

CLIMATE CHANGE LEGISLATION IN CONTEXT

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Congress is finally taking climate change seriously, or at the very least is engaged in a flurry of activity regarding greenhouse gas emissions. The Lieberman-Warner Climate Security Act made it out of the Senate Environment and Public Works Committee, and vigorous debates are taking place over the appropriate regulatory approach to climate change and energy.¹ This Essay considers the context of that statutory conversation. Namely, how does the possibility of U.S. legislative action fit within a broader picture of transnational climate change governance?

Professor Victor Flatt’s lead piece on climate change legislation in this colloquy provides a thoughtful analysis of the many pending federal climate change legislative proposals, including his assessment of what is “best.” He provides a detailed description of the pending proposals, as well as a normative discussion of legislative goals and means of attaining them. In the course of his analysis, he references both international negotiations and smaller scale regulation. He indicates that U.S. legislation should be developed in a way that would be compatible with—but not wait for—possible future international agreements and also not block smaller-scale efforts.²

This Essay builds upon Professor Flatt’s thoughtful analysis of the pending legislation by putting it in the broader context of developments regarding climate change. In contrast to Professor Flatt’s emphasis on specific legislative proposals, this Essay provides a contextualized, normative analysis. In particular, I focus on three main types of pressures on the legislation. First, the legislation faces vertical pressures from “above” (interna-

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¹ See Press Release, U.S. Senate Comm. on Env’t and Pub. Works, Boxer says Passage of Historic Global Warming Bill “Puts the Wind at Our Backs” (Dec. 5, 2007), available at http://epw.senate.gov/public/index.cfm?FuseAction=PressRoom.PressReleases&ContentRecord_id=ACF879B0-802A-23AD-49C5-7B91482C1DD1 (link).

² See Victor B. Flatt, *Taking the Legislative Temperature: Which Legislative Proposal is “Best”?*, 102 NW. U. L. REV. COLLOQUY 123 (2007), <http://colloquy.law.northwestern.edu/main/2007/12/taking-the-legi.html> (link).

tional negotiations for the post-2012 regime) and “below” (state and local efforts). Second, the legislation is influenced horizontally by activity in the other two branches of the U.S. government, namely climate change litigation and executive policy, as well as advocacy efforts by a range of nongovernmental actors. Moreover, many interactions that ultimately influence legislation are simultaneously horizontal and vertical, such as when states and cities use federal courts to push executive branch agencies to regulate.³ Finally, and perhaps most importantly given the looming Presidential election, the shifting public awareness of climate change creates an impetus for Congress to take meaningful action or at least to appear to do so.

Together, these interactions imbue this legislation with significance beyond the specifics of its direct impacts. Namely, the potential legislation forms part of a broader, complex regulatory map. The viability and impact of legislative proposals depend on how a range of other people and entities behave, and in turn, the proposals influence their behavior. In so doing, the legislation can serve in not only a norm-implementing role, but also norm-generating one.⁴ Through exploring the context of climate change legislation, this Essay thus argues for an integrated approach to transnational climate regulation.

I. VERTICAL PRESSURES ON LEGISLATIVE ACTION

Professor Flatt provides a version of “best” that allows legislative efforts to move forward in tandem with initiatives at other levels of governance. He explains that the statutory regime should neither wait for agreement on the 2012 replacement for the Kyoto Protocol nor develop in a way that would be incompatible with its likely targets.⁵ Similarly, Flatt acknowledges the importance of subnational efforts on climate change, and urges that the legislation not be structured in a manner that preempts those innovative efforts.⁶

I agree with Professor Flatt’s analysis, but would like to develop it further through reference to geography⁷ and, more specifically, to issues of

³ I term these simultaneous horizontal and vertical interactions “diagonal” in a draft article on the appropriate scale of climate regulation. See Hari M. Osofsky, *Is Climate Change an “International” Legal Problem?: Towards Diagonal Regulatory Strategies* (draft manuscript on file with author) [hereinafter Osofsky, *Is Climate Change an “International” Legal Problem?*]. For an in-depth analysis of “horizontal” and “vertical” interactions as part of transgovernmental decisionmaking, see ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004).

⁴ For an interesting analysis of the expressivist function of lawmaking—its role in social norm generation—in the criminal law context, see MARK A. DRUMBL, *ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW* 173 (2007).

⁵ See Flatt, *supra* note 2, at 131–32.

⁶ See *id.* at 134.

⁷ Geography is a discipline that studies the interrelationship of place, space, and scale over time. Geography’s inclusion of both the hard and social sciences has been a source of both strength and weak-

regulatory scale. Climate change is a multiscale problem that demands multiscale solutions.⁸ In other words, both emissions and impacts take place at personal, local, state, national, and international levels, and regulation at the national level likely cannot address all of these aspects effectively. Legislative proposals should include the flexibility to adapt to vertical pressures because the problem cannot be regulated at only one level of governance, even a very powerful national one.⁹

Although there has been broad acknowledgment across the political spectrum of the value of addressing climate change at a global scale, more skepticism exists about state and local initiatives. Some argue that the problem is too large both spatially and temporally to manage at smaller levels of governance.¹⁰ These types of antiregulatory arguments are potentially dangerous, whether made in the context of legislation or litigation for three primary reasons.¹¹

First, neither international nor national efforts seem likely to go far enough to get this problem under control,¹² so smaller scale efforts are needed to spur innovation and action.¹³ If the legislation blocks these efforts, greater emissions, with their troubling consequences, may result.

Second, however the balance between centralization and decentralization of governmental power is struck in this area of law, effective climate policy should provide opportunities to draw from state and local expertise and core competences. City governments, for example, will have insights into how streets should be organized in order to decrease vehicle miles trav-

ness for that discipline in the U.S. academy. See Alexander B. Murphy, *Geography's Place in Higher Education in the United States*, 31 J. GEOGRAPHY IN HIGHER EDUC. 121, 122–23 (2007).

⁸ See Osofsky, *Is Climate Change an "International" Legal Problem?*, *supra* note 3; see also Hari M. Osofsky, *The Geography of Climate Change Litigation: Implications for Transnational Regulatory Governance*, 83 WASH. U. L.Q. 1789 (2005) [hereinafter Osofsky, *The Geography of Climate Change Litigation*]. For a comparative analysis of the concept of scale in the geography and political ecology literatures, see Nathan F. Sayre, *Ecological and Geographical Scale: Parallels and Potential for Integration*, 29 PROGRESS IN HUM. GEOGRAPHY 276 (2005).

⁹ See Osofsky, *Is Climate Change an "International" Legal Problem?*, *supra* note 3.

¹⁰ See, e.g., Jonathan B. Wiener, *Think Globally, Act Globally: The Limits of Local Climate Policies*, 155 U. PENN. L. REV. 1961, 1962 (2007) (arguing that "subnational state-level action is not the best way to combat global climate change").

¹¹ My new draft article explores these concerns, addressed briefly below, in more depth. See Osofsky, *Is Climate Change an "International" Legal Problem?*, *supra* note 3.

¹² See H-Holger Rogner, et al, *Introduction to INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, FOURTH ASSESSMENT REPORT, CLIMATE CHANGE 2007: MITIGATION* 95, 109–12 (B. Metz et al eds., 2007), available at <http://www.ipcc.ch/pdf/assessment-report/ar4/wg3/ar4-wg3-chapter1.pdf>.

¹³ For examples of some recent analyses of the benefits and limitations of state and local climate initiatives, see Randall S. Abate, *Kyoto or Not, Here We Come: The Promise and Perils of the Piecemeal Approach to Climate Change Regulation in the United States*, 15 CORNELL J.L. & PUB. POL'Y 369 (2006); Hari M. Osofsky & Janet Koven Levit, *The Scale of Networks: Local Climate Change Coalitions*, 8 CHI. J. INT'L L. 409 (2008); Wiener, *supra* note 10.

eled most effectively and, more broadly, into the unique confluence of factors affecting their localities' regulatory environments.¹⁴

Finally, and most importantly, privileging larger-scale regulation potentially prevents holistic regulatory solutions necessary to manage cross-cutting problems.¹⁵ By acknowledging the national scale as only one level of governance at which climate regulation can take place,¹⁶ Congress will facilitate the creative policy development that climate change demands.

II. HORIZONTAL PRESSURES ON LEGISLATIVE ACTION

The horizontal pressures from the executive and judicial branches also deeply influence the legislative debate and the possibilities for achieving meaningful regulation. Our two-term presidency means that not only do the current congressional proposals occur in the context of the Bush Administration's longstanding recalcitrance on this issue—which is reflected in both macro-level White House statements and decisions and in micro-level agency decisionmaking—but also that Executive Branch policy soon will change, almost certainly in the direction of additional regulatory efforts. Each of the three most likely Presidential prospects—Hillary Clinton, John McCain, and Barack Obama—supports approaches to emissions regulation that go well beyond those of the Bush Administration.¹⁷

Although this electoral context initially appears to create a more positive environment for legislation, it more likely delays congressional action for at least another year. In order for statutes to be passed prior to the presidential election, they must either be acceptable to the Bush Admini-

¹⁴ For a discussion of the locally-specific ways in which effective urban climate policy evolves, see Osofsky & Levit, *supra* note 13 (comparing Portland and Tulsa); see also Robert B. McKinstry, Jr., *Laboratories for Local Solutions for Global Problems: State, Local and Private Leadership in Developing Strategies to Mitigate the Causes and Effects of Climate Change*, 12 PENN ST. ENVTL. L. REV. 15 (2004) (discussing state and local leadership on climate change). Gerald Frug and David Barron provide an insightful analysis of the complexities of the interface between localities and international law and institutions in Gerald E. Frug & David J. Barron, *International Local Government Law*, 38 URB. LAW. 1 (2006).

¹⁵ Climate change cuts across not only regulatory levels, but substantive areas of law. See Osofsky, *Is Climate Change an "International" Legal Problem?*, *supra* note 3.

¹⁶ For examples of analyses of the role of the national scale in transnational regulatory governance, see NEIL BRENNER, *NEW STATE SPACES: URBAN GOVERNANCE AND THE RESCALING OF STATEHOOD* (2004); Becky Mansfield, *Beyond Rescaling: Reintegrating the "National" as a Dimension of Scalar Relations*, 29 PROGRESS IN HUM. GEOGRAPHY 458 (2005); Alexander B. Murphy, *The Sovereign State System as Political-Territorial Ideal: Historical and Contemporary Considerations*, in *STATE SOVEREIGNTY AS SOCIAL CONSTRUCT* 81 (Thomas J. Biersteker & Cynthia Weber eds., 1996); Hari M. Osofsky, *The Geography of Justice Wormholes: Dilemmas from Property and Criminal Law*, 53 VILLANOVA L. REV. __ (forthcoming 2008).

¹⁷ See Kitty Bennett & Farhana Hossain, *The Presidential Candidates on Climate Change*, <http://politics.nytimes.com/election-guide/2008/issues/climate/index.html> (last visited Mar. 15, 2008) (link).

stration or have enough support to override a veto.¹⁸ Members of Congress who are also up for reelection may face competing pressures regarding their stance on climate change, and so far, the Senate and the House do not have a clear meeting of the minds.¹⁹ This horizontal pressure both serves as a slowing force and influences the details of the ultimate bills. Meanwhile, the problem of climate change will continue to worsen as candidates make speeches and sample local specialties.

Moreover, the increasing willingness of the judicial branch to engage climate change creates another complicated horizontal force influencing the legislative environment. The Supreme Court's decision in *Massachusetts v. EPA*,²⁰ though it bears upon executive agency decisionmaking directly, has been part of the conversation on Capitol Hill; it thus has both formal and informal horizontal influences on the other two branches of the federal government.²¹ In addition, major emitters—who play an important lobbying role—are engaged as plaintiffs and defendants in various pending suits. These suits range from disputing the appropriateness of regulation at local, state, and national levels to using nuisance law to target the automobile and power industries.²² Any version of the legislation will alter the litigation environment, which will in turn impact the overall efforts to regulate climate change in the United States.

As with the smaller-scale efforts discussed above, litigation plays a crucial role in the regulation of climate change and the legislation should not attempt to preempt access to courts too broadly. Rather, the statutory scheme should provide a clear basis for concerned individuals and organizations to address inadequate regulation by government and failures by major emitters to reduce their production of greenhouse gases. Such a structure will insure that litigation can continue to play its crucial role in the push and

¹⁸ This issue was analyzed in-depth during the session on *New Legislative Approaches* at the *Duke Environmental Law and Policy Forum Symposium: A Charged Atmosphere: The Future of U.S. Policy on Global Warming*, Nov. 16, 2007, <http://www.law.duke.edu/webcast/?match=DELFPF+Symposium> (last visited Mar. 15, 2008) (link).

¹⁹ See *id.*; see also Flatt, *supra* note 2, at 123–24.

²⁰ 127 S.Ct. 1438 (2007).

²¹ See, e.g., *Waxman to Introduce Moratorium on Approval of New Coal-Fired Power Plants*, Comm. on Oversight and Reform, U.S. House of Representatives, Nov. 8, 2007, <http://oversight.house.gov/story.asp?ID=1613> (last visited Mar. 15, 2008) (link) (“Rep. Henry A. Waxman announced at a congressional hearing with EPA Administrator Stephen Johnson that he will introduce legislation that establishes a moratorium on the approval of new coal-fired power plants under the Clean Air Act until EPA finalizes regulations to address the greenhouse gas emissions from these sources.”).

²² For analyses of these suits, see JOSEPH SMITH & DAVID SHEARMAN, *CLIMATE CHANGE LITIGATION: ANALYSING THE LAW, SCIENTIFIC EVIDENCE & IMPACTS ON THE ENVIRONMENT, HEALTH & PROPERTY* (2006); *ADJUDICATING CLIMATE CHANGE: SUB-NATIONAL, NATIONAL, AND SUPRA-NATIONAL APPROACHES* (William C.G. Burns & Hari M. Osofsky, eds.) (forthcoming 2008, Cambridge University Press).

pull of the complex formal and informal regulatory dance over climate change.²³

Furthermore, these horizontal forces have vertical dimensions, and vice versa. As elections involve individuals and communities in political decisionmaking, they become part of a vertical conversation. When concerned organizations and corporations use litigation to push for or against regulatory action at different levels of government, they influence the multiscale dialogue. These choices over climate change that shape the legislative environment are both imbedded in the context of specific places and influenced by larger political and economic forces.

III. SOCIOCULTURAL PRESSURES ON LEGISLATIVE ACTION

This formal and informal regulatory dance is deeply shaped by the sociocultural discourse over climate change. The awarding of a Nobel Peace Prize to Al Gore and the Intergovernmental Panel on Climate Change (IPCC) symbolizes the increased focus on this problem.²⁴ Opinion polls show a growing public recognition of and concern with the problem of climate change,²⁵ and the legal academic world has seen an explosion in the past two years of public conversation and scholarly discourse over this issue,²⁶ as exemplified by this colloquy.

This sudden interest and activity, like the election environment, probably will have a mixed impact on the proposed legislation. The science that suddenly captivates people is not new; the recent Fourth IPCC Assessment—the most widely recognized compilation of the state of climate science and policy responses to the problem—synthesizes studies by leading

²³ I have explored these regulatory dynamics from a law and geography perspective in previous articles. See Hari M Osofsky, *The Geography of Climate Change Litigation Part II: Narratives of Massachusetts v. EPA*, 8 CHI. J. INT'L L. 573 (2008); Osofsky, *The Geography of Climate Change Litigation*, *supra* note 8. For an analysis of how state-initiated litigation can help address federal regulatory gaps, see Kirsten H. Engel, *Harmonizing Regulatory and Litigation Approaches to Climate Change Mitigation: Incorporating Tradable Emissions Offsets into Common Law Remedies*, 155 U. PA. L. REV. 1563 (2007).

²⁴ See Nobel Peace Prize 2007, http://nobelprize.org/nobel_prizes/peace/laureates/2007/, (last visited Mar. 15, 2008) (link).

²⁵ See Juliet Eilperin & Jon Cohen, *Growing Number of Americans See Warming as Leading Threat*, WASH. POST, Apr. 20, 2007, at A20 (link); see also The Chicago Council on Public Affairs, *Poll Finds Worldwide Agreement that Climate Change is a Threat* (Mar. 2007), available at http://www.worldpublicopinion.org/pipa/pdf/mar07/CCGA+_ClimateChange_article.pdf (link) (an international public opinion poll finding general agreement that climate change is a significant); cf. Cass R. Sunstein, *On the Divergent American Reactions to Terrorism and Climate Change*, 107 COLUM. L. REV. 503 (2007) (comparing public opinion regarding terrorism and climate change prior to the increased public focus on climate change that has taken place over the past several months).

²⁶ See, e.g., Cap and Trade as a Tool for Climate Change, <http://www.law.berkeley.edu/centers/envirolaw/capandtrade/index.html> (Feb. 22–23, 2007, University of California, Berkeley at Boalt Hall School of Law); Stanford Environmental Law Journal and Stanford Journal of International Law, Spring 2007 Symposium: Climate Change Liability and the Allocation of Risk, <http://sjil.stanford.edu/climatechange.shtml> (Feb. 24, 2007).

scientists and provides policy summaries, which reflect stances that those involved in crafting it are willing to take publicly.²⁷ Public opinion polling shows increasing concern with climate change, but not necessarily the will to make the hard choices necessary to get this problem under control.²⁸ Even the most aggressive legislative proposals pending in Congress do not go as far as many scientists suggest is necessary to mitigate the worst impacts.²⁹ The public's desire to do something without a real cognizance of what addressing climate change would entail does not bode well for fostering the political will to pass legislation that would help to steer the world away from major impacts.

As Congress and commentators debate the specifics of legislative proposals, the interaction between sociocultural forces and political decisions shapes what is possible. The public's view of the problem influences how far politicians dependent on an election cycle are willing to go, and Congress's approach to the problem in turn impacts public opinion. And yet all of this interaction occurs against the backdrop of a multiscale ecological phenomenon we do not fully understand. Whether or not people are willing to pass legislation that helps to control future emissions more substantially, the physical climate continues to evolve at multiple scales in ways that current and future generations will have to navigate.

IV. CONCLUDING REFLECTIONS

Returning to the question of "best" that Professor Flatt raised, my view is that the broader context in which legislative proposals occur suggests cause for guarded optimism. National-level legislation, even in a major emitter like the United States, cannot solve the problem of climate change. Current and future proposals will always be buffeted by international negotiations and smaller-scale land use policy choices, executive and judicial decisionmaking, and the broader sociocultural discourse over this problem.

But even in this context, our national-level legislative choices matter deeply. From a practical perspective, as Professor Flatt analyzed, they have the potential to reduce U.S. greenhouse gas emissions substantially and, in the process, significantly bring down the global total.³⁰ As part of transna-

²⁷ See, e.g., INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, FOURTH ASSESSMENT REPORT, CLIMATE CHANGE 2007: THE PHYSICAL SCIENCE BASIS OF CLIMATE CHANGE, FRONT MATTER i, v (2007), available at http://ipcc-wg1.ucar.edu/wg1/Report/AR4WG1_Print_FrontMatter.pdf (link) ("The IPCC does not conduct new research. Instead, its mandate is to make policy-relevant—as opposed to policy-prescriptive—assessments of the existing worldwide literature on the scientific, technical, and socioeconomic aspects of climate change."). For analyses of the Fourth IPCC Report and the state of climate science, see, for example, John Bohannon, *IPCC Report Lays Out Options for Taming Greenhouse Gases*, 316 SCIENCE 781, 812 (2007) (link); Jim Giles, *Special Report: From Words to Action*, 445 NATURE 567, 578 (2007) (link).

²⁸ For analyses of what reductions are necessary, see sources listed *supra* note 13.

²⁹ See sources listed *supra* note 12.

³⁰ See Flatt, *supra* note 2, at 131–32.

tional regulation of climate change, they are arguably even more critical. During his announcement of the decision not to participate in the Kyoto Protocol, President Bush acknowledged that almost 20 percent of the world's human-made greenhouse gases originate from within this country's borders;³¹ furthermore, the United States' official climate action report from 2002 indicated that its emissions will rise by 42.7 percent between 2000 and 2020.³² This focus on legislative action, even if it does not bear fruit until after the 2008 elections, opens up the potential for a national-level policy in the United States that takes climate change more seriously. Such a policy—if constructed with sensitivity to vertical, horizontal, and sociocultural dynamics—may help to foster other regulatory progress; for example, it could help to support constructive international negotiations and dynamic local initiatives.

More broadly, this political and sociocultural context raises core questions about appropriate role of national-level, legislative governance in addressing climate change. For example, what aspects of climate change can be accomplished particularly well at the national scale? How should the legislative branch interact with the other forms of government to form U.S. policy on climate change? How should legislative efforts respond to the myriad of forces addressing global climate change? While Congress debates the specifics of legislative proposals, these questions need to shape the discourse. As the problem of climate change continues to worsen and a range of actors engage in formal and informal regulatory action, U.S. legislation should reflect the context in which it takes place.

³¹ President George W. Bush, Speech Discussing Global Climate Change (June 11, 2001), *available at* <http://www.whitehouse.gov/news/releases/2001/06/20010611-2.html> (link).

³² U.S. DEP'T OF STATE, UNITED STATES CLIMATE ACTION REPORT 2002 73 (2002), *available at* <http://unfccc.int/resource/docs/natc/usnc3.pdf> (link).