

Notes

Introduction: Changing Law for a Changing Climate

DAVID TAKACS*

The Intergovernmental Panel on Climate Change’s 2014 definitive statement portends numerous, widespread, severe (and possibly catastrophic) risks climate change poses to human and nonhuman communities.¹ Temperatures will rise, storms will intensify, droughts will persist, pests will spread, pollinators will go extinct or lose synchronicity with the crops and wild plants they pollinate, and sea levels will rise. Meanwhile, human populations expand and move, exploiting more of the ecosystems upon which all human life depends. Climate change has already disrupted Earth’s functioning ecosystems and the human communities that depend on those ecosystems (that is, all of us), with further growth in greenhouse gas (“GHG”) emissions increasing the likelihood of “severe, pervasive, and irreversible impacts” sooner rather than later.²

All of us—including practicing and aspiring lawyers—ignore these threats at our own peril. In this issue of the *Hastings Law Journal*, three students pose creative yet pragmatic legal solutions, which, if realized, would help mitigate the buildup of greenhouse gases, or help adapt to the inevitable changes that climate change will bring.

In his optimistically titled *How Buildings Will Save the World: Using Building Energy Regulation and Energy Use Disclosure Requirements to Target Greenhouse Gas Emissions*, Rob Taboada notes that buildings account for thirty percent of U.S. GHG emissions—and

* Associate Professor, University of California Hastings College of Law.

1. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2014: IMPACTS, ADAPTATION, AND VULNERABILITY: SUMMARY FOR POLICYMAKERS: CONTRIBUTION OF WORKING GROUP II 11–25 (Christopher B. Field et al. eds., 2014), available at http://ipcc-wg2.gov/AR5/images/uploads/WG2AR5_SPM_FINAL.pdf.

2. *Id.* at 14; see Justin Gillis, *U.N. Draft Report Lists Unchecked Emissions’ Risks*, N.Y. TIMES, Aug. 27, 2014, at A3.

thus about eight percent of global GHG emissions. Taboada suggests that these are the “low-hanging fruit of energy policy”³: Curbing these particular emissions by making buildings more efficient energy users comprises one piece of the climate change mitigation puzzle. Taboada recommends pushing for state and local measures that would require developers to curb inefficient energy use in new buildings. He argues that supplementing best practice energy efficiency requirements with energy use disclosure requirements (with a corresponding private right of action for failure to disclose) could reduce building emissions by over twenty percent.⁴ Best of all, these reductions would save residents a significant amount of money, and have already gained support in the building industry.

Whose money is saved or squandered if public pension fund managers disinvest from fossil fuel companies? If we are to avoid the worst ravages of climate change, the majority of hydrocarbon-based fuels must stay in the ground. Those fuels thus represent “stranded assets”—resources whose potential economic value can never be realized. A growing international political movement seeks to shame portfolio managers into divesting from fossil fuel companies.

Drawing parallels to the anti-apartheid divestment campaign, in *Revisiting Divestment*, Nancy Schneider examines public pension plan managers’ duties of prudence and loyalty to determine whether, and under what circumstances, such managers potentially violate these duties when divesting to achieve social or environmental goals. Reviewing challenges to divestment during South Africa’s anti-apartheid efforts, Schneider finds that U.S. courts held that managers did not violate their fiduciary duties when they divested from South Africa; Schneider argues that the same is true if pension fund managers choose to disinvest portfolios from fossil fuel companies.⁵ Furthermore, she asserts, pension fund managers may violate their duties of prudence and loyalty if they *fail* to divest.⁶ If nations of the world enact legal reforms necessary to avoid catastrophic change, then *failing* to divest may be the fiduciary violation. As Schneider concludes, “pension plan managers who choose not to divest should take a close look at the risk fossil fuel assets pose to their portfolios.”⁷

We may find the will to leave those GHG-polluting “assets” in the ground (and divestment may help), and we may make our buildings more energy (and thus GHG) efficient; but nonetheless, the climate has begun

3. Rob Taboada, *How Buildings Will Save the World: Using Building Energy Regulation and Energy Use Disclosure Requirements to Target Greenhouse Gas Emissions*, 66 HASTINGS L.J. 519, 533 (2015).

4. *Id.* at 523.

5. *See generally* Nancy Schneider, *Revisiting Divestment*, 66 HASTINGS L.J. 589 (2015).

6. *Id.* at 604–13.

7. *Id.* at 613.

to change, and will almost certainly unleash chaos on human and nonhuman communities. How can we assist nonhuman species in surviving with some degree of ecological integrity and evolutionary potential? In *What Happens When Species Move but Reserves Do Not? Creating Climate Adaptive Solutions to Climate Change*, Nicholas Whipps notes that humans are warming the planet faster than most species of animals can adapt. Even species who could potentially adapt and change their home ranges run into human obstacles—cities and suburbs and highways and farms that block their chances of finding new, and newly suitable habitats. Whipps points out that seventy percent of land in the United States is privately owned, and adds that species conservation laws tend to focus on static responses: Put aside a parcel of land and preserve it as is; require private and public landowners to take certain actions that need not change as species need change.⁸

But species' responses to climate change require a more dynamic human response. As Whipps puts it, “conservation policies must focus on protecting species where they are, not just where policymakers would like them to be.”⁹ As a market response that encourages private businesses to conserve and manage land to “offset” species destruction elsewhere, biodiversity banks are a flexible mechanism that help prioritize (and economically incentivize) conservation. Yet, as Whipps argues, those banks still are static: The banks will continue to operate under contractually agreed upon terms even when those terms no longer meet the changing needs of the species they ostensibly protect. Whipps recommends that biodiversity banks be reconfigured so a patchwork of banks and private land can be repurposed as the species moves, with more careful monitoring from the U.S. Fish & Wildlife Service (“USFWS”) to determine when old biodiversity banks (and more traditional forms of conservation) no longer fit their intended purpose, and where and when new banks are needed.

All three scholars are deeply concerned about the future of the planet. Although tackling very different legal solutions to address a sustainable future, they share some insights. For example, each pays careful attention to the cost of their legal solutions: in their pragmatic way, they recognize that Americans are not going to do anything that costs a lot of money or that requires major sacrifices. Pocketbook first, planet second. So all three pose legal solutions that make economic sense—and if we can throw in saving the planet, that is even better. Taboada notes that “[t]he message is clear: the ideal energy policy

8. See generally Nicholas Whipps, *What Happens When Species Move but Reserves Do Not? Creating Climate Adaptive Solutions to Climate Change*, 66 HASTINGS L.J. 557 (2015).

9. *Id.* at 587.

reduces emissions at a net-zero cost.”¹⁰ Schneider suggests that fossil fuel divestment will result in greater fund profits than continuing to invest. And Whipps’ ideas improve an existing free market response to biodiversity depletion.

Further demonstrating their pragmatic chops, each Note seeks win-win solutions: Fuel efficient, GHG emission-reducing buildings save money for buyers and renters; disinvesting from fossil fuels now potentially saves investors from major losses should we become serious about climate change and require leaving most hydrocarbon-based fuel in the ground; and biodiversity banks can be profit-generators for landowners, and can remove the perverse incentives to degrade one’s land or hide the presence of imperiled species.

Recognizing the need for disparate, creative solutions, each of these scholars eschews traditional genres in environmental law. These are only glancingly about litigation; they barely touch on the Supreme Court or other appeals courts; indeed, only Schneider analyzes case law in any depth. Instead, these students examine complicated interactions between law and policy that would serve to constrain development, to manage how we should live if we are to continue to exist on a sustainable planet, and to determine how much we should pay for our profligate ways of life.

Legal historians will look back on this era of legal scholarship as a paradox: With the gravest problem facing humankind at our doorstep, few are looking to the Congress of the most powerful nation on Earth for answers or action. I call this “congressional workaround scholarship:” Having lost interest—or, perhaps faith—that the federal government in general and Congress in particular pose interesting loci of study, legal scholars are looking for law by other means. These Notes pose “workarounds” during an era of scholarship where students are not considering Congress as part of the solution. The solutions posed here are examples of what to do when we have a dysfunctional branch of government, and particularly when many of the elected officials in Congress deny the existence of anthropogenically induced climate change, never mind the exigencies that demand we do something about the problem.

Taboada notes that “[a] national, progressive building energy code is an attractive alternative . . . [but is] unattractive from a political and pragmatic perspective. . . . Efforts to expand implementation should proceed at the state and local level”¹¹ He adds that “it is difficult to imagine Congress seriously considering a federal mandate.”¹² While Congress acted in 1986 to pass the Comprehensive Anti-Apartheid Act

10. Taboada, *supra* note 3, at 521.

11. *Id.* at 523.

12. *Id.* at 543.

(over President Reagan's veto), Schneider does not even suggest that that branch of government might act similarly today to divest from planet threatening fossil fuel exploitation. And while Whipps does look to the federal government, he relies on subcabinet level administrative action to effectuate his legal solution, urging the USFWS to adopt the climate banking system he advocates,

As Schneider warns, “[s]olving climate change requires action from all quarters.”¹³ This includes law students, and it includes the disparate actors (builders, pension fund managers, private landowners, state and local governments, investors, the USFWS) these students implicate. Their legal advice contributes to a growing corpus of scholarship designed to avert widespread climate change induced disaster.

13. Schneider, *supra* note 5, at 591.
