

FOREWORD

FROM DNA TO PVC: THE “EVERYTHING” POLICY OF CLIMATE CHANGE

VICTOR B. FLATT †

This issue of the *Wake Forest Journal of Law & Policy* is devoted to climate change, and there are few topics more important to our future laws and policies. Appropriately, the issue’s writers move beyond traditional environmental discussion to reach both broadly and practically. We move from the law’s DNA to the rough and tumble world of controversial executive and administrative action, finally to the wide realization that climate change must be addressed beyond the context of the environment, through our energy and other policies as well. Bringing cohesion to such a big and important topic is difficult, and certainly one issue of one law journal cannot do it all. That said, this issue is quite comprehensive in its breadth and its specificity, and I hope that there will be avid readers and listeners in government and beyond.

The breadth of this issue can be measured and seen in Professor Gerald Torres and Nathan Bellinger’s contribution: *The Public Trust: The Law’s DNA*.¹ In this article, they attempt to situate climate change within something even larger and more important: our laws and the relation of the governing to the governed. In so doing they issue a challenge to our government to care for its citizens as required, and propose a more activist form of the

† Victor B. Flatt is the Tom and Elizabeth Taft Distinguished Professor of Environmental Law, and the Director of the Center for Law, Environment, Adaptation, and Resources (CLEAR) at the University of North Carolina, Chapel Hill. The author would like to thank the editors of the *Wake Forest Journal of Law & Policy* for their timely issue, and the opportunity to be a part of this discussion.

1. Gerald Torres & Nathan Bellinger, *The Public Trust: The Law’s DNA*, 4 WAKE FOREST J.L. & POL’Y 281 (2014).

“public trust” doctrine. These authors start with the very important proposition that our entire world depends on the natural environment in which our relationships and institutions evolved.² This simple but profound idea is important because it tells us that major changes in our natural environment are not just restricted to environmental policy, but to all policy. As I noted in an article on using law as a framework for climate change adaptation: “Any changes in the natural environment call into question the societal and institutional agreements that are based in part on—or in—the natural environment.”³

But Professor Torres and Mr. Bellinger do more than just assert this importance. They note that once this link is acknowledged, it implicates the important public trust doctrine, which asserts that the government must manage the public’s resources for the benefit of the public, not just now, but for all time.⁴ This of course suggests that the government has an important responsibility to future generations that goes beyond determining the proper discount rate. Explicitly, this is contra to the practice of cost-benefit analysis, at least in some circumstances, an important point made by the authors, with implications of its own.⁵

There have been very astute articles recently discussing the possibility of using the public trust doctrine as a vehicle for addressing climate change.⁶ These are exciting ideas and important tools in our arsenal of necessary responses. But by situating the environment as the basis for our entire society, and coupling that with the public trust, Torres and Bellinger call upon it as more than a tool to address climate change. The implication is that public trust, thus invigorated, can be a command for government response across the board for severe environmental impacts to our world.

2. *See id.* at 281–85.

3. Victor B. Flatt, *Adapting Laws for a Changing World: A Systemic Approach to Climate Change Adaptation*, 64 FLA. L. REV. 269, 273 (2012).

4. *See* Torres & Bellinger, *supra* note 1, at 286–87.

5. *See id.* at 285.

6. Mary Christina Wood, *Advancing the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations (Part I): Ecological Realism and the Need for a Paradigm Shift*, 39 ENVTL. L. 43, 45–46 (2009); *see also* David Takacs, *The Public Trust Doctrine, Environmental Human Rights, and the Future of Private Property*, 16 N.Y.U. ENVTL. L.J. 711, 711–12 (2008).

While I do not yet know whether courts will take the leap that they are invited to do here, Torres and Bellinger point out how they could do so.⁷ Though one could consider the idea revolutionary, it bears a resemblance to the reinvigoration of the public trust doctrine in modern times. Had it not been for the scaffolding on public trust put forth by the recently deceased Joseph Sax,⁸ the implications of much of our history, particularly from the now widely-cited *Illinois Railroad*⁹ case, might have been lost.

That earlier turn to the public trust also provides support for the next step as outlined by Torres and Bellinger. When Joseph Sax called for the public trust as a way for the government to protect the environment, he was doing so at a time when the degradation of the environment was reaching new heights. Perhaps we did not call on the public trust earlier (except in the specific circumstances of government alienation of resources) because our public assets were not in danger of being lost. Similarly, climate change shows us a new threat, not only a possible danger to our public assets now, but a danger for all future societies that may not be reparable. This bigger threat suggests why Torres and Bellinger's call for an activist public trust doctrine is timely. The law's DNA is there, it springs into action when necessary, and perhaps it has never been more necessary.

Robert Means' contribution to this issue, *The Climate Policy Landscape*, shows just how necessary such a reinvigoration of the public trust is.¹⁰ He describes our ongoing woeful political response to the threat of climate change, and in particular notes the paralysis of the federal legislative branch in responding to what is a critical problem.¹¹ As others have noted before him, this lack of legislative action has created a situation in which the executive branch has sought to respond and do what it is able to

7. Torres & Bellinger, *supra* note 1, at 310–17.

8. See Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971).

9. Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387 (1892).

10. Robert Means, *The Climate Policy Landscape*, 4 WAKE FOREST J.L. & POL'Y 319 (2014).

11. *Id.* at 321–27.

in addressing the climate change threat.¹² In his excellent review of what actions have been done and could be done, Professor Means makes two excellent points. First, simply because we are working through the executive branch does not mean that we are free from political currents around climate change.¹³ And second, the executive branch may not be able to do all that is necessary.¹⁴

Surprisingly, given the intense discussion of the Environmental Protection Agency's ("EPA's") powers to regulate climate change under the Clean Air Act ("CAA"), many of our colleagues, myself included, have ignored the political peril of a hostile Congress and President that may be only two years away. This suggests that, to the extent that the EPA is going to try and replicate an efficient cap-and-trade system under the CAA's Section 111(d),¹⁵ they will have to move fast—faster in fact than we have seen so far. Not only do rules for existing electricity generating units need to be promulgated, rules for other sources would have to come as well. And even those optimistic about the EPA's power to create a nationwide, economy-wide cap-and-trade system under the CAA have to realize that they will probably not jump to that solution in the first iteration of rules.¹⁶ Additionally, even in the best of circumstances with aggressive pushes, EPA regulation will put us years behind where we could be with direct legislative action.

This relates to Professor Means' second point: that executive branch action will not be sufficient to address the problem that we face. Part of his concern is whether the EPA can even get to economy-wide cap-and-trade at all.¹⁷ Even though I believe that this is within the EPA's power, his broader point is still well taken. Even if the EPA could manage to create an economy-wide cap-and-trade system for most of the economy, much more

12. See generally Symposium, *The Promise and Limits of Presidential Action on Climate Change*, 32 VA. ENVTL. L.J. (forthcoming 2014) (discussing the implications of a purely executive approach to climate change in light of legislative inaction).

13. Means, *supra* note 10, at 337.

14. *Id.* at 341.

15. See Clean Air Act, 42 U.S.C. § 7411(d) (2006).

16. For one thoughtful discussion of the legality and prospects of an economy wide cap and trade system under the Clean Air Act, Section 111(d), see JONAS MONAST ET AL., NICHOLAS INST. FOR ENVTL. POLICY SOLUTIONS, REGULATING CARBON DIOXIDE UNDER SECTION 111(d) OF THE CLEAN AIR ACT: OPTIONS, LIMITS, AND IMPACTS (2013), available at http://www.nicholasinstitute.duke.edu/sites/default/files/publications/ni_r_13-01.pdf.

17. Means, *supra* note 10, at 344–45.

has to be done moving forward. More emissions must be cut aggressively, and we still must have worldwide cooperation if true progress is to be made. Whatever we may hope for, unless we can muster a political response at our legislative level, such cooperation will be extremely difficult, essentially dooming or putting a significant drag on international effectiveness.¹⁸

In *Vanishing Power Lines and Emerging Distributed Generation*, Professor Gina Warren also situates her discussion in the actions of the executive branch, but calls out for political answers as well.¹⁹ In this case, however, the needed policy responses are not just “environmental,” but in other spheres, particularly with respect to energy. She correctly notes that much of what can pass for progress on climate policy has come and could come from “energy” policy, but that our current dominant paradigm for electricity generation and distribution works counter to that goal.²⁰ In particular, she notes what large progress could be made in climate change mitigation in the electricity sector by distributed generation and micro-grids.²¹ She brings to the fore important policies that are just now getting national attention—the importance of distributed energy for multiple policy purposes, including climate change, and the built in resistance created by the current electricity market model.²² She, like others, correctly notes that this will have to change for substantial progress in both the use of renewables and the increase in energy efficiency necessary to make a dent in climate change.²³ Distributed generation has a higher efficiency rate than more dispersed generation, and that higher efficiency rate, plus other benefits, also increases the cost effectiveness of these alternative energies, particularly solar photovoltaics. But a move away from centralized electricity production requires major changes in legal requirements and a re-examination of underlying policy. Whose interests are being served by centralized electricity production?

18. Victor B. Flatt, *Taking the Legislative Temperature: Which Federal Climate Change Legislative Proposal is “Best”?*, 102 NW. U. L. REV. 123, 130–31 (2007).

19. Gina S. Warren, *Vanishing Power Lines and Emerging Distributed Generation*, 4 WAKE FOREST J.L. & POL’Y 347 (2014).

20. *Id.* at 348.

21. *Id.* at 365–66.

22. *Id.* at 362–63.

23. *Id.* at 395–96; see also Joseph Tomain, *The Challenge of a New Electricity Model*, 38 NOVA L. REV. (forthcoming 2014) (draft copy on file with author).

Does increasing micro-generation threaten electricity stability, or only the model that relies on massive generation and distribution?

Unlike others who have focused on this conflict, Professor Warren boldly suggests that instead of trying to accommodate both models, we instead try to move all the way to this newer micro-generation model.²⁴ Certainly, retaining a mixed model does create the interface problems that we are now dealing with. In fact, the one concern I have with her policy prescription is how we can have both the new micro-grids that do not have to be load and peak balanced, while still having redundancy that must be made up of some interconnected systems.

I also take more from Professor Warren's contribution than this main thesis. Undergirding her article is the fact that climate policy implicates so much more than just environmental effects. It also is intimately connected with energy policy and economic development. To the extent that we wish to address climate and its effects, we have to broaden our policy discussion to the wider world. This brings us full circle to Professor Torres and Mr. Bellinger, and again underscores the importance of this issue.

Climate policy is not only an environmental issue. It is an "everything" issue. Its very "bigness" is forcing us to examine policy connections that we have managed to "silo" for years.²⁵ It must break out of its environmental ghetto. The *Wake Forest Journal of Law & Policy*, this issue, and its authors and editors, move us in that important direction. We must keep tackling climate as an everything issue if we are to make progress against its harms.

24. Warren, *supra* note 19, at 362–63.

25. Victor Flatt & Heather Payne, *Not One Without the Other: The Importance of Integrating Environment, Energy, Climate, and Economic Policy*, 42 ENVTL. L. (forthcoming 2014).