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GLOBAL ENVIRONMENTAL CONSTITUTIONALISM

BRIAN J. GAREAU*

PANEL DISCUSSION FOREWORD

On the evening of September 26, 2012, the Clough Center for the Study of Constitutional Democracy hosted a panel discussion on Global Environmental Constitutionalism.¹ My introductory remarks discussed the sense of wariness regarding global environmental governance and constitutionalism from those within the field of environmental sociology. Three panelists more fully explored the global response to climate change from legal, sociological, scientific, and political perspectives. Douglas Kysar, Deputy Dean and Joseph M. Field '55 Professor of Law at Yale Law School, focused on unequal distribution of political power among nation-states and challenged our current assumptions regarding political decision-making models.² David Wirth, Professor of Law and Director of International Programs at Boston College Law School, surveyed new technologies for addressing global climate change and made recommendations for structural adaptations in international governance.³ Sheila Jasanoff, Pforzheimer Professor of Science and Technology Studies at the Harvard Kennedy School, challenged us to look outside the limitations of standard legal tools and embrace the expertise of other disciplines—such as science—to create a more robust dialogue on global environmental constitutionalism.⁴

Many scholars studying global environmental affairs have found recent efforts to achieve a more robust legal framework with which to

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¹ *Global Environmental Constitutionalism Panel*, B.C. CLOUGH CTR. FOR THE STUDY OF CONST. DEMOCRACY, <http://www.bc.edu/content/bc/centers/cloughcenter/events/f2012-s2013/0926-gecp.html> (last updated Oct. 22, 2012).

² *Executive Summary: Professor Douglas Kysar's Analysis of Flaws in Predictive International Climate Policy Models*, 40 B.C. ENVTL. AFF. L. REV. 409 (2013) [hereinafter *Kysar Executive Summary*].

³ David A. Wirth, *Engineering the Climate: Geoengineering as a Challenge to International Governance*, 40 B.C. ENVTL. AFF. L. REV. 413 (2013).

⁴ Sheila Jasanoff, *A World of Experts: Changing the Discourse About Science and Global Environmental Constitutionalism*, 40 B.C. ENVTL. AFF. L. REV. 439 (2013).

protect global environmental conditions and resources to be rather disappointing. Given the state of the current political milieu, many scholars in the social and political sciences are understandably skeptical of the possibilities of achieving real, meaningful global environmental governance.⁵ The reasons for this skepticism constantly affront us via the “scientific debates” over the reality of climate change so poorly portrayed in the U.S. media.⁶ These debates legitimize the “do-nothing” political attitude of some U.S. politicians.⁷ More grievous is the apparent lack of leadership among global powers at the international level of climate deliberations.⁸ As it had at the start of the 2009 U.N. climate change conference in Copenhagen, however, hope is rising again with President Obama’s second inaugural speech.⁹

In a recent article, environmental sociologists David Sonnenfeld and Arthur P.J. Mol lament that we have become disenchanted by the numerous recent failures of global environmental governance.¹⁰ The authors argue this disenchantment stems from growing distrust of the very actors that inform decision-makers in the global arena, including scientists and environmental non-governmental organizations.¹¹ “These disenchantments [also] involve . . . financial markets; the ‘mainstream media’ of newspapers, television, radio and even the Internet.”¹² Clearly, the image and efficacy of global environmental governance

⁵ See BRIAN J. GAREAU, FROM PRECAUTION TO PROFIT: CONTEMPORARY CHALLENGES TO ENVIRONMENTAL PROTECTION IN THE MONTREAL PROTOCOL 249–67 (2013); JAMES GUSTAVE SPETH, THE BRIDGE AT THE END OF THE WORLD: CAPITALISM, THE ENVIRONMENT, AND CROSSING FROM CRISIS TO SUSTAINABILITY 72 (2008); Jacob Park et al., *The Death of Rio Environmentalism*, in THE CRISIS OF GLOBAL ENVIRONMENTAL GOVERNANCE: TOWARDS A NEW POLITICAL ECONOMY OF SUSTAINABILITY 1, 1–5 (Jacob Park et al. eds., 2008).

⁶ See John M. Broder, *Climate Fight Is Heating Up in Deep Freeze*, N.Y. TIMES, Feb. 11, 2010, at A1.

⁷ See MAXWELL T. BOYKOFF, WHO SPEAKS FOR THE CLIMATE? MAKING SENSE OF MEDIA REPORTING ON CLIMATE CHANGE 159–66 (2011); MIKE HULME, WHY WE DISAGREE ABOUT CLIMATE CHANGE: UNDERSTANDING CONTROVERSY, INACTION AND OPPORTUNITY 72–76, 99–107 (2009).

⁸ See John M. Broder & James Kanter, *Europeans Say U.S. Lacks Will on Climate*, N.Y. TIMES, Sept. 21, 2009, at A4.

⁹ See *Transcript: President Obama 2013 Inaugural Address*, WASH. POST (Jan. 21, 2013 12:08 PM), <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/01/21/transcript-president-obama-2013-inaugural-address/> (“We will respond to the threat of climate change, knowing that the failure to do so would betray our children and future generations.”).

¹⁰ David A. Sonnenfeld & Arthur P.J. Mol, Editorial, *Social Theory and the Environment in the New World (Dis)order*, 21 GLOBAL ENVTL. CHANGE 771, 772 (2011).

¹¹ *Id.*

¹² *Id.*

must be improved, environmental constitutionalism strengthened and redesigned, and inter-linkages between the environment, culture, and market rediscovered.

Environmental lawyers are concerned as well. As South African law professor Louis Kotze recently discussed, global governing efforts to protect the environment have not been all that successful:

It is generally accepted that the [global environmental] regime is ineffective because anthropogenic stresses have not been reduced, environmental quality is continuously deteriorating, and states remain hesitant to subject themselves to binding environmental obligations.¹³

Nation-states have primarily failed to work together in global agreements or institutions to achieve meaningful environmental improvements, let alone to reverse some of the most serious environmental harms, such as carbon emissions.¹⁴ Sonnenfeld and Mol insist, however, that “there are few alternatives to these institutions, and thus the only way forward *is to reform them*.”¹⁵

In many ways, improving global governance and creating meaningful and legally-binding global environmental constitutionalism is a paradigm more popular in past efforts. For instance, surrounding the optimism of the 1992 Rio Earth Summit, many proposals emerged that at least in part sought to strengthen environmental constitutionalism at the global scale.¹⁶ After the fall of the Berlin Wall, some scholars called for “planetary democracy” and a global consensus to find just ways to resolve environmental issues.¹⁷ At the same time, others argued that global environmental problems required a global environmental institu-

¹³ Louis J. Kotzé, *Arguing Global Environmental Constitutionalism*, 1 TRANSNATIONAL ENVTL. L. 199, 202 (2012).

¹⁴ *See id.* at 202–03.

¹⁵ Sonnenfeld & Mol, *supra* note 10, at 772 (emphasis added).

¹⁶ *See Earth Summit*, UNITED NATIONS, <http://www.un.org/geninfo/bp/enviro.html> (last updated May 23, 1997).

¹⁷ DAVID HELD, *DEMOCRACY AND THE GLOBAL ORDER: FROM THE MODERN STATE TO COSMOPOLITAN GOVERNANCE* 231–38 (1995). Václav Havel characterized the era as “part of an endeavor to find a new and *genuinely universal* articulation of that global human experience” in which we all may “engage in a common quest for the general good.” Václav Havel, *Democracy’s Forgotten Dimension*, J. DEMOCRACY, Apr. 1995, at 3, 9 (emphasis added).

tion to which nations would limit their sovereignty.¹⁸ Yet, such aspirations fit nicely with current proposals—such as Professor Kysar’s in this book—for global reformation.

BROADER OBJECTIVES, MEANINGFUL INNOVATIONS, AND COUNTER-ECONOMIC RESPONSES

The positions taken by the scholars during the panel on September 26, 2012 and in this special volume provide some important insights into what might be necessary to succeed in such a global reformation process today. In this age of heightened doubt and skepticism, it will take many people operating from diverse perspectives to discover better ways toward global sustainability and hold major actors accountable for any lack of progress.¹⁹

Professor Kysar deals head-on with the flawed economic models that currently guide political reaction to global environmental problems.²⁰ He asserts that these models suppress global environmental negotiations by focusing on shortsighted cost-benefit analyses instead of taking a more cumulative approach to understanding climate change impacts.²¹ Kysar presses nations to embrace the planetary democracy concept and the precautionary principle.²² These concepts would help to avoid a return to the 1970s when unfettered economic growth, blanket acceptance of industrial-led growth, and the increasing use of human-made chemicals dominated policy decisions.²³ Global environmental constitutionalism requires that we “climb the right mountain.” Global powers must take a leadership role, and decision-makers must broaden their concerns to those that extend beyond the bottom line.²⁴

Professor Wirth explores the technology-based solutions that are on the table today, but he also illustrates that the most promising of which are those deemed to make the most economic sense.²⁵ Carbon

¹⁸ Geoffrey Palmer, *New Ways to Make International Environmental Law*, 86 AM. J. INT’L L. 259, 262, 283 (1992) (suggesting the solution “is to create a proper international environmental agency within the United Nations system that has real power and authority”).

¹⁹ See Jasanoff, *supra* note 4, at 451–52.

²⁰ Kysar *Executive Summary*, *supra* note 2, at 409–10.

²¹ See *id.* at 411.

²² See *id.* at 410–11.

²³ See GAREAU, *supra* note 5, at 39–40.

²⁴ See Kysar *Executive Summary*, *supra* note 2, at 410–11.

²⁵ Wirth, *supra* note 3, at 415–20.

taxation and international trading schemes are the most popular mechanisms for reducing carbon emissions, but they have not been very successful because it has proven very difficult to tax carbon enough to incentivize lower emissions.²⁶ The primacy of these economic solutions reflects a move away from a precautionary approach to environmental protections more prevalent in the 1960s and 1970s toward a profit-led approach in which environmental solutions must unequivocally make economic sense.²⁷ Professor Wirth explores many innovative approaches to reducing carbon emissions that are currently in development, but he warns that they require guidance in implementation if they are to benefit the masses.²⁸ It could be argued that some of these solutions should be pushed forward, despite their current lack of economic viability, but that will not be possible without a constitutional framework that places emphasis on future sustainability over market demands.

Professor Jasanoff eloquently explores why a stronger constitutional framework such as those deemed necessary by Professors Kysar and Wirth (and implied here) will be difficult to achieve without “out of the box” thinking.²⁹ Perhaps ironically, the possibilities for thinking beyond the confines of established notions of global environmental constitutionalism grow with every new disaster. Jasanoff describes the global response to these disasters—which are themselves oftentimes the consequence of human impacts on the global environment—as operating via “counter-economic principles.”³⁰ This is a deeply important way of viewing these responses, as they open up the possibilities of how we may situate these actions in the broader political and economic contexts. So-called “natural” disasters are very expensive, in terms of infrastructure destroyed, lives lost, and finances put on hold.³¹ The counter-economic responses to them—aid, time, effort, lifestyles changed due

²⁶ See Monica Prasad, Editorial, *On Carbon, Tax and Don't Spend*, N.Y. TIMES, Mar. 25, 2008, at A27.

²⁷ GAREAU, *supra* note 5, at 43–58 (“The history of global environmental governance involves the gradual move from precautionary, ‘command-and-control’ state regulatory solutions to private, market-based solutions.”).

²⁸ Wirth, *supra* note 3, at 436–37.

²⁹ See Jasanoff, *supra* note 4, at 443, 451–52.

³⁰ *Id.* at 443–44.

³¹ See, e.g., RICHARD D. KNABB ET AL., NAT'L HURRICANE CTR., TROPICAL CYCLONE REPORT: HURRICANE KATRINA 13 (2005) (estimating 108 dollar billion damage cost of Hurricane Katrina).

to a kind of global reflexivity, and emotional links—are also significant, but the international community considers these costs secondary to the benefits of helping victims of these tragedies.³² Achieving a more productive environmental constitutionalism requires that global institutions continue to incorporate the voices of those most affected by the large-scale changes occurring around the globe.³³ The rural poor and island nations, for example, have deep understandings of climate change, although their knowledge is likely not considered adequately on the global stage.³⁴ Although not easily monetized, the democratization of expertise and experience is a necessary step toward a solution.³⁵

Whether global environmental constitutionalism might regain its status as a legitimate, influential paradigm depends on the creativity of those working on the problem. The call for global environmental constitutionalism is a breath of fresh air for those skeptical of the possibilities of achieving a meaningful global agreement on climate change. In order for it to find legitimacy on the world stage, the main actors will need to use a new set of political and economic tools that more accurately reflect the global nature of environmental change. We need a wider range of options. We need a new paradigm. Discussions like the one among these expert panelists are the first step toward its creation.

³² Jasanoff, *supra* note 4, at 444.

³³ *See id.* at 448–49.

³⁴ *See Kysar Executive Summary, supra* note 2, at 409.

³⁵ *See* Jasanoff, *supra* note 4, at 451.