Ranking Methodology*, WASH. & LEE SCH. OF L., <https://managementtools4.wlu.edu/LawJournals/Default3.aspx> (last visited May 3, 2021) [<https://perma.cc/FHB8-4GYN>].
3. ELPAR members conduct a search in the spring semester of articles published between August 1 and December 31 of the previous year. In the fall semester, members search each journal for articles published earlier that year, between the days of January 1 and July 31. The exact date of access for each journal varies according to when each individual ELPAR member performed the searches on their assigned journals, but the spring searches were performed in the 4th week of January 2021, and the fall searches were performed in the 5th week of August 2020. In order to collect articles from "embargoed" journals, which are only available on Westlaw after a delay, as well as articles from journals that are published after their official publication date, we set up a Westlaw Alert system to notify us when an article meeting our search criteria was uploaded to Westlaw after ELPAR members conducted their initial searches. A Westlaw Alert was set up for the spring search on January 25, 2020, and ran until August 14, 2020. An alert was set up for the fall search on August 15, 2020, and ran until September 13,

natural environment (e.g., “work environment” or “political environment”) are removed, as are book reviews, eulogies, 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 art than science, and our conclusions should be interpreted in that light. We have attempted, however, 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., Office of Management and Budget processes), or tort law topics (e.g., nuisance claims). 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 and are: air, climate change, energy, governance, land use, natural resources, toxic substances, waste, water, and wildlife.<sup>4</sup> ELPAR students assign each article a primary topic category and, if appropriate, a secondary category. ELPAR board members assigned each article a sub-category as well.<sup>5</sup> Figure 3 shows

the breakdown of governance articles by sub-category. No other category had sufficient data to provide a meaningful sub-category analysis.

The ELPAR Editorial Board and Staff work in consultation with the course instructors, Prof. Michael P. Vandenberg, and ELI Senior Attorney Linda K. Breggin, to determine whether articles should be considered environmental law articles and how to categorize the article by environmental topic for purposes of tracking scholarship. The articles included in the total for each year are identified on lists posted on the Vanderbilt University Law School website.<sup>6</sup>

## II. Data Analysis on Environmental Legal Scholarship

For the 2019-2020 ELPAR review period (August 1, 2019, to July 31, 2020), we identified 224 environmental articles published in top law reviews and environmental law journals. The 224 environmental articles published in 2019-2020 is a substantial reduction from the 332 published in 2018-2019.<sup>7</sup> Ninety-nine of the 2019-2020 articles were published in journals that focus on environmental law, and 125 were published in general law reviews.

The primary topics of the 224 environmental articles published in 2019-2020 were as follows (see Figure 1): 76 governance articles (33.93%), 33 climate change articles (14.73%), 25 water articles (11.16%), 25 land use articles (11.16%), 24 energy articles (10.71%), 16 natural resource articles (7.14%), 16 wildlife articles (7.14%), 5 air articles (2.23%), 2 toxic substance articles (0.89%), and 2 waste articles (0.89%). Eighty-eight articles were also identified as including a secondary topic, categorized as follows (see Figure 2): 58 governance articles, 23 climate change articles, 3 land use articles, and 3 energy articles. No other topic category was categorized as a secondary topic. Accordingly, the most common topic category was governance, followed by climate change, and then water and land use.

## III. Top 20 Articles Analysis

The Top 20 articles chosen from the pool of eligible environmental law and policy-related articles published during the 2019-2020 academic year can be found in Table 1. Of

2020. Articles caught by the Westlaw Alert system were subsequently considered for selection by ELPAR and added to our data analysis. Law reviews of schools added to the *U.S. News and World Report* Top 100 are searched for the entire year in the fall and spring, but schools removed from the top 100 are not considered moving forward.

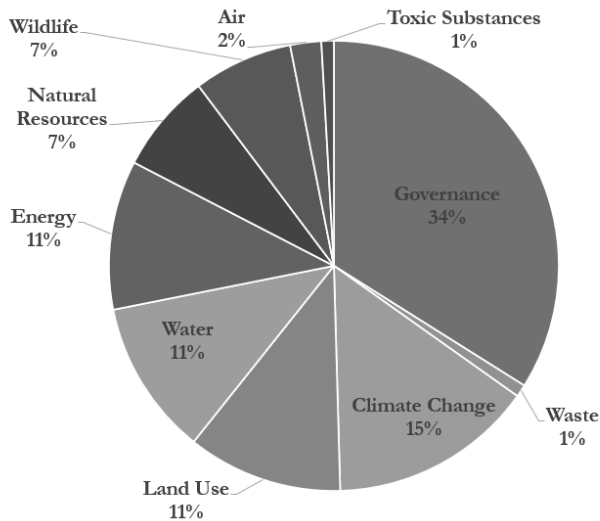
4. *Subject Matter Index*, ELR, <http://www.elr.info/subject-matter-index> (last visited May 3, 2021) [<https://perma.cc/Q8PL-82BZ>].

5. *ELR* subject matter index includes subtopics for each topic. For example, subtopics for the governance topic include: administrative law, Administrative Procedure Act, agencies, bankruptcy, civil procedure, comparative law, constitutional law, contracts, corporate law, courts, criminal law, enforcement and compliance, environmental justice, environmental law and policy, Equal Access to Justice Act, False Claims Act, Federal Advisory Committee Act, federal facilities, federal jurisdiction, Freedom of Information Act, human rights, indigenous people, infrastructure, institutional controls, insurance, international, public health, public participation, risk assessment, states, tax, tort law, trade, tribes, and U.S. government. For a list of all the subtopics in each topic, please see the following *ELR* link. *Subject Matter Index*, ELR, <http://www.elr.info/subject-matter-index> (last visited May 3, 2021) [<https://perma.cc/Q8PL-82BZ>].

6. *Environmental Law & Policy Annual Review Online Supplements*, VAND. L. SCH., <http://law.vanderbilt.edu/academics/academic-programs/environmental-law/environmental-law-policy-annual-review/online-supplements.php> (last visited May 3, 2021) [<https://perma.cc/9XP3-PJ6H>].

7. The steep decline in articles this year may be the result of responses to COVID-19. Most of the articles included in this year’s cohort were from 2020 spring and summer publications, some of which appeared to publish less frequently during this period than in prior years. In addition, an increasing number of journals appeared to publish articles exclusively online, leading to less articles published through Westlaw, a trend possibly accelerated by the pandemic. Finally, Westlaw may have had a greater lag in incorporating publications into its database as a result of COVID-19 workplace disruptions, which could have resulted in fewer articles in the pool. Indeed, following the initial article logging process, fewer Westlaw Alerts were received than in the previous year. Additional research would be necessary to assess the extent to which the COVID-19 pandemic contributed to the decline in articles in this year’s pool.

**Figure 1. 2019-2020 Articles Categorized by Primary Topic**



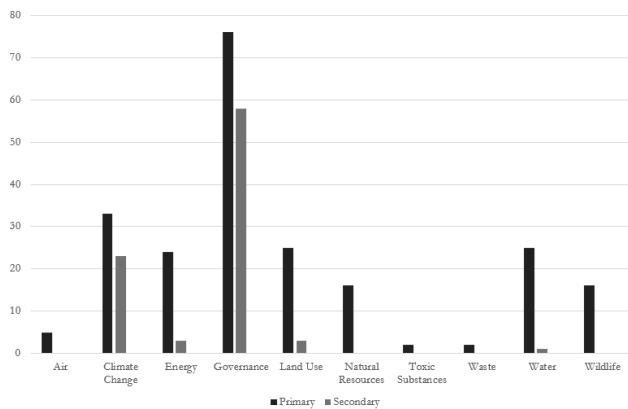
the Top 20 outlined below, six articles called for action by state and local governments as a part of their proposal; six called for action by either federal executive agencies or judicial actors; two articles called for updates to federal or international law; and six articles proposed private governance measures. Many article proposals incorporated federal, state and local, and private entity actions.

Primary topics identified in the Top 20 articles were as follows: seven governance articles, seven climate change articles, four energy articles, one land use article, and one wildlife article. Secondary topics were also identified for several articles: five climate change, four governance, and one land use.

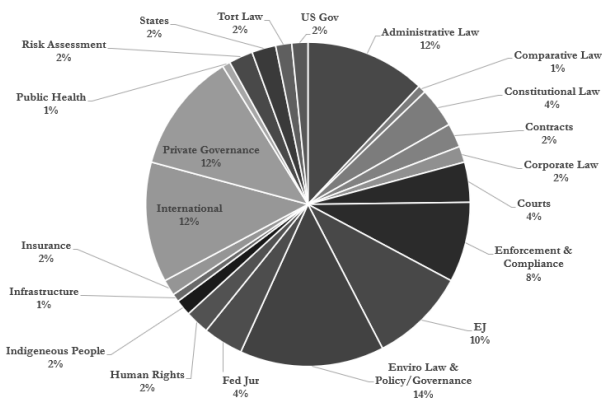
This year’s pool of top articles came from both general and environmental law journals. Ten of the Top 20 articles were published in environmental law journals; the other 10 Top 20 articles were published in general law reviews.

The chart 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 the student editors 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.

**Figure 2. 2019-2020 Articles by Primary and Secondary Topic Where Relevant**



**Figure 3. 2019-2020 Governance Articles Categorized by Sub-Category**



**Environmental Law and Policy Annual Review Top 20 Article Selections  
2019-2020 Academic Year**

Author	Title	Citation and URL	Topic	The Big Idea
Burger, Michael et al.	<i>The Law and Science of Climate Change Attribution</i>	45 COLUM. J. ENV'T L. 57 <a href="https://journals.library.columbia.edu/index.php/cjel/article/view/4730/2118">https://journals.library.columbia.edu/index.php/cjel/article/view/4730/2118</a>	Climate Change	Based on a multidisciplinary team's thorough assessment of the state of climate attribution science, which links climate change and its impacts to anthropogenic sources of greenhouse gas emissions, policymakers and litigants should: (1) communicate climate research to a broader audience; (2) link individual studies to fully establish causal chains; (3) engage stakeholders in research efforts; (4) pursue further research to reduce uncertainties associated with key findings; and (5) use attribution research in litigation to establish standing and justifiability, demonstrate causation, and prove obligations and redressability.
Condon, Madison	<i>Externalities and the Common Owner</i>	95 WASH. L. REV. 1 <a href="https://digitalcommons.law.uw.edu/cgi/viewcontent.cgi?article=5103&amp;context=wlr">https://digitalcommons.law.uw.edu/cgi/viewcontent.cgi?article=5103&amp;context=wlr</a>	Governance/ Climate Change	A growing number of institutional investors, by virtue of holding a very large percentage of the shares in multiple industry competitors, have incentives to engage in firm-level climate change activism that reflects portfolio-level motivations to maximize profit by reducing the negative externalities (e.g., carbon emissions) of the firms in their portfolios rather than conforming to traditional expectations of profit-maximizing shareholders, and corporate law should acknowledge and engage with this implication of common ownership.
Gosman, Sara	<i>Planning for Failure: Pipelines, Risk, and the Energy Revolution</i>	81 OHIO ST. L.J. 349 <a href="https://kb.osu.edu/bitstream/handle/1811/91856/1/OSLJ_V81N3_0349.pdf">https://kb.osu.edu/bitstream/handle/1811/91856/1/OSLJ_V81N3_0349.pdf</a>	Energy	Pipeline safety and siting frameworks should be consolidated into one risk governance system administered by the Pipeline and Hazardous Materials Safety Administration to improve overall economic efficiency and to reduce the number of accidents and emergency response measures, as well as the risk management burden on communities and landowners.
Grannis, Jessica	<i>Community-Driven Climate Solutions: How Public-Private Partnerships With Land Trusts Can Advance Climate Action</i>	44 WM. & MARY ENV'T L. & POL'Y REV. 701 <a href="https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1763&amp;context=wmelpr">https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1763&amp;context=wmelpr</a>	Land Use/ Climate Change	State and local governments can bolster community and conservation land trusts, which are designed to protect and preserve community resources for the benefit of the environment and future generations, through greater public-private partnerships that provide: (1) use or low-cost sale of public lands; (2) start-up funding and financing; and (3) training and technical support.
Kakade, Seema	<i>Remedial Payments in Agency Enforcement</i>	44 HARV. ENV'T L. REV. 117 <a href="https://harvardelr.com/wpcontent/uploads/sites/12/2020/04/44.1-Kakade.pdf">https://harvardelr.com/wpcontent/uploads/sites/12/2020/04/44.1-Kakade.pdf</a>	Governance	To foster the use of beneficial environmental projects as part of enforcement actions, Congress should specifically authorize agencies to spend penalty monies received rather than require deposit into the U.S. Treasury; alternatively, federal agencies should strengthen the non-punitive, remedial purpose of projects by: (1) identifying the harms caused by violations more clearly through upfront investment in experts, research, and modeling; (2) explaining in settlement documents the connection between identified harms and proposed projects; and (3) establishing an inter-agency workgroup to discuss best practices.
Klass, Alexandra B.	<i>Eminent Domain Law as Climate Policy</i>	2020 WIS. L. REV. 49 <a href="http://repository.law.wisc.edu/suwlaw/media/303591">http://repository.law.wisc.edu/suwlaw/media/303591</a>	Climate Change	States that adopt aggressive clean energy laws should simultaneously reform their eminent domain laws—by reducing or eliminating eminent domain rights for fossil fuel projects and expanding eminent domain rights for clean energy projects—to disincentivize fossil fuel energy projects and promote clean energy projects.

Author	Title	Citation and URL	Topic	The Big Idea
Kousky, Carolyn, and Sarah Light	<i>Insuring Nature</i>	69 DUKE L.J. 323  <a href="https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3996&amp;context=dlij">https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3996&amp;context=dlij</a>	Governance/ Climate Change	Insurance can be a valuable instrument to promote ecosystem restoration and conservation in situations in which: (1) a party has an insurable interest, (2) parties are willing to pay the premium associated with insurance, (3) the ecosystem is threatened by random severe peril, (4) the ecosystem can be restored by action funded by an immediate infusion of post-disaster cash, and (5) insurance is cost-effective compared to other mechanisms.
Lee, Charles	<i>A Game Changer in the Making? Lessons From States Advancing Environmental Justice Through Mapping and Cumulative Impact Strategies</i>	50 ELR 10203 (Mar. 2020)  <a href="https://heinonline.org/hol/landingpage?handle=hein.journals/elrna50&amp;div=29&amp;id=&amp;page=">https://heinonline.org/hol/landingpage?handle=hein.journals/elrna50&amp;div=29&amp;id=&amp;page=</a>	Governance	CalEPA and EPA's successful environmental justice mapping tools, which use quantitative data sets to identify and characterize vulnerable communities disproportionately burdened by multiple pollution sources, provide an easily replicable road map for states and localities looking to incorporate environmental justice concerns into public policy by systematically devoting resources of scale to overburdened and vulnerable communities, an imperative now being championed by the new Biden Administration, and addressing land use planning, facility siting, and permitting issues.
Leonard III, Louis G.	<i>Under the Radar: A Coherent System of Climate Governance, Driven by Business</i>	50 ELR 10546 (July 2020)  <a href="https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3598219">https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3598219</a>	Governance/ Climate Change	Private efforts to address climate change constitute an effective governance system that can circumvent political polarization, while delivering results aligned with science-based emissions trajectories, if stakeholders: (a) advance a collective research agenda aligned with high-level and sector-based road maps; (b) explore how to ensure accountability; (c) foster sustainable funding and business models; and (d) design federal policies that accelerate private actions.
Macey, Joshua C.	<i>Zombie Energy Laws</i>	73 VAND. L. REV. 1077  <a href="https://bit.ly/3kM81XI">https://bit.ly/3kM81XI</a>	Energy/ Climate Change	Rules designed to protect consumers in the public utility era are being used to protect incumbents and hamstring decarbonization efforts in restructured energy markets and, therefore, regulators should prohibit vertically integrated utilities from using state ratemaking proceedings to recover losses their generators incur in wholesale electricity markets, ease restrictive certificate of public convenience and necessity laws to support additional energy infrastructure, and abandon the filed rate doctrine.
Miller, D. Lee, and Ryke Longest	<i>Reconciling Environmental Justice With Climate Change Mitigation: A Case Study of NC Swine CAFOs</i>	21 VT. J. ENV'T L. 523  <a href="http://vjel.vermontlaw.edu/files/2020/05/Miller_Final.pdf">http://vjel.vermontlaw.edu/files/2020/05/Miller_Final.pdf</a>	Governance/ Climate Change	North Carolina should use permitting, enforcement agreements, and/or legislation to require corporate CAFO operators—which have long resisted efforts to address harmful farming practices that disproportionately impact the health of neighboring communities of color—to use profits from new swine waste biogas production to install long-promised clean waste treatment technologies.
Pidot, Justin R.	<i>Contingent Delisting</i>	91 U. COLO. L. REV. 649  <a href="http://lawreview.colorado.edu/wp-content/uploads/2020/02/Pidot_Final.pdf">http://lawreview.colorado.edu/wp-content/uploads/2020/02/Pidot_Final.pdf</a>	Wildlife	To address both wildlife conservation and economic interests, the Fish and Wildlife Service should implement an Endangered Species Act contingent delisting option that would render certain listings dormant, return jurisdiction to the states, but allow federal intervention if species' conditions deteriorate.

Author	Title	Citation and URL	Topic	The Big Idea
Ruple, John C., and Kayla M. Race	<i>Measuring the NEPA Litigation Burden: A Review of 1,499 Federal Court Cases</i>	50 ENV'T L. 479 <a href="https://law.lclark.edu/live/files/30163-50-2-ruple">https://law.lclark.edu/live/files/30163-50-2-ruple</a>	Governance	Based on a quantitative study of 1,499 federal cases finding that the NEPA litigation burden is overstated, improvements to the NEPA process (1) should include standardized and more robust NEPA document collection across all agencies; and (2) should not include deadlines and page limits for EISs, as expedited analyses more frequently result in litigation and raise questions of whether the agency took a sufficiently "hard look."
Schanzenbach, Max M., and Robert H. Sitkoff	<i>Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee</i>	72 STAN. L. REV. 381 <a href="https://stanford.io/3mNj7vQ">https://stanford.io/3mNj7vQ</a>	Governance	Under American trust fiduciary law, a trustee may engage in ESG investing if: (1) the trustee reasonably concludes that ESG investing will benefit the beneficiary by improving risk-adjusted returns and the trustee's exclusive motive for such investing is to obtain this direct benefit; or (2) for purposes other than improving risk-adjusted returns but only to a limited extent and if such purposes are authorized by the terms of the trust or by the beneficiaries.
Slobodian, Lydia	<i>Defending the Future: Intergenerational Equity in Climate Litigation</i>	32 GEO. ENV'T L. REV. 569 <a href="https://bit.ly/2JbEpF1">https://bit.ly/2JbEpF1</a>	Climate Change	Incorporating the concept of "intergenerational equity" into established legal doctrine about fundamental rights and the public trust can serve as a meaningful tool for rhetorically framing climate change litigation brought on behalf of current and future generations, thereby shifting international legal paradigms regarding obligations and remedies.
Sourgens, Frédéric G.	Geo-Markets	38 VA. ENV'T L.J. 58 <a href="http://www.velj.org/uploads/1/2/7/0/12706894/38.1_sourgens_final_formatted.pdf">http://www.velj.org/uploads/1/2/7/0/12706894/38.1_sourgens_final_formatted.pdf</a>	Climate Change	Geomarkets, in which government issuers pay a guaranteed price per ton of GHG "produced" and holders of freely transferable licenses agree to a GHG removal quota, would (1) address the total accumulation of atmospheric GHGs; (2) provide capital with which governments can finance additional market mitigation efforts; and (3) redistribute how the costs of net reductions in GHG emissions are borne to buyout and overcome reliance on fossil fuel infrastructures—these markets should also be integrated with a solar radiation management market as a stop gap measure against worst-case climate change scenarios.
Van Loo, Rory	<i>The New Gatekeepers: Private Firms as Public Enforcers</i>	106 VA. L. REV. 467 <a href="https://www.virginialawreview.org/sites/virginialawreview.org/files/Van-Loo_Book.pdf">https://www.virginialawreview.org/sites/virginialawreview.org/files/Van-Loo_Book.pdf</a>	Governance	The regulatory state has increasingly conscripted large companies to become "enforcer-firms" to fill regulatory gaps left by resource-limited regulatory agencies with less-sophisticated industry knowledge, but the role of enforcer-firms should be carefully designed—whether firms are drafted into a rulemaking or enforcement role—to ensure that the enforcer-firms are accountable to the public and provide adequate transparency.
Webb, Romany M.	<i>Climate Change, FERC, and Natural Gas Pipelines: The Legal Basis for Considering Greenhouse Gas Emissions Under Section 7 of the Natural Gas Act</i>	28 N.Y.U. ENV'T L.J. 179 <a href="https://bit.ly/34PE6IE">https://bit.ly/34PE6IE</a>	Energy/ Climate Change	In evaluating whether new pipelines serve public convenience and necessity, the Federal Energy Regulatory Commission (FERC) reports that it considers both environmental and economic factors; however, data analysis of approvals between 2014-2018 shows that FERC frequently justifies certification decisions solely on economic grounds, which is a violation of §7 of the Natural Gas Act—going forward, FERC must be satisfied that the economic benefits outweigh potential climate change and other environmental impacts in approving new pipelines.

Author	Title	Citation and URL	Topic	The Big Idea
Welton, Shelley	<i>Decarbonization in Democracy</i>	67 UCLA L. REV. 56 <a href="https://www.uclalawreview.org/wp-content/uploads/securepdfs/2020/07/Welton-67-1.pdf">https://www.uclalawreview.org/wp-content/uploads/securepdfs/2020/07/Welton-67-1.pdf</a>	Energy/ Climate Change	Scholars and policymakers have underestimated the ways in which more citizen engagement might strengthen, not weaken, climate change policies, through measures including: (1) requiring utilities to report on citizen preferences in their integrated resource plans, and (2) putting more control over energy sourcing decisions in the hands of local communities.
Wyman, Katrina M., and Danielle Spiegel-Feld	<i>The Urban Environmental Renaissance</i>	108 CAL. L. REV. 305 <a href="https://bit.ly/35LQUyM">https://bit.ly/35LQUyM</a>	Governance	Cities have emerged as leaders in the development of environmental policies, but face obstacles to achieving their goals, such as the pervasive threat of preemption and limits upon their taxation powers, that could be reduced if (1) cities frame environmental pricing regulations as fees, not taxes; (2) state constitutional amendments and legislation allocate greater taxation powers to local jurisdictions; and (3) federal courts take a more discerning approach to interpreting the preemptive force of federal environmental statute.