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Introduction: Climate Disruption and Governmental Action: Approaches, Obstacles, and Opportunities

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INTRODUCTION:

CLIMATE DISRUPTION AND GOVERNMENTAL ACTION: APPROACHES, OBSTACLES, AND OPPORTUNITIES

JOEL A. MINTZ*

On February 6th and 7th, 2014, Nova Southeastern University and the Center for Progressive Reform co-sponsored a symposium on *New Directions in Energy Law and Policy, Climate Disruption and Sea Level Rise*. The gathering—which was held in Fort Lauderdale, Florida—featured presentations by an outstanding interdisciplinary group of scientists, legal scholars, federal, state and local government officials, representatives of non-governmental organizations and others, along with thoughtful questions and comments from the audience. Preparation of a written law review article was not made a prerequisite to speaking at the symposium, and—primarily due to other professional commitments—most of those who spoke on symposium panels chose not to summarize or expand their oral comments in a written piece. Nonetheless, three distinguished, nationally prominent legal scholars—Professors David Driesen, Joseph Tomain, and Thomas McGarity—followed up by submitting the articles that comprise this important issue of the *Nova Law Review*. In this brief symposium introduction, I will summarize some of the key points advanced by each of the article authors, note two themes that are common to their pieces, and discuss a few of the implications of their perceptive work.

In *Phasing Out Fossil Fuels*, David Driesen advances a powerful case for a planned and reasonably rapid phase out of fossil fuels. Noting that carbon dioxide (“CO₂”) emissions account for fully eighty percent of all greenhouse gas emissions—both in the United States and globally—that once emitted CO₂ remains in the atmosphere for centuries, and that fossil fuels cause immense problems wholly apart from their impacts on climate, Driesen argues that the predicted and possible consequences of climate disruption are simply too serious to permit a very gradual shift to a carbon free economy.

Professor Driesen soundly rejects the theory that any phase out of fossil fuels should set emission targets or prices designed to equalize costs and benefits at the margins. He perceptively observes that cost-benefit analysis does not provide a useful guide to policy since the costs and benefits of particular mitigation measures cannot be quantified with precision; and it is morally unacceptable to refuse to prevent deaths in developing—and some developed—countries because prevention would be too costly. Instead,

Driesen calls for a focus on *distribution* of the costs of phasing out fossil fuels, including particularly the hardships this needed policy might create for individuals who are employed in the fossil fuels industry, and for energy consumers. He advocates the use of emission trading to phase out fossil fuels. He also suggests the enactment of an *environmental competition statute*—legislation that would allow facilities reducing their carbon emissions to collect the cost of their emission reductions from competitors with higher carbon emissions—as a spur to technological innovation in the control of CO₂.

With regard to the politics of phasing out fossil fuels, Professor Driesen advises environmental leaders to make the phasing out of fossil fuels part of a rhetorical strategy that prepares the American public for much more significant changes than are now politically feasible. However, he concedes that it is not possible for anybody to *prove* a view about what political strategy is best, and he views his own strategic recommendation as simply a starting point for further discussion.

In contrast with David Driesen's article, Professor Thomas McGarity's illuminating piece, *The Disruptive Politics of Climate Disruption*, focuses less on the normative question of what the energy policy approach of the United States *should* be, and far more on the sobering realities of national climate disruption politics. In a remarkably comprehensive, detailed, and well-documented way he describes five failed attempts by supporters of a federal program to reduce greenhouse gas emissions to move legislation through Congress. These include the Clinton administration's proposed BTU tax, Senator Jim Jeffords' four pollutant bill, the Lieberman-Warner proposal, and the Waxman-Markey and Kerry-Lieberman-Graham bills. In each instance, Professor McGarity demonstrates coordinated, well-funded, ideologically-driven campaigns—conducted by the business community, a small coterie of conservative funders, and various foundations and institutions that they created—that successfully forestalled the passage of climate disruption legislation.

McGarity carefully analyzes the lessons to be learned by environmental advocates from these successive legislative defeats. He observes that the political *infrastructures* that the business community has erected over the past thirty-five years have had a powerful influence on both public opinion and the sentiments of federal elected officials. Due to those efforts, America is now deeply divided on numerous issues—certainly including climate disruption; and many Americans are now persuaded that climate disruption is neither caused by humans nor a genuine threat, and that the government should not interfere in private economic arrangements. The business community has adeptly taken advantage of regional differences and made effective use of ginned up *grassroots* organizations. Moreover,

although they have experienced internal difficulties, business interests have generally remained unified in their political positions regarding climate disruption legislation.

McGarity notes that—like the general public—the two major national political parties are now substantially divided along ideological lines. While Democratic leaders in Congress have experienced great difficulty corraling enough votes to get mandatory climate disruption bills through committees and past floor votes, Republican congressional leaders have been able to persuade nearly all of their party’s members to vote against all such proposals as a bloc. Additionally, major environmental organizations supporting anti-climate disruption bills have been repeatedly *outgunned and outclassed* by the sophisticated, well-resourced efforts of lobbyists and public relations experts working to further the positions of industry. Furthermore, notwithstanding its profoundly harmful impacts, climate disruption is too gradual a process to create the sort of crisis atmosphere among the public that is likely to generate Congressional action.

Given these various considerations, Professor McGarity concludes that Congress is not likely to enact national anti-climate disruption legislation for some time to come. And even if such legislation somehow does emerge, it will probably contain a jumble of conflicting provisions that may not actually reduce greenhouse gas emissions in an effective way.

Unlike the Driesen and McGarity articles, Professor Joseph Tomain’s well-reasoned article concentrates on investor owned electric utility companies and state public utility commissions. He argues that the utilities must recognize the realities of enormous shifts in the electricity market, create new business models, and join with state regulators to create a new regulatory compact.

As Professor Tomain’s piece lucidly describes, the demand for centrally generated electricity has fallen very considerably since the early 1990s, and it is projected to decline much further in coming years. This trend is the result of a combination of factors, including competition from new technologies, increases in energy efficiency, lifestyle changes among energy consumers, and certain shifts in federal and state regulatory requirements. At the same time, electric utilities are now called upon to make significant new investments in order to upgrade the current grid, to develop and use new technologies, and to promote interconnections with renewable resources. To meet these new challenges, Tomain contends, a new set of regulatory principles is now urgently needed.

More specifically, Joseph Tomain proposes five new precepts as a general guide to state regulation of utilities. First, he writes, utilities should not be required to incur “stranded costs,” i.e. excess costs due to regulatory or policy changes that force utilities to lose customers. Simultaneously,

however, universal electric service must be maintained by the utilities. Third, traditional cost-of-service rulemaking should not be used to allow utilities to build coal-fired plants or projects based on nuclear power. Fourth, competition and the development of innovative energy technologies—including technologies friendly to distributed generation of energy and the development of solar, wind, and other renewable energy projects—must be encouraged. Finally, public utility commissions should encourage electric utilities to adopt new business models that are more in sync with a rapidly shifting electricity marketplace.

Professor Tomain argues for some significant departures from traditional ratemaking practices. He favors rate designs that base utility rates on factors other than the volume of electricity sales, such as the number of customers that a utility serves, and the sums that the utility has invested in smart grids, energy audits, smart meters, and the like. He also favors regular, mandatory reviews of the *prudence* of utility capital investments, and state regulatory assessments of the need for power, before investments are made in new large-scale utility construction projects.

Finally, Tomain urges investor-owned utilities to place their emphasis on distribution and customer service instead of on generating electricity. In his view, utilities should evolve into the managers of a modern infrastructure system. In the future, their focus should be on providing financial products for firms that wish to install distributed energy technology, develop and provide energy storage, and promote distributed generation and energy efficiency retrofits.

Although the three articles that form this symposium issue concern quite disparate aspects of the policy and politics of climate disruption, upon close examination two common themes are evident. First, each of the article authors either identifies or presumes a very clear need for a change in the status quo. Professor Driesen identifies a need for a reasonably rapid phasing out of fossil fuels at the national level and assays its implications. Professor Tomain urges a new regulatory regime and a new business model for electric utilities that responds to the realities of climate disruption. And, although his article is primarily historical and empirical, Professor McGarity also identifies a need for new legislation to curb climate disruption, writing that the impact of human greenhouse gas emissions “may well be the most profound environmental problem that the civilized world has ever encountered.”

Secondly, all three authors note the need for a meaningful *governmental* role in curbing climate disruption. Driesen takes the view that climate disruption poses *problems of coordination* that make it *unsolvable* without a significant government role; and he proposes profound changes in our national approach to energy policy. McGarity assesses the prospects for

national legislative change through the enactment of a federal statute to curb greenhouse gas emissions; and Tomain argues for new directions in state administrative regulation of electric utilities.

Beyond these similarities, the three fine articles in this symposium issue also imply some less obvious conclusions. Given the dismal prospects for the enactment of federal legislation to curb climate disruption demonstrated in Professor McGarity's piece, it may well be that those concerned with this grave and burgeoning threat should focus, to an increased extent, on pressing for policy changes among the *states*, rather than at the national level. Professor Tomain's recommendations, of course, already emphasize a need for regulatory reforms by state electric utility regulators and state legislatures. Although Professor Driesen's provocative energy policy recommendations would clearly be most effective on a national—if not an international—level, their adoption by state legislators and regulators, and environmental non-governmental organizations, would nonetheless count as a forward step toward a carbon free economy.

In addition, given the ongoing political obstacles to reforming governmental energy policies among some U.S. states and in the federal government, these symposium articles seem to imply a need for climate disruption opponents to concentrate more on persuading non-governmental actors to make helpful changes. Thus, for example, environmental advocates may wish to improve their relationship with the news media generally and with television weather reporters in particular. Much of what the public learns about disastrous climate disruption-related events is gleaned from the reports of television meteorologists. If weathercasters noted that particular severe droughts, floods, and cyclonic storms are consistent with well-supported scientific studies that predict an increase in human caused weather-related disasters—even though no individual weather event may be directly linked to climate disruption—public awareness of the perils of climate disruption may be significantly increased. Patient relationship-building with television weather reporters, and their editors and producers, might persuade some of them to adopt that progressive approach.

Anti-climate disruption advocates will also do well to *friend raise* among business enterprises that already recognize the acute dangers posed by global climate disruption. Even though few such companies have thus far been willing to break openly with the anti-regulation/anti-government positions espoused by the business community, over time some anti-climate disruption business leaders may find the courage to do so. Their political support would certainly be of benefit. Along the same lines, quiet discussions with leaders of electric utility companies might persuade a number of them to modernize their business models along the sensible lines recommended by Professor Tomain.

All in all, the outstanding articles contained in this symposium issue provide a rich sampling of the sorts of careful research, thorough analysis, and creative thought that is much needed in discussions of climate disruption and public energy policy. Each one is a valuable contribution to the field. I hope these top-notch symposium articles will provoke your thought, stir your conscience, and benefit your work.