INTRODUCTION

THE SUSTAINABILITY PRINCIPLE

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The Environmental & Energy Law & Policy Journal has established a solid tradition of bringing together scholars and practitioners to explore both theoretical and practical implications of important issues at the confluence of environment and energy law. This year’s symposium issue continues this tradition by addressing the principle of sustainability as an independent concept of the first order. The symposium topic of sustainability builds on the 2008 symposium issue topic of greenhouse gas legislation, stepping back to a theoretical inquiry into the need for a principle to address the global problem of greenhouse gas. This symposium topic of sustainability as a principle is particularly apt given the impasse on legislation to address growing problems that imperil sustainability. Global climate change has focused scholars, lawyers, and the public on the problem of unsustainable practices and the need for fundamental change in energy and environmental policy. In his introduction to last year’s issue, Professor Victor B. Flatt stated “[i]t is almost certain that the United States will pass some form of comprehensive federal legislation controlling the emission of heat trapping greenhouse gases within the next two years.”

While both state and federal legislatures have focused significant attention on greenhouse gas, they have not passed comprehensive climate legislation despite significant public demand. Cap-and-trade legislation, which continues to be the most favored approach, presents a system of stunning complexity, raising questions about the ability of government to monitor such a system. The market and regulatory failures to

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manage complex financial markets effectively highlight the
difficulties of monitoring complex systems.
While the term “sustainability” has a host of meanings, it is
used most often with reference to “sustainable development.”
The term “sustainability” is ubiquitous. It appears in strategic
plans, corporate stewardship reports, and advertising pitches,
presenting a variety of dimensions and definitions. It is
commonplace today for corporate publications to include
sustainable development as a goal. Corporate policies aspire to
join profitability and sensitivity to the physical integrity of the
planet. In 1987, the United Nation published the Brundtland
Report, entitled Our Common Future. The report’s definition of
“sustainable development” is development that “meets the needs
of the present without compromising the ability of future
generations to meet their own needs.” This definition goes
beyond the context of development, presenting a general
principle for action in a world of limited resources. It is the
Intergenerational Golden Rule: use the resources but do not use
them up.

The foundational concept of sustainability is broader than
the focal point of development and it deserves separate treatment
and assessment. Moreover, understanding sustainability as a
stand-alone concept is essential to seriously addressing the
challenge of global climate change and the environmental and
public health threats it poses. Just as businesses assess profit as
a separate concept, arguably sustainability deserves stand-alone
consideration, disaggregated from the goal of development, as an
independent value rather than a qualifier of profit or
development. Qualification of foundational principles inevitably
accompanies the implementation of those principles.
Nevertheless, development of the animating goal of
sustainability should be confronted as a matter separate from the
inevitable trade-offs brought about by implementation. This
symposium issue seeks to further dialogue on sustainability,
applying the concept to global climate change and other
challenges.

2. See e.g. Environmental Law Institute, Law of Environmental Protection § 8:48
(noting that the Constitution of the World Trade Organization “refers to optimal use of
the world’s resources in accordance with sustainable development”); Tyson Foods, Inc.,
Sustainability: It’s in Our Nature (2007) (available at
3. Rpt. of the World Commn. on Env. and Dev., UN GAOR, 42d Sess., UN Doc.
In his article, “An Agenda For Sustainable Communities,” Professor John C. Dernbach explores questions regarding what we should learn from efforts to establish sustainable communities and the larger question of what is needed for a sustainable America. Professor Dernbach surveys developing plans for sustainable practices in municipalities, including the limited success of Agenda 21 signed by nations at the Rio conference. Although he notes that “many municipalities do not appear to be engaged at all,” Dernbach sees potential for climate change as a “driver” for future change. While describing the dangers of urban sprawl, he maintains optimism regarding state policy tools such as brownfields regulation to rehabilitate urban contaminated sites. His view that law can be “reflexive” presents the possibility that government can learn from past failures and encourage nongovernmental entities and businesses to be more sustainable. Consistent with his earlier extensive writing on this topic, Dernbach advocates for sustainability coordinators in local government and focuses on the responsibility of the full spectrum of leaders in society, including colleges and universities, religious organizations, and political leaders to promote both economic growth and environmental protection.

In “Can You Hear Me Up There? Giving Voice to Local Communities Imperative for Achieving Sustainability,” Professor Patricia E. Salkin continues the focus of the symposium on sustainability and global climate change by exploring avenues municipalities have developed or may develop to engage sustainable practices. She suggests that local communities could respond to the inaction of the federal government on the climate issue by entering compacts such as the Mayors’ Climate Protection Agreement, the ICLEI-Local Governments for Sustainability, and the “Cool Counties” campaign. Salkin listens to the "chorus of . . . whispers" at the local level and speculates that federal and state climate change plans cannot be effective absent a partnership with the local government. Many local governments have the necessary authority to implement greenhouse gas solutions by virtue of delegated police power, and most states have climate action plans that include recommendations to reduce CO₂ emissions through a variety of mechanisms, including energy efficiency in buildings and transportation, carbon sequestration, and regional cooperation in cap-and-trade programs. Professor Salkin explores several plans of local governments that could serve as a model for others. Salkin describes regulatory tools employed varying levels of success, including tiered utility rates, voluntary travel offset,
leadership in carbon-neutral buildings, recycling, mandatory energy efficiency for new, “green” concrete, compact land-use, innovative and flexible zoning districts, and bans on surface parking lots. Professor Salkin concurs with Professor Dernbach’s assessment of the potential benefits of brownfields redevelopment. She also endorses the innovative use of housing programs to revitalize downtown districts and promote infill development.

In “Climate Change, Sustainability and Globalization: Charting the Future of Indigenous Environmental Self-Determination,” Professor Rebecca Tsosie takes up the issue of sustainability in the climate change context as it affects indigenous peoples. Professor Tsosie documents the dichotomy between tribes that fit the mainstream framework of development and extraction and those tribes that have retained traditional values and ways of living. She argues that indigenous peoples have sustained negative effects of global climate change without recourse because of the difficult task of establishing environmental harms as a legal matter. She emphasizes the right of indigenous peoples to cultural self-determination and the right to choose to continue to live as they did in the past. In the course of her thorough discussion of the politics of global climate change, Professor Tsosie argues for the principle of self-determination for indigenous peoples, focusing on the Navajo Nation to provide specific examples of her points. She evokes the current debate on cap-and-trade legislation, speculating that such legislation could serve as a way of protecting tribal resources and culture. In this mix of rights and obligations, Professor Tsosie emphasizes the opportunity for governments to promote self-determination for indigenous peoples in a variety of contexts, including coal and uranium mining. She recounts the unfolding story of Navajo coal mining in the Black Mesa region and presents the case for global climate change as an issue of human rights. Professor Tsosie sees sustainability as a moral framework for understanding an “ethic of place,” and demonstrates that even when local governments implement sustainable practices, federal and state law are necessary to give force to local policies.

**CONCLUSION**

Concerns about sustainability in the context of global climate change have captured the attention of the public and governments at every level. Attention is not the same, however,
as acceptance of sustainability as a general principle. Whether the political will and administrative commitment are sufficient to make sustainability a principle for action remains an open and troubling question. The goals of the symposium include assessing sustainability as an unadorned and free standing principle for judging action and offering new perspectives on the inclusion of sustainability as a component of the qualified concepts such as “sustainable development.” The goal of an expanding economy and an economy built on carbon intensity, a central insight of the works presented here is that governments play a key role in responding to global climate change and to adopting sustainability as a guiding principle.

Although congressional leaders and the President recognize the importance of addressing global climate change, it remains unclear whether global climate change has the momentum necessary to stimulate fundamental change in the way governments regulate industry and land use planning. While the United States has acknowledged the serious nature of global climate change, it has yet to make the kinds of substantive changes necessary to join the international community’s call for common commitment to a climate treaty. The actions taken by the United States in both the United Nations Framework Convention on Climate Change and the United States’ position on the Kyoto Protocol suggest that the United States recognizes the effects of anthropogenic emissions on global climate change, but does not regard global climate change and its effects as significant to its interests or of immediate concern at the level of issues such as the economy or national security.\textsuperscript{4}

Global climate change has brought to center stage the realization that it is possible for humans to alter natural patterns of the earth in disastrous ways. While governments at every level appear eager to embrace the newly articulated principle of sustainability, whether the mechanisms they are employing result in sustainable development is uncertain. Effectively confronting the challenge of sustainability requires that policy makers develop new approaches to development and sustainability, considering from the ground up the public interest and working to insure, through the principle of sustainability, the optimal use of the world’s resources.